

## The Civil War Congress

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For the past several years I have been investigating what has seemed to me a relatively neglected corner of legal history: extrajudicial interpretation of the Constitution. Up to now I have published four volumes on the subject that deal with congressional and executive interpretation from the beginnings of the new government in 1789 down to the eve of the Civil War.<sup>1</sup> The present study continues this examination through the war, from 1861 to 1865.

I have elsewhere dealt in detail with the Constitution of the so-called Confederate States of America, which exhibited both considerable similarities to and significant departures from the United States model on which it was largely based.<sup>2</sup> My present focus is on constitutional issues that arose in the North during the same period. My principal emphasis is on legislative controversies—not because issues raised by executive actions of the time were of lesser interest or importance, but because they have been far more intensely analyzed by others.<sup>3</sup>

Obviously the war and its consequences occupied the bulk of Congress's attention during the period we are considering. Yet the nonmilitary legislation of the Civil War years also reflected a veritable revolution in the understanding of federal authority. As one commen-

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<sup>1</sup> For these earlier installments, see generally David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801* (Chicago 1997); David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801–1829* (Chicago 2001); David P. Currie, *The Constitution in Congress: Democrats and Whigs, 1829–1861* (Chicago 2005); David P. Currie, *The Constitution in Congress: Descent into the Maelstrom, 1829–1861* (Chicago 2005).

<sup>2</sup> See generally David P. Currie, *Through the Looking Glass: The Confederate Constitution in Congress, 1861–1865*, 90 Va L Rev 1257 (2004).

<sup>3</sup> Of particular interest are Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime* (Norton 2004); Daniel Farber, *Lincoln's Constitution* (Chicago 2003); Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (Oxford 1991); James G. Randall, *Constitutional Problems under Lincoln* (Appleton 1926).

tator put it, “It was in 1861, in the face of Southern secession, that Andrew Jackson’s universally popular notion of a federal government passive in domestic affairs began to be abandoned”; and by the end of the war the central government was “a far ampler sovereignty than it earlier had been, more powerful, more ambitious, and more be-sought.”<sup>4</sup> Indeed another observer went so far as to call the legislation of the first Civil War Congress a “blueprint for a new America.”<sup>5</sup> We shall consider this legislation in detail.

After a long and discouraging parade of mediocrity the country finally had a worthy president, and there were interesting individuals in Congress as well. We shall meet the antislavery zealots Charles Sumner and Thaddeus Stevens, the powerful Lyman Trumbull of Illinois, the influential William Pitt Fessenden of Maine.<sup>6</sup> It has been suggested that the accomplishments of the Thirty-seventh Congress may have been “a direct result of the extraordinary capabilities of its membership”;<sup>7</sup> in any case there were numerous instances in which the quality of constitutional debate was high. This was most likely to be true with respect to those issues on which the dominant Republicans differed sharply among themselves; on many other important questions, given the inevitability of the outcome, there was little or no debate at all.

As in earlier installments of this series, I disclaim any pretension to improve upon the work of historians and political scientists who have studied this period.<sup>8</sup> Specialization, as I have said before, is as advantageous in scholarship as in the manufacture of pins. My aim is to examine the same material through a lawyer’s lens.

#### PART ONE: OVERVIEW

When Abraham Lincoln became President in March 1861, seven states had purported to leave the Union and to form “a government of

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<sup>4</sup> Bray Hammond, *Sovereignty and an Empty Purse: Banks and Politics in the Civil War* 11, 26 (Princeton 1970).

<sup>5</sup> Leonard P. Curry, *Blueprint for Modern America: Nonmilitary Legislation of the First Civil War Congress* 9 (Vanderbilt 1968).

<sup>6</sup> For sketches of wartime Senators and analysis of their voting records, see generally Allan G. Bogue, *The Earnest Men: Republicans of the Civil War Senate* (Cornell 1981).

<sup>7</sup> Curry, *Blueprint for Modern America* at 8 (cited in note 5).

<sup>8</sup> The most prominent studies of the period as a whole and of its leading protagonists include James G. Randall, *Lincoln the President* (Da Capo 1st ed 1997); David Herbert Donald, *Lincoln* (Simon & Schuster 1995); James M. McPherson, *Battle Cry of Freedom: The Civil War Era* (Oxford 1988); Alan Nevins, *The War for the Union* (Scribner’s 1959–71); David Donald, *Charles Sumner and the Rights of Man* (Knopf 1970); and James Ford Rhodes, 3–5 *History of the United States from the Compromise of 1850 to the McKinley-Bryan Campaign of 1896* (Macmillan rev ed 1920).

[their] own,” the Confederate States of America—a looking-glass version of the United States from a Southern point of view.<sup>9</sup>

Lincoln’s Inaugural Address was an eloquent plea for peace and preservation of the Union. While insisting that no state had the right to secede and that he was bound to enforce the laws, he reminded disaffected Southerners they had no *reason* to secede either: As he had said before, he had neither intention nor authority to interfere with slavery within the states. He emphasized that the question of war and peace lay entirely in Southern hands, for he would not attack the South; there would be no bloodshed “unless it be forced upon the national authority.” He ended with this familiar peroration:

I am loath to close. We are not enemies, but friends. We must not be enemies. Though passion may have strained it must not break our bonds of affection. The mystic chords of memory, stretching from every battlefield and patriot grave to every living heart and hearthstone all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.<sup>10</sup>

Just over a month later, Confederate troops took Fort Sumter. The war was on, and Congress was not in session. The President called out the militia to execute the laws, declared a blockade of Southern ports for the same purpose and to put down the insurrection, and summoned Congress to an extraordinary sitting—but not until the Fourth of July, nearly three months away.<sup>11</sup> Four more states decided to secede.<sup>12</sup>

Up to this point, as he would tell Congress when it assembled in the summer, the President’s actions had been “strictly legal.” Pursuant to Article I, § 8, Congress in 1795 had authorized the President to employ the militia both to suppress insurrections and to execute the laws, and an 1807 statute empowered him in the same cases to use the army and navy as well.<sup>13</sup>

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<sup>9</sup> See generally Currie, 90 Va L Rev 1257 (cited in note 2).

<sup>10</sup> Abraham Lincoln, First Inaugural Address (Mar 4, 1861), in James D. Richardson, ed, 6 *A Compilation of the Messages and Papers of the Presidents* 5, 7, 11–12 (US Congress 1900).

<sup>11</sup> Abraham Lincoln, Proclamation (Apr 15, 1861), in Richardson, ed, 6 *Messages and Papers of the Presidents* 13, 13; Abraham Lincoln, Proclamation (Apr 19, 1861) in Richardson, ed, 6 *Messages and Papers of the Presidents* 14, 14. Apart from the logistical problems of convening distant members before the advent of the Pacific railroad and in some cases before they were scheduled to be elected, the delay “gave Lincoln more time to control war policy before Congress could intervene.” Farber, *Lincoln’s Constitution* at 117 (cited in note 3).

<sup>12</sup> On April 27 the blockade was accordingly extended to ports in North Carolina and Virginia. See Abraham Lincoln, Proclamation (Apr 27, 1861), in Richardson, ed, 6 *Messages and Papers of the Presidents* 15, 15 (cited in note 10).

<sup>13</sup> US Const Art I, § 8, cl 15; Act of Feb 28, 1795, 1 Stat 424; Act of Mar 3, 1807, 2 Stat 443. The Supreme Court would uphold the Southern blockade in the *Prize Cases*, 67 US (2 Black)

Subsequent presidential measures, however, lifted a number of eyebrows. On April 27, responding to interference with troops attempting to reach the capital, the President famously authorized the commanding general to suspend the privilege of habeas corpus if necessary at any point between Philadelphia and Washington, later extending the authorization as far as New York and ultimately all the way to Bangor, Maine.<sup>14</sup> Chief Justice Taney in the familiar *Merryman* case would hold that only Congress could suspend the privilege.<sup>15</sup> But of course the Constitution did not explicitly answer the question, as it spoke neutrally in the passive voice: “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”<sup>16</sup> And of course it could be argued that authority to suspend the privilege was implicit in the President’s authority as commander in chief.<sup>17</sup>

Lincoln had a double defense for suspension. His first argument was one largely of necessity:

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635 (1863). See David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888* 273–75 (Chicago 1985). For discussion of the constitutional and statutory issues, see Currie, *Descent into the Maelstrom* at 238–42 (cited in note 1). For the President’s assessment, see Abraham Lincoln, Special Session Message (July 4, 1861), in Richardson, ed, 6 *Messages and Papers of the Presidents* 20, 24 (cited in note 10).

<sup>14</sup> Abraham Lincoln, Executive Order (Apr 27, 1861), in Richardson, ed, 6 *Messages and Papers of the Presidents* 18, 18 (cited in note 10); Abraham Lincoln, General Order (July 2, 1861), in Richardson, ed, 6 *Messages and Papers of the Presidents* 19, 19 (cited in note 10); Abraham Lincoln, General Order (Oct 14, 1861), in Richardson, ed, 6 *Messages and Papers of the Presidents* 39, 39 (cited in note 10). He had authorized suspension in Florida on May 10. See Abraham Lincoln, Proclamation (May 10, 1861), in Richardson, ed, 6 *Messages and Papers of the Presidents* 16, 16–17 (cited in note 10). See Neely, *The Fate of Liberty* at 13–14 (cited in note 3) (arguing that Lincoln had no justification for extending the original order beyond Philadelphia).

<sup>15</sup> *Ex parte Merryman*, 17 F Cases 144, 148, 152 (Cir Ct Md 1861). The Wisconsin Supreme Court agreed. See *In re Kemp*, 16 Wis 382 (1863). Attorney General Edward Bates advised against taking this case to the Supreme Court: An adverse Supreme Court decision would be a disaster. See Randall, 2 *Lincoln the President* Part I, 167–68 (cited in note 8) (citing an unpublished letter from Bates to Secretary of War Stanton).

<sup>16</sup> US Const Art I, § 9, cl 2.

<sup>17</sup> US Const Art II, § 2 (“The President shall be commander in chief of the Army and Navy of the United States”). See also the discursive opinion of Attorney General Bates, 10 Op Atty Gen 74, 82–83, 90 (1861) (tracing the President’s power to his obligation to execute the laws and suppress insurrection); Reverdy Johnson, *Power of the President to Suspend the Habeas Corpus Writ*, in Frank Moore, ed, 2 *The Rebellion Record: A Diary of American Events* 185, 188 (Van Nostrand 1866):

His sworn obligation is to suppress the rebellion, in order “that the laws be faithfully executed.” In the use of the force placed by Congress under his command as the constitutional commander-in-chief, has he not all powers directly or indirectly belonging to a state of war, and necessary to accomplish its end?

See also Horace Binney, *The Privilege of the Writ of Habeas Corpus* 8 (Sherman & Son 1862) (“The power to suspend the privilege, is supplementary to the military power to suppress or repel.”).

Are all the laws *but one* to go unexecuted, and the Government itself go to pieces lest that one be violated? Even in such a case, would not the official oath be broken if the Government should be overthrown when it was believed that disregarding the single law would tend to preserve it?

His second argument was that the power to suspend the privilege belonged to the President, since the alternative would be absurd:

[A]s the provision was plainly made for a dangerous emergency, it can not be believed the framers of the instrument intended that in every case the danger should run its course until Congress could be called together, the very assembling of which might be prevented, as was intended in this case, by the rebellion.<sup>18</sup>

A few days later President Lincoln called for some forty-two thousand volunteers to join the Federal forces. Whether volunteers were militiamen had been debated in the past, and a congressional committee would soon conclude that they were.<sup>19</sup> At the same time, however, the President directed significant increases in the regular army and navy, despite the plain language of Article I vesting in *Congress* the power to raise armies and provide a navy—promising to submit his actions to legislative scrutiny when Congress came together in July.<sup>20</sup>

On April 30, 1862—nearly a year after the events in question—the House of Representatives censured Secretary of War Simon Cameron for, among other things, having entrusted a private citizen “with the control of large sums of the public money, and authority to purchase military supplies, without restriction.”<sup>21</sup> President Lincoln, in a special message to Congress, took full responsibility for the Secretary’s actions, noting *inter alia* that he had authorized the Secretary of the Treasury to advance \$2 million to a group of private individuals for procurement purposes because the government was infested with

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<sup>18</sup> Abraham Lincoln, Special Session Message (July 4, 1861), in Richardson, ed, 6 *Messages and Papers of the Presidents* 20, 25 (cited in note 10). There was some uncertainty as to just what suspension of the privilege meant. President Lincoln made clear he thought suspension was tantamount to authorization to make arrests that otherwise would be illegal. *Id.* The Supreme Court, in contrast, declared that suspension “does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.” *Ex parte Milligan*, 71 US (4 Wall) 2, 115 (1867) (dictum).

<sup>19</sup> See Currie, *The Federalist Period* at 248–50 (cited in note 1); Currie, *The Jeffersonians* at 8 n 29, 167–72 (cited in note 1); S Rep No 2, 37th Cong, 2d Sess 2 (1861). Professor Randall took a different view. See Randall, *Constitutional Problems under Lincoln* at 38 (cited in note 3).

<sup>20</sup> US Const Art I, § 8, cl 12–13; Abraham Lincoln, Proclamation (May 3, 1861), in Richardson, ed, 6 *Messages and Papers of the Presidents* 15, 15–16 (cited in note 10). See Joseph Story, 3 *Commentaries on the Constitution of the United States* § 1182 (Hilliard, Gray 1833) (“[C]ongress can alone raise armies.”).

<sup>21</sup> Cong Globe, 37th Cong, 2d Sess 2383 (May 27, 1862).

so many disloyal officers that it could not be trusted to act in the national interest. He said nothing to suggest that the money had been appropriated by Congress, as Article I, § 9 required. Conceding that some of the steps he had taken were “without any authority of law,” the President pleaded necessity once again: “I believe that by these and other similar measures taken in that crisis, . . . the Government was saved from overthrow.” Some things, he was telling us, were more important than obedience to the Constitution.<sup>22</sup>

### I. THIRTY-SEVENTH CONGRESS, SPECIAL SESSION

When the Thirty-seventh Congress assembled in July pursuant to the President’s call, he threw himself on its mercy. “[W]hether strictly legal or not,” he said, his calls for additional fighting men had been made “under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them”—as President Jefferson had once contemplated a constitutional amendment to ratify the Louisiana Purchase, which he considered of doubtful legality.<sup>23</sup>

Congress sat for a little over a month, and virtually the first matter the Senate took up was a joint resolution to comply with the President’s request. Listing all of the measures mentioned above except for the still undisclosed placement of funds with private parties, the proposed resolution undertook to declare each and every one of them “legal and valid, to the same intent, and with the same effect, as if they had been issued and done under the previous express authority and direction of the Congress of the United States.”<sup>24</sup>

There was less debate than one might have expected, and it consisted largely of objections. Confident that they would ultimately prevail, supporters of the resolution hardly bothered to defend it. Opponents pointed out the President’s patent lack of authority to raise armies and navies, assailed the blockade as a forbidden port preference, an act of war, and a regulation of commerce, and even insisted that

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<sup>22</sup> Abraham Lincoln, Special Message to Congress (May 26, 1862), in Richardson, ed, 6 *Messages and Papers of the Presidents* 77, 77–79 (cited in note 10). See also Randall, 1 *Lincoln the President* Part I at 374–75 (cited in note 8); Farber, *Lincoln’s Constitution* at 118 (cited in note 3).

<sup>23</sup> Lincoln, Special Session Message (July 4, 1861) at 24 (cited in note 18). See also Currie, *The Jeffersonians* at 97–98 (cited in note 1).

<sup>24</sup> Cong Globe, 37th Cong, 1st Sess 40 (July 10, 1861). On the question whether this Janus-like terminology was meant to legalize the President’s actions or to recognize their initial validity, see George Clarke Sellery, *Lincoln’s Suspension of Habeas Corpus as Viewed by Congress* 15–17, unpublished PhD dissertation, University of Wisconsin (1907).

authority to suppress insurrection did not empower the President to coerce the states.<sup>25</sup>

The dissenters reserved their heaviest artillery, however, for an assault on the suspension of habeas corpus. All the arguments Chief Justice Taney had used in *Merryman* were trotted out again. Habeas corpus was guaranteed by statute, and it took a law to repeal a law. The suspension provision appeared in Article I, § 9, which dealt exclusively with limitations on the powers of Congress. Even in England only the legislature could suspend the privilege. The Supreme Court had announced in dictum that the power belonged to Congress, and Justice Story had repeated this conclusion in his treatise. Until President Lincoln issued his first order, James Bayard of Delaware added in a later debate, it had never occurred to anyone that the executive could act on his own. Finally, there was the precedent of *Merryman* itself: The Chief Justice of the United States, sitting as Circuit Justice, had held the President's action unconstitutional.<sup>26</sup>

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<sup>25</sup> See Cong Globe, 37th Cong, 1st Sess 42 (July 10, 1861) (Sen Kennedy); id at 47–48 (Sen Polk); id at 66, 68 (Sen Powell); id at 138 (July 11, 1861) (Sen Breckinridge). Representative Burnett made some of the same points during an unrelated debate in the House. Id at 150 (July 16, 1861). All of the named speakers came from border states, and three of them would soon be expelled from Congress for defecting to the enemy. Ohio Senator John Sherman, however, though a stalwart Republican, agreed that the President had no authority to raise armies and navies or to suspend habeas corpus. Id at 393 (Aug 2, 1861).

<sup>26</sup> See id at 48 (July 10, 1861) (Sen Polk) (“That issue has been solemnly determined by the Supreme Court of the United States.”); id at 66–67 (July 11, 1861) (Sen Powell) (“It has been decided by the highest judicial tribunal in the land, that the legislative power alone has the authority to suspend the writ of *habeas corpus*, and then only in the cases provided in the Constitution.”); id at 139 (July 16, 1861) (Sen Breckinridge) (“The Chief Justice . . . gives an opinion, which has commanded the respect and acquiescence, not only of the profession of which he is so great an ornament, but of almost all thoughtful men in the country.”); id at 150 (Rep Burnett) (“The President of the United States, in his refusal to recognize the authority of the Supreme Court . . .”); id at 333–34 (July 30, 1861) (Sen Pearce) (discussing the habeas corpus act and the Supreme Court’s instruction to look to the common law for the proper construction of it); Cong Globe App, 37th Cong, 1st Sess 16 (July 19, 1861) (Sen Bayard) (“In my judgment, a received construction of more than half a century, and a settled opinion of the profession, is always a strong indication of what the law really is.”). See also Cong Globe, 37th Cong, 3d Sess 227–31 (Jan 8, 1863) (Sen Saulsbury) (examining the history and judicial construction of habeas corpus); id at 1093–94 (Feb 19, 1863) (Sen Bayard) (same); Wayne Morrison, ed, 1 *Blackstone’s Commentaries on the Laws of England* \*136 (Cavendish 2001) (“[I]t is the parliament only, or legislative power, that, whenever it sees proper, can . . . [suspend] the habeas corpus act for a short and limited time.”); St. George Tucker, ed, 1 *Blackstone’s Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* app 292 (Lawbook Exchange 1996) (first published in 1803) (“In the United States, it can be suspended, only, by the authority of congress.”); William Rawle, *A View of the Constitution of the United States of America* 118–19 (Philip H. Nicklin 2d ed 1829) (explaining that only Congress can suspend the courts’ power to issue writs of habeas corpus); Story, 3 *Commentaries on the Constitution* at § 1336 (cited in note 20) (“It would seem, as the power is given to congress to suspend the writ in cases of rebellion or invasion, that the right to judge, whether exigency had arisen, must exclusively belong to that body.”); *Ex parte Bollman*, 8 US (4

Indiana Senator Henry Lane made the sole serious effort to defend Lincoln's suspension of habeas corpus, echoing the President's powerful argument that if he could not suspend it when Congress was out of session there would be times when nobody could suspend it at all.<sup>27</sup> Additional responses came later, in debates on other proposed measures. It was not true that other provisions of § 9 limited only congressional authority: The ban on granting titles of nobility applied to both Congress and the executive, while the requirement that no money be spent without legislative appropriation restricted the President alone. The President was not like the King or Queen of England, and neither an occasional dictum nor even the best treatise was in any way binding. The President was not attempting to repeal the law.<sup>28</sup> He was merely trying to do what all agreed someone could do, namely suspend the privilege; one might say there was a certain circularity in arguing that to do so was necessarily a legislative act, as that was the very question to be decided.<sup>29</sup>

Attempts to justify the legality of *all* the President's acts were rare indeed. Maine Senator Lot Morrill tried it several times without giving any reasons, as if repetition lent credibility to his implausible assertion.<sup>30</sup> California Democrat James McDougall put forward the frightening contention that civil laws were superseded in time of war.<sup>31</sup>

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Cranch) 75, 100 (1807) (dictum) ("If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so."). In a later debate New Jersey Senator James Wall quoted a statement by Edmund Randolph in the Virginia ratifying convention that it was safe to allow the writ to be suspended because in this country, as in England, only the legislature could do it. Cong Globe, 37th Cong, 3d Sess 1462 (Mar 2, 1863), apparently quoting Jonathan Elliot, 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 203 (Taylor & Maury 2d ed 1836). Unfortunately, Elliot's report does not contain the critical words on which Senator Wall relied.

<sup>27</sup> Cong Globe, 37th Cong, 1st Sess 142–43 (July 16, 1861) ("I approve, then, the suspension of the writ of *habeas corpus*."). For similar reasons the Convention famously altered the phrasing of Congress's war power to permit the President "to repel sudden attacks." Max Farrand, ed, 2 *The Records of the Federal Convention of 1787* 318 (Yale rev ed 1966).

<sup>28</sup> See, for example, Cong Globe, 37th Cong, 2d Sess 2069–73 (May 12, 1862) (Rep Shellabarger); Cong Globe, 37th Cong, 3d Sess 216–18 (Jan 7, 1863) (Sen Field). Shellabarger added, rightly enough, that the suspension provision had initially been placed in the judiciary article of the Constitution and owed its present position to the Committee of Style, which had no power to make substantive changes. Cong Globe, 37th Cong, 2d Sess 2070–71 (May 12, 1862) ("This historical recital, I submit to every fair-minded man, totally refutes all inferences in favor of the legislative control over this writ."); Farrand, 2 *Records of the Federal Convention* at 576, 596 (cited in note 27).

<sup>29</sup> "[T]he weight of opinion," wrote James G. Randall in 1926, "would seem to incline to the view that Congress has the exclusive suspending power." Randall, *Constitutional Problems under Lincoln* at 136 (cited in note 3).

<sup>30</sup> Cong Globe, 37th Cong, 1st Sess 392 (Aug 2, 1861) (arguing "that the President has not transcended his power").

<sup>31</sup> Id at 339–40 (July 30, 1861) (arguing, inter alia, that the writ of habeas corpus "might be called a peace right").



But Wisconsin Senator Timothy Howe assured his colleagues that the resolution did not say that the President had acted lawfully in every instance; it purported to legalize his actions after the fact, *as if* they had been lawful to begin with. The President might have exceeded his authority, Howe continued, but he was more to be lauded than censured; for he had exercised his honest judgment to keep the country from falling to pieces in an emergency.<sup>32</sup>

To ratify the President's acts, protested John Breckinridge of Kentucky, was to amend the Constitution; it was therefore beyond Congress's authority.<sup>33</sup> It was of course nothing of the sort. Ratification of unauthorized acts had a long and honorable history in the law of agency, and there was no reason not to apply the principle to agents of the government, as the Supreme Court would soon do in the *Prize Cases*.<sup>34</sup> Bayard of Delaware raised a narrower objection that had more firepower: The blockade could not be ratified retroactively, since forfeiture for acts done before they were outlawed would be *ex post facto*.<sup>35</sup> This argument went unanswered in Congress; and the Court's later effort in this direction, I have elsewhere argued, left something to be desired.<sup>36</sup>

The proposed joint resolution was never put to a vote, but on the next to last day of the session a watered-down version of it was tacked

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<sup>32</sup> Id at 393–95 (Aug 2, 1861) (“The resolution does not affirm that [the President’s acts] were legal . . . but it declares that they shall be as legal and valid as if they had had the previous express authority and direction of the Congress of the United States.”). Better a “slight departure from the Constitution,” argued Tennessee Senator Andrew Johnson, than overthrow of the government. Id at 296 (July 27, 1861).

<sup>33</sup> Id at 137–38 (July 16, 1861) (“I deny, Mr. President, that one branch of this government can indemnify any other branch of the government for a violation of the Constitution or the laws.”).

<sup>34</sup> See 67 US (2 Black) 635, 670–71 (1862), Joseph Story, *Commentaries on the Law of Agency* §§ 239, 244, 248 (Little, Brown 7th ed 1869). For conflicting later views as to whether a principal may *benefit* from his own ratification, see Floyd R. Mechem, *Outlines of the Law of Agency* §§ 247–52 (Callahan 4th ed 1952). President Jefferson, as the reader may know, ratified his agents’ unauthorized agreement to purchase Louisiana, but France then endorsed his action by itself ratifying the treaty. See Currie, *The Jeffersonians* at 95–98 (cited in note 1). See also Cong Globe, 37th Cong, 1st Sess 392 (Aug 2, 1861) (Sen Morrill) (“Whatever power Congress might have conferred on the President in advance, it may ratify when exercised without its authority.”). As the President had said in his message, he had done nothing that Congress itself could not do. Abraham Lincoln, Special Session Message (July 4, 1861) at 18 (cited in note 18). For doubts as to congressional ratification, see Randall, *Constitutional Problems under Lincoln* at 58 (cited in note 3) (“[I]t argues a curious commingling of legislative and executive functions for a President to perform an act which he adjudges to be within the competence of Congress and then, when the measure has been irrevocably taken, to present Congress with an accomplished fact for its subsequent sanction.”).

<sup>35</sup> Cong Globe App, 37th Cong, 1st Sess 15 (July 5, 1861) (“On what principle can you, in the face of the Constitution, affirm by legislation such action as that?”). See US Const Art I, § 9.

<sup>36</sup> See *Prize Cases*, 67 US (2 Black) at 671. See also Currie, *The First Hundred Years* at 275 n 290 (cited in note 13). The Court actually had no need to confront this issue in view of its alternative conclusion that the President had acted lawfully in the first place.

onto an innocuous bill to increase the soldiers' pay and passed by both Houses without significant further debate. Maine Senator William Pitt Fessenden assured doubters that the revised provision "avoids all questions with regard to the *habeas corpus* and other matters, and refers only to the military appropriations . . . ; [t]here is nothing in the world in it except what relates to the Army and Navy volunteers."<sup>37</sup> Here it is in its full final form; the reader may judge for herself whether it was quite so narrow as Senator Fessenden maintained.<sup>38</sup>

*And be it further enacted*, that all the acts, proclamations, and orders of the President of the United States after the fourth of March, eighteen hundred and sixty-one, respecting the army and navy of the United States, are hereby approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States.<sup>39</sup>

For the future, Congress during its special session adopted a variety of measures designed to promote the prosecution of the war. It authorized the President to raise as many as five hundred thousand additional volunteers and to borrow up to \$250 million.<sup>40</sup> It increased customs duties and provided means of facilitating their collection, including the closing of Southern ports.<sup>41</sup> It imposed a direct tax on lands and houses and levied the nation's first income tax—not apportioned among the states according to the census but at a uniform rate of 3 percent on sums over \$800.<sup>42</sup> The constitutional objection that would

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<sup>37</sup> Cong Globe, 37th Cong, 1st Sess 442 (Aug 5, 1861).

<sup>38</sup> It should be borne in mind that it was the commanding general who was authorized to suspend *habeas corpus*, and that the navy enforced the blockade. Senator Grimes, in a letter to an Iowa correspondent, declared that the provision "ratifies and confirms . . . all the acts of the President that needed or that were susceptible of ratification." Sellery, *Lincoln's Suspension of Habeas Corpus* at 23 (cited in note 24).

<sup>39</sup> 12 Stat 326, ch 63, § 3 (Aug 6, 1861). Another ratification had occurred on July 27, 1861, when Congress appropriated \$100,000 "for the Payment of the Police organized by the United States for the City of Baltimore." 12 Stat 279 (July 27, 1861). The following year the President once again authorized the commanding general to supersede the Baltimore police, and also "to arrest and imprison disloyal persons, declare martial law, and suspend the writ of *habeas corpus* anywhere within his command." Edwin M. Stanton, Order of the War Department (Apr 5, 1862), in Richardson, ed, 6 *Messages and Papers of the Presidents* 112, 112 (cited in note 10). Presumably this was done in the exercise of his statutory authority to put down the rebellion.

<sup>40</sup> 12 Stat 268 (July 22, 1861); 12 Stat 259 (July 17, 1861).

<sup>41</sup> 12 Stat 292, 292–93, §§ 1–5 (Aug 5, 1861); 12 Stat 222 (July 13, 1861).

<sup>42</sup> 12 Stat at 294, 297, §§ 8, 13; id at 309, § 49. The statute contemplated that states might opt to assume or collect the direct tax "in their own way and manner" and pay the apportioned sum to the federal government, with a 15 percent deduction to account for collection costs. Id at 311, § 53. The Federalist had envisioned that state officers might be invited to enforce federal laws, but the alternative provision of the 1861 statute permitting states themselves to assume the obligation was reminiscent of the old requisitions the federal tax power was intended to replace.

prove fatal to a comparable later exaction was not even suggested in debate—the first of many unargued constitutional issues that characterized the Thirty-seventh Congress.<sup>43</sup>

In addition, Congress made conspiracy a crime if its object was to overthrow the government, to levy war against the United States, to obstruct the execution of the laws, or to seize government property; outlawed the recruiting of soldiers to fight against the United States; authorized the President to prohibit commercial intercourse with rebel states; required federal officers to take an oath of allegiance to the nation; and removed a source of ambiguity in the President's authority to enforce the laws by empowering him to call out the armed forces and militia for that purpose whenever it was "impracticable" to enforce them by ordinary judicial means.<sup>44</sup> These measures were all innocent enough in constitutional terms, and none of them met with significant constitutional objection.<sup>45</sup>

More interesting perhaps was the first Confiscation Act, which provided for forfeiture of property used in furtherance of the rebellion, including slaves.<sup>46</sup> Forfeiture of the tools of crime had a long and respectable history that saved it from due process and other objections,<sup>47</sup> and in this case it was necessary and proper to suppression of the

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See Federalist 27 (Madison), in *The Federalist* 171, 171–75 (Wesleyan 1961) (Jacob E. Cooke, ed); Articles of Confederation, Art 8, 1 Stat 4, 6 (July 9, 1778), reprinted in Worthington Chauncey Ford, ed, 9 *Journals of the Continental Congress, 1774–1789* 907, Art 8 (GPO 1907). Section 46 of the statute, however, resolved the difficulty by authorizing the federal government to collect the tax if the state failed to live up to its undertaking. 12 Stat at 308.

<sup>43</sup> See *Pollock v Farmers' Loan & Trust Co.*, 157 US 429, 582–83 (1895) (holding the income tax unconstitutional because violative of the apportionment requirement and holding the municipal bond tax unconstitutional because it taxed the power of the states to borrow money), modified on rehearing 158 US 601, 637 (1895) (vacating the Court's original decree and striking down the entire income tax statute); David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888–1986* 24–26 (Chicago 1990) (discussing *Pollock*). See also Hammond, *Sovereignty and an Empty Purse* at 49–50 (cited in note 4) (“[B]y the time of the Civil War it was generally understood that an income tax was not a direct tax; instead it was called a ‘duty.’”).

<sup>44</sup> 12 Stat 284 (July 31, 1862); 12 Stat 317 (Aug 6, 1861); 12 Stat 255, 257, § 5 (July 13, 1861); 12 Stat 326 (Aug 6, 1861); 12 Stat 281, § 1 (July 29, 1861). The President did promptly forbid commercial intercourse (except in western Virginia). See Abraham Lincoln, Proclamation (Aug 16, 1861), in Richardson, ed, 6 *Messages and Papers of the Presidents* 37, 37–38 (cited in note 10). On the ambiguity of the prior law, see Currie, *Descent into the Maelstrom* at 238–42 (cited in note 1).

<sup>45</sup> Senators Bayard and Powell did object to the conspiracy bill on the ground that it undermined the narrow definition of treason in Article III, Cong Globe, 37th Cong, 1st Sess 233 (July 24, 1861), but it seems most unlikely that the Framers meant to preclude the punishment of lesser offenses entirely. See Currie, *The Second Century* at 297–99 (cited in note 43) (discussing *Cramer v United States*, 325 US 1 (1945)).

<sup>46</sup> 12 Stat 319 (Aug 6, 1861).

<sup>47</sup> See *Calero-Toledo v Pearson Yacht Leasing Co.*, 416 US 663, 682–83 (1974) (tracing the common law and statutory history of forfeiture). Congress had provided for such forfeitures as early as 1794. 1 Stat 347, 347–49, § 1 (Mar 22, 1794). Appropriately, the 1861 statute provided for judicial proceedings to enforce the forfeiture. 12 Stat at 319, §§ 2–3.

rebellion; apart from ritual complaints that Congress had no power to emancipate slaves,<sup>48</sup> this provision went virtually unchallenged as well.<sup>49</sup>

Finally, reviving an early tradition seldom honored since the time of the first President Adams, both Houses joined in requesting the President to proclaim a day of humiliation, fasting, and prayer. Lincoln readily complied, and the precedent was followed periodically throughout the war—again without constitutional objection.<sup>50</sup>

## II. THIRTY-SEVENTH CONGRESS, SECOND SESSION

When Congress met for its first regular session in December 1861, it was busy indeed—not only with additional war measures but also with a whole slew of unfinished business left over from the days before the rebellion. The harvest was rich and worked a sea change in constitutional interpretation. Yet the most interesting fact about this revolution was the dog that failed to bark—the almost complete absence of constitutional arguments that had been zealously pressed and had often prevailed before.

### A. Unfinished Business

To begin with, Congress adopted, and the President signed, legislation providing land grants both for homesteads and for colleges of

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<sup>48</sup> See Cong Globe, 37th Cong, 1st Sess 410–11 (Aug 2, 1861) (Rep Burnett) (stating that “[t]his Congress has no power, and the power exists nowhere in this government”); id at 411 (Rep Crittenden) (“I say, in relation to slavery, that Congress never had any power of legislation within the States.”). However, responded Representative McClernand, if Congress could forfeit a horse used in the war, then it could forfeit slaves used for the same purpose. Id (“I would inquire if a law which would forfeit the ownership of a horse would not forfeit the title to a negro found engaged in military service.”).

<sup>49</sup> Representative Crittenden briefly alluded to the clause of Article III, § 3, declaring that “no attainder of treason shall work corruption of blood, or forfeiture” beyond the life of the offender, but he did not develop the argument. Id at 412. For discussion of this provision, see Part Two, II.

<sup>50</sup> 12 Stat 328 (Aug 5, 1861); Abraham Lincoln, Proclamation (Aug 12, 1861), in Richardson, ed, 6 *Messages and Papers of the Presidents* 36, 36 (cited in note 10); Abraham Lincoln, Proclamation (Apr 10, 1862), in Richardson, ed, 6 *Messages and Papers of the Presidents* 89, 89; Abraham Lincoln, Proclamation (Mar 30, 1863), in Richardson, ed, 6 *Messages and Papers of the Presidents* 164, 164–65; Abraham Lincoln, Proclamation (July 15, 1863), in Richardson, ed, 6 *Messages and Papers of the Presidents* 170, 170; Abraham Lincoln, Proclamation (July 7, 1864), in Richardson, ed, 6 *Messages and Papers of the Presidents* 221, 222; Abraham Lincoln, Proclamation (Oct 20, 1864), in Richardson, ed, 6 *Messages and Papers of the Presidents* 228, 228–29. See Randall, 2 *Lincoln the President* Part I at 56–57 (cited in note 8) (noting that it was through Lincoln “that the day became for the first time a matter of regular annual proclamation by the President”). See also Abraham Lincoln, General Order (Nov 15, 1862), in Richardson, ed, 6 *Messages and Papers of the Presidents* 125, 125 (cited in note 10) (enjoining observance of the Sabbath in the army and navy because of “[t]he importance for man and beast of the prescribed weekly rest, the sacred rights of Christian soldiers and sailors, a becoming deference to the best sentiment of a Christian people, and a due regard for the divine will”).

agriculture and the mechanical arts. President Buchanan had vetoed such measures on constitutional grounds before the war; in 1862 they zipped through Congress without significant constitutional quibbles of any kind.<sup>51</sup>

Similarly, Congress in 1862 enacted a new districting requirement for congressional elections. When such a provision was first adopted in 1842, it was vociferously assailed on the ground that it unconstitutionally imposed affirmative duties on state officers. After the next election a new majority on the Elections Committee pronounced it invalid, and it was not reenacted after the 1850 census. In 1862 it sailed through both Houses without a peep from the few states'-righters who remained in Congress, Massachusetts Representative Henry Dawes blandly remarking that "[t]he Constitution . . . authorizes Congress to prescribe the manner in which [members] are to be elected."<sup>52</sup>

A revolutionary bill to establish a Department of Agriculture, in contrast, encountered a bit of heavy weather in the Senate, though it too was ultimately enacted. The tasks of the Department, the bill recited, would be "to acquire and to diffuse among the people of the United States useful information on subjects connected with agriculture . . . and to procure, propagate, and distribute among the people new and valuable seeds and plants."<sup>53</sup> At the last minute Pennsylvania Senator Edgar Cowan, a Republican, asked the obvious question: Where did Congress get the power to promote agriculture?

Its only authority to encourage science and the useful arts, said Cowan, was by granting copyrights and patents; the Constitutional Convention had quietly abandoned a provision to establish public institutions, rewards, and immunities to further agriculture, manufacturing, and commerce. "When it is shown that it was proposed to give

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<sup>51</sup> 12 Stat 392 (May 20, 1862); 12 Stat 503 (July 2, 1862). See Cong Globe, 37th Cong, 2d Sess 909 (Feb 20, 1862) (Rep Grow) (suggesting that the homestead proposal had been so thoroughly debated and so broadly supported in the past that it required little discussion). The bill passed the House 107-16 and the Senate 33-7. Id at 1035, 1951 (Feb 28 and May 6, 1862). For a general discussion of the fate of earlier efforts along these lines, see Currie, *Democrats and Whigs* at 50-57 (cited in note 1). But see Cong Globe, 37th Cong, 2d Sess 2275, 2277, 2441 (May 22 and 30, 1862) (Sen Lane) (arguing that the college bill was unconstitutional, but only because it allowed one state to enter and select lands in another). See also McPherson, *Battle Cry of Freedom* at 450 (cited in note 8) ("[I]t was the war—or rather the absence of southerners from Congress—that made possible the passage of these [and other] Hamiltonian-Whig-Republican measures for government promotion of socioeconomic development.").

<sup>52</sup> Cong Globe, 37th Cong, 2d Sess 2911 (June 24, 1862). See 12 Stat 572 (July 14, 1862). See also US Const Art I, § 4; Cong Globe, 37th Cong, 2d Sess 2910-12, 3117-18, 3280 (June 24, July 5, and 12, 1862) (debating the districting requirement); Currie, *Democrats and Whigs* at 254-68 (cited in note 1) (discussing the districting issue in detail).

<sup>53</sup> 12 Stat 387 (May 15, 1862). President Lincoln had suggested the establishment of an agricultural bureau. See Abraham Lincoln, First Annual Message (Dec 3, 1861), in Richardson, ed, 6 *Messages and Papers of the Presidents* 44, 52-53 (cited in note 10).

us that authority and that it was withdrawn,” Cowan concluded, “I cannot see how we are to get clear of it.”<sup>54</sup>

Lafayette Foster of Connecticut, admitting he had not looked into the constitutional question, lamely said he had no doubt of Congress’s authority.<sup>55</sup> Fessenden of Maine invoked precedent. As an original matter, he announced, he was inclined to agree Congress had no power in the premises, but the question had been settled by legislative construction,<sup>56</sup> for, as others pointed out, Congress had appropriated money for a modest program along the same lines in the past.<sup>57</sup> Exactly, snapped Cowan, without any warrant in the Constitution<sup>58</sup> — and, we might add, without any discussion of the constitutional question.

You can make your objection when we propose to appropriate money for the new department, said James Simmons of Rhode Island,<sup>59</sup> but I have found no evidence that he ever did. And thus a principal tenet of prewar Democratic theology was steamrolled with hardly the semblance of an explanation. Thenceforth, apparently, Congress could not only dispose of the public lands for purposes not enumerated in the Constitution (such as homesteads and agricultural colleges)<sup>60</sup> but

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<sup>54</sup> Cong Globe, 37th Cong, 2d Sess 2015 (May 8, 1862). See Farrand, *2 Records of the Federal Convention* at 325 (cited in note 27). On the question of congressional authority to promote science in general, see Currie, *The Federalist Period* at 71 (cited in note 1).

<sup>55</sup> Cong Globe, 37th Cong, 2d Sess 2015 (May 8, 1862).

<sup>56</sup> *Id* at 2016.

<sup>57</sup> See *id* at 856 (Feb 17, 1862) (committee report) (stating that one goal of past congressional appropriations had been to collect agricultural statistics); *id* at 1692 (Apr 17, 1862) (Sen Wright) (“For many year we have had a system in this country . . . created by resolution and by addition to appropriation bills.”); *id* at 1756 (Apr 22, 1862) (Sen Lane of Indiana) (arguing that no legislation was necessary since money was already appropriated for the benefit of agriculture).

<sup>58</sup> *Id* at 2015 (May 8, 1862).

<sup>59</sup> *Id* at 2016.

<sup>60</sup> A House committee proposal to grant California three million acres of desert for irrigation purposes raised once again the question of just how broad this authority was. Declaring flatly that the United States itself could not go into the reclamation business (as forty years later it would do), the committee reasoned that the proposed grant was supported by the precedent of earlier donations of swamp lands to the states for purposes of drainage: “There is no distinction in principle . . . between lands rendered unfit for cultivation from *excess* of water and lands unfit for cultivation from *scarcity* of the same element.” The analogy was clever but not altogether convincing, as it was easier to argue in the case of wetlands that the grant would improve the value of lands retained by the government by removing a nuisance, and that was the basis on which they had been sustained. The same argument that justified grants for agricultural colleges would have supported the desert proposal, but the bill was tabled without further discussion of the constitutional question. See HR Rep No 87, 37th Cong, 2d Sess 5–6 (1862); Cong Globe, 37th Cong, 2d Sess 2379–81 (May 27, 1862) (Rep Crisfield); Currie, *Democrats and Whigs* at 48 (cited in note 1). For the Reclamation Act, see 32 Stat 388 (June 17, 1902).

could tax and spend for them too—so long, presumably, as the expenditure served to promote the general welfare of the United States.<sup>61</sup>

A further item of unfinished business was authorization of the Pacific railroad, which had long been stalled less by constitutional qualms—it was generally understood to be necessary to the defense of the West Coast—as by sectional disputes over the appropriate route.<sup>62</sup> As in numerous earlier cases, Congress subsidized construction by copious grants of alternative sections of government property, evidently on the accepted theory that the railroad would serve the purposes for which the public domain had been acquired by enhancing the value of the remaining public land.<sup>63</sup> But the 1862 statute went beyond its predecessors in one significant respect: It incorporated the Union Pacific Railroad to build and maintain the line from the 100th meridian in Nebraska to the western boundary of Nevada.<sup>64</sup>

The reader will observe that this stretch of roadway did not suffice to carry trains all the way from Kansas City to San Francisco, as the project was intended to do. State-created corporations, armed with the usual subsidy, were authorized to construct the end sections through Kansas and California.<sup>65</sup>

Barely articulated constitutional reservations appear to have accounted for this peculiar arrangement. It was the implacable Thaddeus Stevens of Pennsylvania—hardly renowned as a partisan of states' rights—who ran up the red flag in the House, proposing an amendment to the bill that would permit the Union Pacific to construct the railroad

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<sup>61</sup> This was the interpretation the Supreme Court later adopted in *United States v Butler*, 297 US 1 (1936). To avoid what he wrongly considered an even greater incursion on states' rights, President Monroe had embraced this interpretation in his famous veto of the Tollgate Bill in 1822. See Currie, *The Second Century* at 227–31 (cited in note 43) (discussing Roberts's opinion in *Butler*); Currie, *The Jeffersonians* at 278–81 (cited in note 1). See also 12 Stat 806 (Mar 3, 1863), incorporating the National Academy of Sciences. Since the Academy's initial statutory assignment was to make investigations and reports at the government's request, it may be that its creation was necessary and proper to those legitimate government functions that would be aided by the requested reports.

<sup>62</sup> See Currie, *Democrats and Whigs* at 31–34 (cited in note 1) (examining the constitutionality of these grants as “necessary and proper for purposes of national defense”). Even strict constructionists, said Representative Dunn, conceded that Congress could build roads if there was a military need for them, as there was in this case. Cong Globe, 37th Cong, 2d Sess 1701–03 (Apr 17, 1862).

<sup>63</sup> 12 Stat 489, 492, § 3 (July 1, 1862). See Currie, *Democrats and Whigs* at 28–31 (cited in note 1); Cong Globe, 37th Cong, 2d Sess 1579 (Apr 8, 1862) (Rep Campbell). Additional aid was to be provided by the loan of government bonds, which might also be defended as necessary and proper to the management of the remaining public lands—or to the defense of the West Coast. 12 Stat at 492, § 5; Cong Globe, 37th Cong, 2d Sess 1591 (Apr 9, 1862) (Rep Phelps) (“For what are Governments formed if not to protect their citizens from foreign invasion and wrong—to secure their happiness and promote their general welfare.”).

<sup>64</sup> 12 Stat at 489, 490, § 1. The authorization covered a telegraph line as well as the railroad. Id.

<sup>65</sup> Id at 493–94, § 9.

only through the territories, and not within the states. There was a serious question, he said, whether Congress had power to create a corporation to build a railroad through a state. He was not sure he shared the doubt as to congressional authority, but there were many who did; he offered his amendment to eliminate the constitutional objection.<sup>66</sup>

How a Congress that tamely swallowed the camel of land-grant colleges and a Department of Agriculture could have strained at the gnat of a corporation to build railroads in the states passes ordinary understanding. That Congress could give public lands to subsidize railways through the public domain in the states had long been established; that the Pacific road was a military necessity had been proclaimed by Democratic as well as Whig presidents before the war. A corporation, as Chief Justice Marshall had patiently explained in *McCulloch v Maryland*,<sup>67</sup> was a perfectly ordinary, necessary, and proper means of carrying out the various powers granted to Congress;<sup>68</sup> and thus the ostensible constitutional question was not serious after all. But Congress for some reason remained skittish; Stevens's amendment was accepted in a trice,<sup>69</sup> and that was the end of the Union Pacific's initially envisioned authority to build tracks in Kansas and California.<sup>70</sup>

## B. Slavery and Polygamy

Not long into the first session of the wartime Congress, longtime Kentucky Senator John J. Crittenden (now serving in the House) introduced a resolution declaring that the purpose of the war was only

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<sup>66</sup> Cong Globe, 37th Cong, 2d Sess 1889–90 (Apr 30, 1862) (“I desire to perfect a bill which shall run clear of all difficulties and doubts as to its constitutionality.”). Senator Lyman Trumbull of Illinois, another prominent Republican who had supported such measures as the homestead and agricultural college bills, said he too thought the constitutional question was serious. Id at 2679 (June 12, 1862). Morrill of Maine was more negative still: As the bill reached the Senate, it provided for a railroad only in the territories; and there, he said, Congress's power ended. Id. Pomeroy of Kansas protested that Congress could build railroads in the states with state consent, but he might as well have held his peace; if the Constitution did not give Congress the authority, no state could confer it. See id (“I cannot see any valid objection to this amendment arising from the Constitution.”); Currie, *The Jeffersonians* at 264–66 (cited in note 1) (discussing the so-called Bonus Bill). Neither Nebraska nor Nevada nor any of the territory in between, it should be added, had yet been admitted to the Union.

<sup>67</sup> 17 US (4 Wheat) 316 (1819).

<sup>68</sup> Id at 410–11.

<sup>69</sup> See Cong Globe, 37th Cong, 2d Sess 1890 (Apr 30, 1862) (on a vote of 59-39).

<sup>70</sup> In a debate over amending the bill to permit Congress to alter or repeal the Union Pacific charter, Senator Howard suggested that any such alteration should require a two-thirds vote of each House. Senator Sherman replied that Congress could not prescribe how many members must vote to enact laws in the future—a preview of later arguments over Senate rules requiring an extraordinary majority to end a filibuster. See id at 2779 (June 18, 1862). Compare the puzzle of the unamendable constitutional amendment, discussed in Currie, *Descent into the Maelstrom* at 250–53 (cited in note 1) (discussing Mr. Corwin's proposed amendment to prohibit the adoption of any amendment giving Congress power to abolish slavery).



to preserve the Union, not to interfere with the “established institutions” of the states. The House adopted this resolution by a squeaky vote of 117-2, and the Senate followed suit by an almost equally lopsided margin.<sup>71</sup> Nevertheless, Congress during its second Civil War session took several important steps to limit slavery.

To begin with, in the teeth of the *Dred Scott* decision, Congress abolished slavery both in the territories and in the District of Columbia.<sup>72</sup> In each case the prohibition was cold turkey. There was no provision for gradual emancipation, as had been practiced in most Northern states, or for a referendum, as was occasionally proposed in the case of the District.<sup>73</sup> In language taken directly from the celebrated Northwest Ordinance, slavery was forbidden immediately, eternally, and without reservation.<sup>74</sup>

There were significant differences between the District and territorial provisions, owing no doubt to the fact that slavery was firmly established in the District of Columbia. Perhaps redundantly, the District statute provided that persons currently held to service were “hereby discharged.” It also provided, as several speakers had insisted it must, for compensation—to be determined by a board of commissioners and not to exceed “in the aggregate” \$300 for each person freed. Finally, the District bill appropriated \$100,000 for the purpose of colonization of free blacks who were willing to go “to the Republics of Hayti or Liberia, or such other country beyond the limits of the United States as the President may determine.”<sup>75</sup>

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<sup>71</sup> Cong Globe, 37th Cong, 1st Sess 223 (July 22, 1861) (House); id at 257, 265 (July 25, 1861) (Senate). The Senate sponsor was Andrew Johnson of Tennessee. See also Lincoln, First Annual Message (Dec 3, 1861) at 54 (cited in note 53) (defining “the integrity of the Union” as “the primary object of the contest on our part”).

<sup>72</sup> 12 Stat 432 (June 19, 1862) (territories); 12 Stat 376, § 1 (Apr 16, 1862) (District of Columbia). See *Scott v Sandford*, 60 US (19 How) 393 (1857) (alternative holding) (denying Congress’s authority to prohibit slavery in the territories); Currie, *The First Hundred Years* at 267–72 (cited in note 13) (discussing *Dred Scott*).

<sup>73</sup> For the Northern history, see Currie, *Descent into the Maelstrom* at 3 (cited in note 1). On the referendum question, see Cong Globe, 37th Cong, 2d Sess 1477–78 (Apr 1, 1862) (Sen Willey) (proposing a referendum); id at 1643 (Apr 11, 1862) (Rep Wright) (same); id at 1478 (Apr 1, 1862) (Sen Pomeroy) (doubting its constitutionality, as legislative authority belonged to Congress, not to the people); id at 1643 (Apr 11, 1862) (Rep Sheffield) (suggesting that the Pennsylvania Supreme Court had recently found a referendum requirement unconstitutional). For earlier discussion of this question, see Currie, *Democrats and Whigs* at 142–43 (cited in note 1).

<sup>74</sup> In each case the statute provided that “neither slavery nor involuntary servitude” should thenceforth exist in the affected regions, except as punishment for crime. 12 Stat at 376, § 1 (District); 12 Stat at 432 (territories). For the Ordinance provision, see Northwest Ordinance (July 13, 1787), 1 Stat 50, 53 n (a), Art VI (Aug 7, 1789), reprinted in Roscoe R. Hill, ed, 32 *Journals of the Continental Congress, 1774–1789* 334, 343, Article VI (GPO 1936).

<sup>75</sup> 12 Stat at 376–78, §§ 1, 2, 11. For arguments that compensation was required for the taking (as the Fifth Amendment clearly provided), see, for example, Cong Globe, 37th Cong, 2d Sess 1335, 1497, 1502 (Mar 24 and Apr 2, 1862) (Sen Davis); id at 1354 (Mar 25, 1862) (Sen Ken-

Whatever the Supreme Court had said about slavery in the territories, said New Hampshire Senator John Hale, there was no doubt of Congress's power to outlaw slavery in the District.<sup>76</sup> As Southerners had once argued in opposing a ban on slavery in the territories, the District and territorial provisions, we may add, were not the same: While Article IV authorized Congress only to "make all needful rules and regulations respecting the territory or property belonging to the United States," Article I empowered it to exercise "exclusive legislation in all cases whatsoever" over the seat of government.<sup>77</sup>

There were scattered suggestions that even this compendious grant did not permit Congress to abolish slavery. Congress had been given legislative authority over the District, said old Garrett Davis of Kentucky, in order to protect the federal government from harassment; the provision should be narrowly construed to accomplish only this purpose.<sup>78</sup> That was a pretty tall order in light of the all-embracing language of Article I; it seems more proper to conclude that the danger of harassment prompted the Framers to give Congress plenary powers over the District, as the Constitution appeared unmistakably to say.<sup>79</sup> Davis's obvious argument that the District power, like other

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ned). For arguments that \$300 was inadequate compensation, see *id.* at 1336 (Mar 24, 1862) (Sen Davis) ("I say that that is not full compensation. I say it is only half compensation; or was before these war times."); *id.* at 1523 (Apr 3, 1862) (Sen Powell) (finding the compensation to be "a very inadequate one"). For Senator Wilson's riposte that \$300 was merely an average figure and that more could be awarded in particular cases, see *id.* ("The average is to be \$300; but for some may be paid [more or less as appropriate.]").

<sup>76</sup> Cong Globe, 37th Cong, 2d Sess 1267 (Mar 18, 1862).

<sup>77</sup> US Const Art IV, § 3, cl 2; US Const Art I, § 8, cl 17. For earlier Southern arguments based on this distinction, see Currie, *Descent into the Maelstrom* at 138–39 (cited in note 1). The District bill also provided that no slaveowner could receive compensation without taking an oath that he had not given aid or comfort to the rebellion. Senator Bayard challenged this provision on the ground that it amounted to punishment without trial; this issue is bound up with those surrounding the second Confiscation Act, which we shall dissect in due course. See 12 Stat at 376–77, §§ 2–3; Cong Globe, 37th Cong, 2d Sess 1524–25 (Apr 3, 1862). See also text accompanying notes 287–309. Representative Wadsworth made the same objection in the House. See Cong Globe, 37th Cong, 2d Sess 1644 (Apr 11, 1862).

<sup>78</sup> Cong Globe, 37th Cong, 2d Sess at 1335 (Mar 24, 1862).

<sup>79</sup> For statements that Congress's power over the District was plenary, see, for example, *id.* at 1350 (Mar 25, 1862) (Sen Wilson) (arguing that the Constitution gave Congress the "power to exercise exclusive legislation in all cases whatsoever"); *id.* at 1472 (Apr 1, 1862) (Sen Fessenden) ("Can any man doubt the constitutional power of Congress over that subject?"); *id.* at 1474 (Sen Browning) ("I have never myself doubted the existence of the power in Congress under the Constitution to pass this or any other legislative measure affecting the District of Columbia."); *id.* at 1491 (Apr 2, 1862) (Sen Sherman) (finding the abolition of slavery in the District a "simple municipal regulation, clearly delegated to the Congress"); *id.* at 1618 (Apr 10, 1862) (Rep Thomas) (saying that "the power of Congress over slavery in this District is absolute"). Compare the Supreme Court's conclusion that the risk of undue obstructions to interstate commerce had induced the Framers to give Congress plenary authority to restrict commerce as well as to remove obstructions created by the states. *United States v Darby*, 312 US 100, 115 (1941). Equally fallacious for the same reason was Senator Sumner's parallel but opposite argument that Con-

congressional powers, was subject to extraneous limitations like the ban on titles of nobility was even less inviting—not because constitutional restrictions were inapplicable to the District, as Pennsylvania Representative John Hickman asserted, but because there was no constitutional guarantee of slavery.<sup>80</sup>

More troubling were the repeated arguments, echoing debates during the great petition fight of the 1830s, that the Fifth Amendment required not only just compensation for the taking of present slaves but also that the taking be for public use. Plainly the government had no intention of keeping the slaves for its own purposes; the bill flatly provided for setting them free. Supporters of the measure answered this argument only with the fatuous denial that human beings could be property, which was contradicted by decades of history in the District of Columbia and centuries of it elsewhere. Without rewriting the Constitution to substitute “public purpose” for “public use,” as the Supreme Court has since done, I see no way around the public use problem; I have discussed this issue elsewhere and shall not repeat myself here.<sup>81</sup>

Delaware Senator Willard Saulsbury was the only speaker to deny congressional authority to spend money to ship free blacks from the District to colonies outside the United States,<sup>82</sup> and nobody bothered to contradict him. Whether Congress could appropriate funds to colonize free blacks living in the *states* was indeed a ticklish and uncertain question, and we shall take it up presently. But the District was different, as always; for Congress, as we know, had the right to exercise “exclusive legislation” over the District, including the power to spend.<sup>83</sup>

After all this the territorial bill was an anticlimax. Strikingly, no one so much as mentioned the *Dred Scott* case, which had struck down

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gress could not *establish* slavery in the District because the Constitution did not expressly say so. See Cong Globe, 37th Cong, 2d Sess 1447–48 (Mar 31, 1862). See also Cong Globe App, 37th Cong, 2d Sess 103 (Apr 11, 1862) (Rep Hutchins) (same). Sumner further contended that slavery offended the Due Process Clause—a proposition that depends on not one but two debatable premises respecting the constitutional provision, as I have said before. See Cong Globe, 37th Cong, 2d Sess 1449 (Mar 31, 1862); Currie, *Descent into the Maelstrom* at 13 n 75 (cited in note 1).

<sup>80</sup> See Cong Globe, 37th Cong, 2d Sess 1335 (Mar 24, 1862) (Sen Davis); id at 1644 (Apr 11, 1862) (Rep Hickman).

<sup>81</sup> See id at 1335 (Mar 24, 1862) (Sen Davis) (insisting that takings must be for public use); id at 1354 (Mar 25, 1862) (Sen Kennedy) (same); id at 1523 (Apr 3, 1862) (Sen Powell) (same). See also id at 1447 (Mar 31, 1862) (Sen Sumner) (denying slaves were property); id at 1497 (Apr 2, 1862) (Sen Clark) (same); id at 1503 (Sen Morrill) (same). For earlier arguments on the public-use issue, see Currie, *Descent into the Maelstrom* at 14–17 (cited in note 1). President Lincoln, in signing the bill, declared that he had “never doubted” congressional authority to do away with slavery in the District. See Abraham Lincoln, Special Message to Congress (Apr 16, 1862), in Richardson, ed, 6 *Messages and Papers of the Presidents* 73, 73 (cited in note 10). As an Illinois Representative in 1849, he had offered a proposal to do just that in the House. See Currie, *Descent into the Maelstrom* at 147 n 88 (cited in note 1).

<sup>82</sup> Cong Globe, 37th Cong, 2d Sess 1333 (Mar 24, 1862).

<sup>83</sup> See id at 83 (Dec 12, 1861) (Sen Doolittle).

a provision indistinguishable from the one just proposed, let alone explained why the decision was wrong—although Maryland Representative John W. Crisfield did condemn the bill as an unwarrantable interference with private property.<sup>84</sup> Thaddeus Stevens blithely declared that the territorial bill could not be distinguished from the District law that Congress had just passed,<sup>85</sup> but that was not true; as Massachusetts Representative Benjamin F. Thomas pointed out, the District bill had provided for compensation.<sup>86</sup> Thomas was right, but his point was trivial, for as George Fisher of Delaware observed there were hardly any slaves in the territories; with all due respect to Chief Justice Taney, the bill would deprive virtually no one of existing property.<sup>87</sup>

Not long after prohibiting slavery in the territories Congress also forbade polygamy, the second of what the 1856 Republican platform had described as “twin relics of barbarism.”<sup>88</sup> Each House spent about fifteen minutes on the polygamy bill, and the proceedings were quite unembarrassed by the arguments of federalism and religious freedom that had characterized earlier debates on the subject. Senator Hale insouciantly intimated that the proposal seemed contrary to the *Dred Scott* decision, but allowed that if the committee chairman thought it was all right he was happy to go along. Senator Bayard responded that he thought *Dred Scott* was different without saying why, and maybe it

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<sup>84</sup> Id at 2049 (May 9, 1862) (“If you take from us today our right to hold slaves . . . in face of the Constitution . . . how long will it be before you will take from us some other constitutional right, even more valuable than that?”).

<sup>85</sup> See id at 2052 (“[E]very argument that could be used against this bill would apply with equal force against the bill . . . abolishing slavery in the District of Columbia.”).

<sup>86</sup> See id.

<sup>87</sup> Id at 2067 (May 12, 1862). See Nevins, 2 *The War for the Union* at 94 (cited in note 8) (“The formal abolition of slavery in the Territories . . . carried no compensation, for it was Republican doctrine that no valid title to slave property had ever existed there.”). For Taney’s view, see *Scott v Sandford*, 60 US (19 How) at 450 (invoking the Due Process Clause in striking down the antislavery provision of the Missouri Compromise).

<sup>88</sup> 12 Stat 501 (July 1, 1862). See Kirk H. Porter & Donald B. Johnson, eds, *National Party Platforms, 1840–1964* 27 (Illinois 1973). The polygamy statute applied not only to the territories but also to any “other place over which the United States have exclusive jurisdiction,” including enclaves within the states and the District of Columbia. 12 Stat at 501, § 1. See US Const Art I, § 8, cl 17. The slavery statutes did not go so far. For although the original draft of the territorial bill would have applied to enclaves as well, and although the argument for congressional power was as strong with respect to enclaves as to the District of Columbia, the reference to enclaves proved controversial and was dropped before the bill left the House. See Cong Globe, 37th Cong, 2d Sess 2030 (May 8, 1862) (Rep Lovejoy) (reporting the original bill); id at 2044 (May 9, 1862) (Rep Arnold) (arguing for Congress’s power to abolish slavery in federal enclaves); id at 2068 (May 12, 1862) (Rep Lovejoy) (presenting a modification to his substitute bill containing no reference to enclaves).

was;<sup>89</sup> the main point is that yet another prior constitutional controversy had magically disappeared.<sup>90</sup>

But we have not yet finished with slavery. In March 1862, without serious discussion, Congress forbade military personnel to return fugitive slaves to their masters.<sup>91</sup> Article IV, of course, required that fugitive slaves be returned, but it did not say by whom; it was not clear that the army and navy were constitutionally required to do so.<sup>92</sup> Four months later Congress provided that slaves owned by rebels, together with their families, would be freed if they performed military service.<sup>93</sup> Apart from the question whether this measure could be justified as punishment for participation in the insurrection, this bill raised the same question that the Confederate Congress wrestled with at the end of the war, namely whether the power to raise armies embraced authority to liberate slaves as an incentive to induce them to serve.<sup>94</sup> One might have thought these issues challenging enough to warrant debate, but again there was none.

In addition, responding to the urging of President Lincoln, both Houses passed a joint resolution declaring that the United States ought to give financial aid to “any State which may adopt gradual

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<sup>89</sup> The arguments respecting the narrow reach of Article IV were equally applicable to both cases, but the arguably decisive due process argument applied more obviously to property than to marriage—though the modern Court would hold the right to marry a part of the liberty protected by the Fifth and Fourteenth Amendments. See generally *Loving v Virginia*, 388 US 1 (1967) (striking down a state antimiscegenation statute on due process grounds). Compare *Lawrence v Texas*, 539 US 558 (2003) (discerning in the Due Process Clause a right to engage in sodomy).

<sup>90</sup> The House passed the bill without a division; the Senate vote was 37-2. See *Cong Globe*, 37th Cong, 2d Sess 1847-48 (Apr 28, 1862) (House); *id* at 2506-07 (June 3, 1862) (Senate). For the earlier debates, see Currie, *Descent into the Maelstrom* at 219-22 (cited in note 1). Other provisions of the statute annulled the corporate charter of the Mormon Church and limited the amount of real estate in the territories any religious or charitable organization could acquire. Though existing vested rights in land were spared, these provisions raised constitutional questions of their own. They were not mentioned in Congress, however, and I shall not discuss them either. See 12 Stat at 501-02, §§ 2-3; *Davis v Beason*, 133 US 333 (1890) (upholding against First Amendment challenge a law requiring registered voters to sign a pledge affirming that they were not a member of “any order, organization or association” that advocated polygamy). The Contract Clause, it may nevertheless be said, does not apply to the federal government. US Const Art I, § 10, cl 1.

<sup>91</sup> 12 Stat 354 (Mar 3, 1862).

<sup>92</sup> A constitutional argument might perhaps have been built upon Representative Mallory’s inquiry whether the government was not required to use military force when ordinary methods of law enforcement were ineffective, for the President after all was directed to “take care that the laws be faithfully executed.” See *Cong Globe*, 37th Cong, 2d Sess 955 (Feb 25, 1862). See also US Const Art II, § 3.

<sup>93</sup> 12 Stat 597, 599, § 13 (July 17, 1862).

<sup>94</sup> See Currie, 90 *Va L Rev* at 1295-1306 (cited in note 2). On an earlier proposal along the same lines Representative Sedgwick had made the argument that it did. *Cong Globe*, 37th Cong, 2d Sess 2325 (May 23, 1862).

abolishment of slavery.”<sup>95</sup> Several border-state members protested that by adopting this resolution Congress would be interfering with slavery in the states.<sup>96</sup> Defenders of the program replied rightly enough that the plan left emancipation entirely to state discretion.<sup>97</sup> But that did not answer the fundamental question: Where did Congress get authority to make this offer it hoped the border states could not afford to refuse?<sup>98</sup>

President Lincoln attempted to justify his proposal as a war measure. The leaders of the rebellion, he wrote, entertained the hope that the border slave states might someday join them; to abolish slavery in those states would dash their hopes and thus shorten the war. Thus, he seemed to be saying, subsidizing emancipation was necessary and proper to suppression of the rebellion.<sup>99</sup>

Congressional supporters echoed this argument,<sup>100</sup> but it seems somewhat conjectural to me.<sup>101</sup> Without mentioning the glaring prece-

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<sup>95</sup> 12 Stat 617 (Apr 10, 1862). For the President’s recommendation, see Abraham Lincoln, Special Message to Congress (Mar 6, 1862), in Richardson, ed, 6 *Messages and Papers of the Presidents* 66, 68–69 (cited in note 10). See also Special Message to Congress (July 14, 1862), in Richardson, ed, 6 *Messages and Papers of the Presidents* 84, 84 (cited in note 10), forwarding to Congress a draft bill to carry out the purpose to which the joint resolution had committed the United States.

<sup>96</sup> See, for example, Cong Globe, 37th Cong, 2d Sess 1172 (Mar 11, 1862) (Rep Crittenden); id at 1332 (Mar 24, 1862) (Sen Saulsbury); id at 1374 (Mar 26, 1862) (Sen Powell); Cong Globe App, 37th Cong, 2d Sess 69 (Mar 11, 1862) (Rep Wickliffe).

<sup>97</sup> Lincoln had anticipated this objection and given the answer noted in the text. See Lincoln, Special Message to Congress (Mar 6, 1862) at 68 (cited in note 95) (“Such a proposition . . . sets up no claim of a right by Federal authority to interfere with slavery within State limits, referring, as it does, the absolute control of the subject in each case to the State and its people.”). See also Cong Globe, 37th Cong, 2d Sess 1174 (Mar 11, 1862) (Rep Fisher) (“I regard the policy contemplated by the President, not as an entering wedge for a series of measures of confiscation and emancipation under the war power of the Government, but as altogether a *counter project* to any such series of measures.”); id at 1169 (Rep Diven).

<sup>98</sup> See, for example, Cong Globe 37th Cong, 2d Sess 1150 (Mar 10, 1862) (Rep Wickliffe); id at 1332 (Mar 24, 1862) (Sen Saulsbury). The resolution was phrased to say the United States should provide financial assistance, not that Congress should, thus permitting doubters of congressional authority to vote for it in anticipation of a constitutional amendment. See id at 1333 (Sen Davis); Cong Globe, 37th Cong, 3d Sess 588–89, 592 (Jan 29, 1863) (Sen Fessenden). See also Abraham Lincoln, Second Annual Message (Dec 1, 1862), in Richardson, ed, 6 *Messages and Papers of the Presidents* 126, 136–39 (cited in note 10) (proposing just such an amendment).

<sup>99</sup> Abraham Lincoln, Special Message to Congress (Mar 6, 1862) at 68 (cited in note 95). Professor Donald thought there was something to Lincoln’s fears. See Donald, *Lincoln* at 344–45 (cited in note 8) (“Lincoln knew that so long as these heavily populated and strategically located states maintained slavery there was a possibility that they might join the Confederacy.”). See also HR Rep 148, 37th Cong, 2d Sess 10 (1862), which, without adverting to the constitutional question, spoke of the need to break the artificial bond between border states and the Deep South.

<sup>100</sup> See, for example, Cong Globe, 37th Cong, 2d Sess 1151–52 (Mar 10, 1862) (Rep Bingham); id at 1169 (Mar 11, 1862) (Rep Diven).

<sup>101</sup> Various speakers denied that abolishing slavery in the border states would do anything to shorten the war. See, for example, id at 1169 (Rep Biddle) (worrying that such a scheme would counterproductively increase the burden on the United States); id at 1174 (Rep Crittenden) (arguing that the proposal might negatively affect relations with otherwise loyal states and that

dent of the Department of Agriculture, New York Representative Alexander Diven propounded a more sweeping defense: Ever since Congress had decided to support an asylum for the deaf and dumb, it had been established that Congress could tax and spend for anything that would promote the general welfare,<sup>102</sup> as the abolition of slavery would surely do.<sup>103</sup>

Diven neglected to mention that the asylum in question had been aided not by tax revenues but with a grant of public lands, as to which congressional authority was arguably broader.<sup>104</sup> He also neglected to mention that President Pierce had flatly repudiated the asylum precedent in vetoing on constitutional grounds a bill to convey public lands in aid of homes for the indigent insane.<sup>105</sup> It was understandable that Diven would not make his adversaries' case for them; it was incomprehensible that more of them did not think of making it themselves. Only Senator McDougall advanced Madison's position that money could be spent only in the exercise of Congress's enumerated powers, which had been the prevailing interpretation before the war.<sup>106</sup>

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the sole aim of any policy should be to unite the Union against the rebels); Cong Globe App, 37th Cong, 2d Sess 70 (Mar 11, 1862) (Rep Wickliffe) (same).

<sup>102</sup> Cong Globe, 37th Cong, 2d Sess 1169 (Mar 11, 1862). Representative Bingham argued the measure was supported by the power to tax for the common defense, but that was the flimsy war-powers thesis in different words. Id at 1150 (Mar 10, 1862). For the Agriculture Department, see text accompanying notes 53–61.

<sup>103</sup> Diven also mentioned the precedent of famine relief for Ireland, but that (like earlier aid for earthquake victims in South America) could be distinguished as an exercise of congressional power over foreign affairs. See Currie, *The Jeffersonians* at 290–91 (cited in note 1); Currie, *Democrats and Whigs* at 49 n 68 (cited in note 1).

<sup>104</sup> See Currie, *The Jeffersonians* at 292–94 (cited in note 1).

<sup>105</sup> See Currie, *Democrats and Whigs* at 46–49 (cited in note 1).

<sup>106</sup> Cong Globe, 37th Cong, 2d Sess 1373 (Mar 22, 1862). Senators Saulsbury and Powell flatly denied Congress's authority, but without giving reasons. Id at 1372, 1374. See also Cong Globe App, 37th Cong, 2d Sess 69 (Mar 11, 1862) (Rep Wickliffe). Saulsbury, however, would repeat McDougall's argument the following year. Cong Globe, 37th Cong, 3d Sess 898–99 (Feb 12, 1863). For Madison's view, see Currie, *The Federalist Period* at 169 (cited in note 1). The prevailing understanding was represented by three presidential vetoes of measures involving the disposition of public lands. See Currie, *Democrats and Whigs* at 46–57 (cited in note 1).

During the third session Missouri actually petitioned Congress to carry out its promise of financial aid, and a bill to do just that passed both Houses in different form, only to fail in the end for want of agreement on the details. There was no significant debate in the House. See Cong Globe, 37th Cong, 3d Sess 207–09 (Jan 6, 1863). Senate discussion largely repeated arguments that had been made in the previous session. See id at 903 (Feb 12, 1863) (Senate passage of the amended bill). See also id at 1545 (Mar 3, 1863) (House's refusal to suspend the rules, on the last day of the session, to take up a substitute the House committee had proposed). The only new twist was the desperate suggestion that the arrangement involved a treaty that the state was forbidden to enter by Article I, § 10. It is difficult to see how this provision prevented Missouri from taking advantage of a federal offer to pay for the emancipation of slaves. See id at 782 (Feb 7, 1863) (Sen Davis) (objecting that the proposal envisioned a treaty); id at 897 (Feb 12, 1863) (Sen Saulsbury) (same); id at 616 (Jan 30, 1863) (Sen Howard) (pooh-poohing the suggestion); id at 782 (Feb 7, 1863) (Sen Henderson) (same).

Finally, after one of the fiercest debates of the entire session, Congress passed a second Confiscation Act providing, among other things, for the forfeiture of slaves as a punishment for treason and related offenses, raising grave constitutional issues on which we shall focus in detail later on.<sup>107</sup>

Congressional opponents of the measures considered in this section denounced them as opening wedges in a campaign to abolish slavery altogether in violation of President Lincoln's assurance and the Crittenden resolution quoted at the beginning of this section.<sup>108</sup> Fuel was added to the fire when the House twice tabled motions to renew that resolution,<sup>109</sup> though in defense of that action it might be said there was no need to reenact a provision that was already on the books.<sup>110</sup> Congress had indeed made significant inroads on slavery even within the states, and Massachusetts Representative Thomas Eliot offered a preview of the future by arguing that the President had authority to free slaves in insurrectionary districts, since the laws of war permitted resort to any measure that would weaken the enemy.<sup>111</sup> For the moment his proposed resolution went nowhere; the best or the worst, depending on one's point of view, was yet to come.

### C. Other Issues

Without debate, Congress during its second session authorized the President to seize railroad and telegraph lines when the public safety so demanded. This measure was obviously necessary and proper to combating the rebellion, and compensation for the taking was provided, as the Fifth Amendment required.<sup>112</sup> President Lincoln lost little time in exercising this authority, raising possible First Amendment questions by not only forbidding the transmission of unauthorized news about military operations—some of which, at least, could have been prohibited altogether under the dictum in *Near v Minnesota*<sup>113</sup>—

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The language of the resolution was broad enough to include subsidies for colonization as well as emancipation, and Saulsbury denied that Congress could spend for this purpose either. Cong Globe, 37th Cong, 2d Sess 1372 (Mar 26, 1862). Senator Doolittle opined that colonization was an easy case because the United States had power to make treaties with foreign nations; evidently he thought appropriations to transport freedmen to tropical climes would be necessary and proper to implementation of a colonization treaty. See id at 1371.

<sup>107</sup> 12 Stat 589, 589–90, §§ 1–2 (July 17, 1862). See also Part Two, II of this Article.

<sup>108</sup> See, for example, Cong Globe, 37th Cong, 2d Sess 1300 (Mar 20, 1862) (Sen Willey); id at 1338 (Mar 24, 1862) (Sen Davis).

<sup>109</sup> See id at 15 (Dec 4, 1861); id at 1042 (Mar 3, 1862).

<sup>110</sup> See id at 1170 (Mar 11, 1862) (Rep Olin).

<sup>111</sup> Id at 5, 78–80 (Dec 2 and 12, 1861). See also id at 2325 (May 23, 1863) (Rep Sedgwick).

<sup>112</sup> 12 Stat 334, §§ 1, 3 (Jan 31, 1862).

<sup>113</sup> 283 US 697, 716 (1931) (“No one would question but that a government might prevent . . . the publication of the sailing dates of transports or the number and location of troops.”).



but also denying the use of both telegraph and railroad facilities to newspapers that published unauthorized military information—which seemed to suppress utterances that were constitutionally protected as well as those which were not.<sup>114</sup>

Financial measures of the second session connected to the war included not only a thorough revision of the tax laws that attracted conspicuously little constitutional attention<sup>115</sup> but also authorization of the country's first issuance of paper money as legal tender, which gave rise to a vigorous debate over congressional power to which we shall recur.<sup>116</sup>

Nearly last but not least, Congress required federal officers to swear not only that they would support the Constitution (as Article VI already required) but also that they had never voluntarily borne arms against the United States or given aid or encouragement to their enemies.<sup>117</sup> The Supreme Court would later condemn a similar retroactive provision applicable to the practice of law as both an *ex post facto* law and a bill of attainder, but neither argument was made in Congress,

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<sup>114</sup> See Edwin M. Stanton, Order of the War Department (Feb 25, 1862), in Richardson, ed, *6 Messages and Papers of the Presidents* 108, 108–09 (cited in note 10) (discussing telegraphs); M.C. Meigs, Order of the War Department (May 25, 1862), in Richardson, ed, *6 Messages and Papers of the Presidents* 113, 113 (cited in note 10) (discussing railroads). Secretary of State William Henry Seward directed the military censor to permit transmission of no information relating to either civil or military operations of the government except that originating with the “regular agent of the associated press,” who testified that he sent only dry facts without comment. Journalists understood that they were not to criticize the government, and a House committee concluded the Secretary had gone too far. Examples of censored messages included such innocuous items as rumors about possible Cabinet changes and Mexican letters of marque. The committee recommended that only military and naval reports should be suppressed, and the House commendably adopted a resolution declaring that censorship should be restricted to matters that aided the enemy's military or naval operations or discovered our own. HR Rep 64, 37th Cong, 2d Sess (Mar 20, 1862); Cong Globe, 37th Cong, 2d Sess 1682 (Apr 16, 1862) (Rep Wilson) (presenting a resolution from the Committee on the Judiciary).

<sup>115</sup> 12 Stat 432 (July 1, 1862). A proposal to tax cotton was dropped from the bill after objections that it offended the constitutional ban on export taxes because much of the cotton would be exported, despite the sensible reply that what was to be taxed was production, not exportation. See Cong Globe, 37th Cong, 2d Sess 1413 (Mar 27, 1862) (Rep Morrill) (raising the objection); id (Rep Kellogg) (refuting it); id at 2319 (May 23, 1862) (Sen Trumbull) (same); id at 2375 (May 27, 1862) (deleting the provision). A proposed tax on the services of slaves was rejected after it was condemned as effectively a tax on slaves themselves, which was a form of capitation tax that would have to be apportioned among the states according to population, as all direct taxes did. See, for example, id at 1546 (Apr 4, 1862) (Rep Blair) (proposing the tax); id at 1547 (Apr 4, 1862) (Rep Bingham) (making the constitutional objection); id at 2403 (May 28, 1862) (Sen Sumner) (arguing that this was no more a capitation tax than a tax on auctioneers or lawyers would be); id at 1550, 1576, 2430, 2605 (Apr 4 and 8, May 29, and June 6, 1862) (rejecting the proposal first in the House and then in the Senate). The question is not free from difficulty, but I think Senator Sherman was right that this was an effort to evade the direct tax provision. Id at 2403 (May 28, 1862). See also US Const Art I, §§ 2, 9.

<sup>116</sup> 12 Stat 345, § 1 (Feb 25, 1862). See also Part Two, I. The financial measures of the Civil War period are minutely dissected in Hammond, *Sovereignty and an Empty Purse* (cited in note 4).

<sup>117</sup> 12 Stat 502 (July 2, 1862).

and the prophylactic argument for keeping traitors out of government office was stronger.<sup>118</sup> Opponents of the oath confined themselves to the losing argument that the oath prescribed by Article VI was exclusive<sup>119</sup> and the more troublesome suggestion that the bill would add to the exhaustive list of qualifications the Constitution laid down for the president and members of Congress.<sup>120</sup> Supporters of the measure were unimpressed; the bill passed the Senate by a vote of 33-5 and the House with hardly any debate at all.<sup>121</sup>

Finally, the House quickly impeached, and the Senate quickly removed and disqualified, a federal judge in Tennessee named West W. Humphreys who had deserted his post and taken up duties as a judge for the Confederate States. Neglect of duty alone surely qualified as a high crime or misdemeanor sufficient for conviction under Article II, § 4—let alone taking office in support of the rebellion, which very likely amounted to giving aid and comfort to the enemy and thus to treason within the meaning of Article III—an offense for which removal from office was expressly prescribed.<sup>122</sup> Throughout the Thirty-seventh Congress, moreover, occasional members were likewise expelled for consorting with the Confederacy,<sup>123</sup> and one (Indiana Sena-

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<sup>118</sup> See *Ex parte Garland*, 71 US (4 Wall) 333 (1867). See also Currie, *The First Hundred Years* at 292–96 (cited in note 13) (discussing the “test oath” cases); US Const Art I, § 9. A little later the Court divided 4-4 over the validity of an oath of past loyalty as a qualification for voting. See 12 Stat 403 (May 20, 1862); Currie, *The First Hundred Years* at 296 n 56 (cited in note 13).

<sup>119</sup> Cong Globe, 37th Cong, 2d Sess 2693 (June 13, 1862) (Sen Saulsbury). According to Senator Trumbull, all states had required their officers to swear allegiance to the state as well as the federal constitution. *Id* at 2694.

<sup>120</sup> See, for example, *id* at 2694, 3013 (June 13 and 30, 1862) (Sen Davis) (“I hold it to be an undoubted principle that the Congress of the United States can neither add to nor subtract from the qualifications prescribed in the Constitution for any office.”); *id* at 2871 (June 23, 1862) (Sen Carlile) (stating similar sentiments). For discussion of the general issue of qualifications of positions in Congress and the Executive, see Currie, *Democrats and Whigs* at 245–47 (cited in note 1); Currie, *The Jeffersonians* at 79–82, 85–86 (cited in note 1); *Powell v McCormack*, 395 US 486 (1969). This debate was renewed when it was suggested that Senators were required to take the oath, but nothing new was added. See, for example, Cong Globe, 38th Cong, 1st Sess 278 (Jan 20, 1864) (Sen Hendricks) (arguing that Congress could not add to the constitutional qualifications); *id* at 275–76 (Sen Collamer) (noting that Congress had disqualified persons convicted of bribery as early as 1790); *id* at 325 (Jan 25, 1864) (noting passage of a resolution requiring that Senators take the oath).

<sup>121</sup> See Cong Globe, 37th Cong, 2d Sess 2564–65 (June 4, 1862) (House); *id* at 2873 (June 23, 1862) (Senate).

<sup>122</sup> The articles of impeachment are printed in *id* at 2277 (May 22, 1862). See also *id* at 2944–49 (June 26, 1862) (testimony on the articles of impeachment), 2949 (votes to convict), 2953 (votes to remove and to disqualify). At one point a Senator objected to a question posed to a witness by the House managers; the President pro tem ruled that it was for the Senate, not the presiding officer, to pass on the objection, and the objection was withdrawn. *Id* at 2946. The case is discussed in Eleanore Bushnell, *Crimes, Follies, and Misfortunes* 115–24 (Illinois 1992) (describing Humphreys’s case as “the shortest and only uncontested trial in the annals of impeachment,” and applauding the result).

<sup>123</sup> See Cong Globe, 37th Cong, 1st Sess 63–64 (July 11, 1861) (discussing the expulsion of Senators Mason, Hunter, Clingman, Bragg, Chesnut, Nicholson, Sebastian, Mitchel, Hemphill,

tor Jesse Bright) for actually recommending an arms merchant to Jefferson Davis.<sup>124</sup> Expulsion was obviously appropriate in such cases; the only difficulty lay in drawing the line between support for the enemy and freedom of speech.<sup>125</sup>

### III. THIRTY-SEVENTH CONGRESS, THIRD SESSION

It was between the second and third sessions of the Thirty-seventh Congress that President Lincoln dropped that celebrated bombshell,

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and Wigfall, all from states that had recently purported to secede); Cong Globe, 37th Cong, 2d Sess 5 (Dec 2, 1861) (Missouri Representative John W. Reid); id at 7–8 (Dec 3 and 4, 1861) (Kentucky Representative Henry C. Burnett); id at 9–10 (Dec 4, 1861) (Kentucky Senator John C. Breckinridge); id at 263–64 (Jan 10, 1862) (Missouri Senators Waldo Johnson and Trusten Polk). During the special Senate session called to consider President Lincoln's appointments in March 1861 the Senate had declared the seats of senators from seceding states vacant rather than expelling them, and during the summer session Senator Bayard argued that the same should be done with the latest absentees as well. See Cong Globe, 36th Cong, 2d Sess 1454 (Mar 14, 1861) (special Senate session of March 1861); Cong Globe, 37th Cong, 1st Sess 63 (July 11, 1861) (Sen Bayard) ("I can see no reason why we should depart from the determination of the Senate at the last session, in declaring the seats vacant, and adopt now the rule of expulsion."). On the vacancy question, see Currie, *Descent into the Maelstrom* at 246–48 (cited in note 1).

<sup>124</sup> See Cong Globe, 37th Cong, 2d Sess 89 (Dec 16, 1861) (printing the charges); id at 391–92 (Jan 20, 1862) (Sen Wilkinson) (making the case for expulsion); id at 471–72 (Jan 24, 1862) (Sen Cowan) (arguing that when he wrote the letter, before the attack on Fort Sumter, Bright thought there would be no war); id at 655 (Feb 5, 1862) (voting 32–14 to expel Bright).

<sup>125</sup> See id at 891–92, 1208–15 (Feb 19 and Mar 13, 1862) (Sens Wilkinson and Davis) (making the case for expulsion of Kentucky Senator Lazarus Powell); id at 1234 (Mar 14, 1862) (Sen Trumbull) (explaining why the committee had recommended against expulsion); see also id (voting 28–11 not to expel Powell); S Rep 38, 37th Cong, 2d Sess 5 (1862) (invoking several statements purportedly made by Oregon Senator Benjamin Stark and concluding that he was "disloyal"); id at 3–4 (reproducing Stark's letter protesting that he was being persecuted for his expressions and opinions); Cong Globe, 37th Cong, 2d Sess 2596 (June 6, 1862) (refusing to take up Senator Sumner's motion to expel Stark). In Bright's case Illinois Senator Orville Browning distressingly suggested that to oppose the government's policy of coercing the seceding states amounted to supporting the rebellion. Id at 623 (Feb 4, 1862). He was not alone in making such assertions. See, for example, id at 431, 544 (Jan 22 and 29, 1862) (Sen Davis) (noting that Bright had voted against a variety of measures designed to combat the rebellion). Wiser heads retorted that a member ought not to be expelled for a mere difference of opinion, and as noted there were better arguments to support the case against Bright. See, for example, id at 473 (Jan 24, 1862) (Sen Harris); id at 645 (Feb 5, 1862) (Sen Anthony); id at 648 (Sen Bayard).

In Stark's case the Senate also debated the threshold question whether, if disloyalty was proved, it should be a ground only for expulsion or for refusing to seat him in the first place. The discussion was a reprise of earlier controversies over the power to add to the constitutional qualifications for office, adverted to in connection with the loyalty oath considered in notes 117–20 and accompanying text. See, for example, Cong Globe, 37th Cong, 2d Sess 265 (Jan 10, 1862) (Sen Bayard) (arguing that the constitutional list of qualifications was exclusive); id at 266 (Sen Sumner) (arguing that the Article VI provision requiring an oath to support the Constitution made loyalty a qualification for office); id at 268 (Sen Trumbull) (suggesting that Bayard's thesis would require the Senate to seat Jefferson Davis). The Senate voted 26–19 to seat Stark without prejudice to subsequent proceedings, id at 994 (Feb 27, 1862), but an aye vote on this motion could have meant any of three things: that disloyalty was not a legitimate ground for exclusion; that Stark should be seated before the Senate investigated the question whether to exclude him; or that there was as yet insufficient evidence of disloyalty.

the preliminary Emancipation Proclamation of September 1862, declaring all slaves in areas under rebel control free as of January 1, 1863.<sup>126</sup> Twice before Union generals had issued similar orders limited to their fields of command, and Lincoln had set them aside. Whether or not the President could issue such an order, he wrote, no general was authorized to do so; he alone would make the decision.<sup>127</sup>

When Congress met again in December 1862, anguished opponents castigated the President for unconstitutionally interfering with slavery in the states, which in his Inaugural Address he had insisted he had no authority to do.<sup>128</sup> In his preliminary proclamation he said nothing to identify the source of his asserted authority; in his second proclamation, issued on New Year's day to carry out the first, he said only that his action was "a fit and necessary measure for suppressing [the] rebellion . . . warranted by the Constitution upon military necessity," and that it fell within his authority as Commander in Chief.<sup>129</sup> Yet Lincoln's defenders in Congress built upon this cryptic statement to make a case for him that was both straightforward and convincing: Slave labor fueled the rebellion, and anything that weakened the enemy was within the President's authority to suppress insurrection.<sup>130</sup> Here are the words of Ohio Representative John Hutchins:

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<sup>126</sup> See Abraham Lincoln, Proclamation (Sept 22, 1862), in Richardson, ed, 6 *Messages and Papers of the Presidents* 96, 96 (cited in note 10).

<sup>127</sup> See Abraham Lincoln, Proclamation (May 19, 1862), in Richardson, ed, 6 *Messages and Papers of the Presidents* 91, 91 (cited in note 10) (disowning an order by General David Hunter); Abraham Lincoln, To John C. Frémont (Sept 11, 1861), in Roy P. Basler, ed, 4 *The Collected Works of Abraham Lincoln* 517, 517–18 (Rutgers 1953) (directing General John C. Frémont to rescind his order).

<sup>128</sup> See, for example, Cong Globe, 37th Cong, 3d Sess 130–31 (Dec 18, 1862) (Rep Yeaman); id at 148 (Rep Crisfield). But see James G. Randall and David Donald, *The Civil War and Reconstruction* 380 (Heath 2d ed 1961) ("Lincoln's promise in his inaugural of 1861 that he would not touch slavery in the states was not a prediction of governmental policy in the event of civil war, but rather a pledge based on the assumption that the slave states should remain in the Union.").

<sup>129</sup> Abraham Lincoln, Proclamation (Sept 22, 1862), in Richardson, ed, 6 *Messages and Papers of the Presidents* 157, 158–59 (cited in note 10). "As Commander-in-Chief . . . in time of war," Lincoln told a group of visitors to the White House, "I suppose I have a right to take any measure which may best subdue the enemy." Abraham Lincoln, Reply to Emancipation Memorial Presented by Chicago Christians of All Denominations (Sept 13, 1862), in Roy P. Basler, ed, 5 *The Collected Works of Abraham Lincoln* 419, 421 (Rutgers 1953).

<sup>130</sup> See Abraham Lincoln, To James C. Conkling (Aug 26, 1863), in Roy P. Basler, ed, 6 *The Collected Works of Abraham Lincoln* 406, 408 (Rutgers 1953) ("Is there—has there ever been—any doubt that by the law of war, property, both of enemies and friends, may be taken when needed? And is it not needed whenever taking it helps us, or hurts the enemy?"). See also M.D. Vattel, *The Law of Nations* 429 (Nicklin & Johnson 1829) ("A nation has a right to deprive the enemy of his possessions, and goods, of every thing which may augment his forces, and enable him to make war.") For a narrower view, see *Mitchell v Harmony*, 54 US (13 How) 115, 133, 134–35 (1852), approving a jury instruction that a military officer might take private property only in a case of "immediate and impending danger or . . . an urgent necessity." ("[T]he question here is, whether the law permits it to be taken to insure the success of any enterprise against a public

The proclamation of the President is in the nature of a military order, having effect in States and parts of States in insurrection; and its intendment is to aid in putting down that insurrection . . . . As a military order, the constitutional power to issue it cannot be seriously questioned, for it is the exercise of the war power by the President—a power ample enough to cover the purpose of the proclamation.

As a war measure, is this military order wisely adapted to accomplish the object intended? If it will weaken the resources of the rebels, it will cripple their power and diminish their capacity for resistance. If it will weaken the rebels, and at the same time strengthen the Government, it will in a double aspect aid in crushing the rebellion. I maintain that if carried out it will weaken in a vital point the rebels, and powerfully strengthen the Government. Laborers in the Army, laborers in raising provisions and procuring supplies, are as essential elements of military power as soldiers.

It would make as much sense to leave the rebels their guns, Hutchins concluded, as to allow them to retain their slaves.<sup>131</sup>

Of course it was not quite that simple. In order to put down the rebellion, Senator Garrett Davis of Kentucky inquired, could the President suspend the Constitution, lay taxes, or raise armies?<sup>132</sup> Of course not, any more than he could impose cruel and unusual punishments, but that is because of limitations found elsewhere in the Constitution. Suspending the Constitution would offend the Supremacy Clause; laying taxes and raising armies would usurp powers expressly given to Congress.<sup>133</sup> There was no such limitation in the case of slavery.

More worrisome was Davis's reminder that the Supreme Court had held in *Brown v United States*<sup>134</sup> that a mere declaration of war did not authorize the President to seize enemy property within the United

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enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it.”).

<sup>131</sup> Cong Globe, 37th Cong, 3d Sess 76–77 (Dec 11, 1862). I have divided the quotation in the text into paragraphs for the sake of clarity. Even Representative Crisfield, who as I have said thought the proclamation unconstitutional, defined the powers of the commander in chief broadly: “Whatever retards or embarrasses the march of his army, he may abate or remove; whatever is necessary for its subsistence and protection, he may take; whatever enables the force in front to keep up the resistance, he may destroy.” Id at 150 (Dec 19, 1862). That seems to me to come pretty close to an admission that he can free the slaves.

<sup>132</sup> Id at 531 (Jan 27, 1863). See also Benjamin R. Curtis, *Executive Power* 24 (Little, Brown 1862) (arguing that the Constitution confers increased powers on the president as commander in chief in times of war).

<sup>133</sup> US Const Art VI; US Const Art I, § 8, cl 1, 12. For the ban on cruel and unusual punishments, see US Const Amend VIII.

<sup>134</sup> 12 US (8 Cranch) 110 (1814).

States.<sup>135</sup> Whether or not this decision was correct, it seems to me that authorization to put down a rebellion impliedly embraces all reasonable measures to secure that end unless forbidden by other constitutional provisions.<sup>136</sup> It should be emphasized that the proclamations applied only behind enemy lines; in terms Justice Black would later employ in the *Steel Seizure Case*, they were battlefield measures within the purview of the commander in chief, not domestic measures reserved exclusively to Congress.<sup>137</sup>

Senator Davis also suggested at one point that the proclamations took slaveowners' property without just compensation in violation of the Fifth Amendment.<sup>138</sup> But as Richard Epstein has written, a plea of self defense may be a defense to a charge of unconstitutional taking.<sup>139</sup> Representative Hutchins's analogy to guns is once again helpful: No one would think the government would have to pay compensation if it deprived the enemy of its weapons; why should slaves be treated differently, when they were as valuable in promoting rebellion as the weapons themselves?<sup>140</sup>

On December 15, 1862, by a vote of 78-51, the House adopted a resolution declaring the initial proclamation both constitutional and good policy.<sup>141</sup>

#### A. Other Military Measures

At the very end of its final session the Thirty-seventh Congress finally declared that the President was authorized to suspend the

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<sup>135</sup> Cong Globe, 37th Cong, 3d Sess 531 (Jan 27, 1863). See also *Brown*, 12 US (8 Cranch) at 127.

<sup>136</sup> See Cong Globe, 37th Cong, 2d Sess 2918 (June 25, 1862) (Sen Sumner) ("There is not one of the rights of war which Congress may not exercise; there is not a weapon in its terrible arsenal that Congress may not grasp."). See also *Miller v United States*, 78 US (11 Wall) 268, 305 (1871).

<sup>137</sup> *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 587 (1952). See also Farber, *Lincoln's Constitution* at 156-57 (cited in note 3) (distinguishing Lincoln's emancipation of slaves in the rebelling states from President Truman's seizure of steel mills in *Youngstown*).

<sup>138</sup> Cong Globe, 37th Cong, 3d Sess 532 (Jan 27, 1863).

<sup>139</sup> Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 111 (Harvard 1985).

<sup>140</sup> Consider *United States v Caltex, Inc* 344 US 149 (1952) (holding that the government need not pay when it destroys the property of *its own* adherents in order to keep it out of enemy hands).

<sup>141</sup> Cong Globe, 37th Cong, 3d Sess 92 (Dec 15, 1862). There is no published opinion of Attorney General Bates on the legality of the Proclamation, and there was little Cabinet discussion of the question. Navy Secretary Gideon Welles, who privately called it "an arbitrary and despotic measure in the cause of freedom," reported that some members of the Cabinet "thought legislation desirable before the step was taken." Edgar T. Welles, ed, 1 *Diary of Gideon Welles* 144-45 (Houghton, Mifflin 1911). See also *id* at 158-60 (stating that the proclamation was "an extreme exercise of war powers" that Welles was prepared to accept); Salmon P. Chase, *The Journals of Salmon P. Chase*, in John Niven, ed, 1 *The Salmon P. Chase Papers* 3, 393-95 (Kent State 1993).

privilege of habeas corpus.<sup>142</sup> When it did so it encountered the un-elaborated argument that Congress could not delegate its authority.<sup>143</sup> Illinois Senator Lyman Trumbull responded that Congress was no more required to perform the actual suspension than to sign promissory notes, issue letters of marque, or coin money.<sup>144</sup> The question should have been whether the statute laid down standards precise enough that it could be said that the President was executing a policy laid down by Congress rather than creating one of his own.<sup>145</sup>

As adopted, the provision permitted the President to suspend the privilege anywhere in the country if he found the public safety so required, as he soon did nationwide for many persons in military custody.<sup>146</sup> The breadth of the statutory provision was attacked on the ground that the existence of an insurrection in some parts of the country did not justify suspending the privilege elsewhere.<sup>147</sup> This argument went unanswered in Congress, but I think it missed the mark; so long as an insurrection was in progress, the Constitution permitted suspension whenever and wherever the public safety required.<sup>148</sup>

Although the President's authority to suspend the writ was not in terms made retroactive, it might as well have been. For § 4 of the statute made compliance with any presidential order a defense to any proceeding attacking "any search, seizure, arrest, or imprisonment" made

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<sup>142</sup> 12 Stat 755, § 1 (Mar 3, 1863). See Farber, *Lincoln's Constitution* at 159 (cited in note 3) (arguing that the statutory language—"the President . . . is authorized"—"was carefully ambiguous about whether Congress was conferring the power to suspend the writ or merely recognizing its existence in the hands of the president"). Though Senator Trumbull, who wrote the clause, said it would authorize suspension, Senator Doolittle said it did not attempt to determine whether the President's authority was "derived from the act of Congress which we now pass, or . . . from the Constitution." Cong Globe, 37th Cong, 3d Sess 1092 (Feb 19, 1863). See also Sellery, *Lincoln's Suspension of Habeas Corpus* at 46 (cited in note 24) ("The designed and confessed ambiguity of the clause is indubitable, and it is impossible to maintain that those who voted for the bill thereby condemned Presidential suspension as illegitimate.").

<sup>143</sup> See Cong Globe, 37th Cong, 3d Sess 111, 1091, 1158, 1192, 1465 (Dec 17, 1862; Feb 19, 21 23, and Mar 2, 1863) (Sen Powell); id at 1460 (Mar 2, 1863) (Sen Wall) ("You actually confer upon him the functions of a legislator . . . a right which I hold under the Constitution belongs alone to Congress."); id at 1475 (Sen Bayard).

<sup>144</sup> Id at 1185 (Feb 23, 1863).

<sup>145</sup> See *Buttfield v Stranahan*, 192 US 470, 496 (1904); Currie, *The Second Century* at 19 (cited in note 42) (discussing *Buttfield*).

<sup>146</sup> Abraham Lincoln, Proclamation (Sept 15, 1863), in Richardson, ed, 6 *Messages and Papers of the Presidents* 170, 170 (cited in note 10). Section 2 of the statute mitigated the harshness of the suspension by providing that, once a grand jury had sat without indicting them, all political prisoners were to be released on taking an oath of allegiance to the United States and, if the public safety required it, a bond to keep the peace. See 12 Stat at 755, § 2.

<sup>147</sup> See Cong Globe, 37th Cong, 3d Sess 229 (Jan 8, 1863) (Sen Saulsbury); id at 1093 (Feb 19, 1863) (Sen Carlile); id at 1105 (Rep Wickliffe).

<sup>148</sup> Lincoln made the same point in a letter to Erastus Corning, et al, dated June 12, 1863. Abraham Lincoln, To Erastus Corning and Others (June 12, 1863), in Basler, ed, 6 *Collected Works of Abraham Lincoln* 260, 265–66 (cited in note 130).

pursuant to such an order;<sup>149</sup> and denial of all remedies for a wrongful act is tantamount to denial of the right itself.<sup>150</sup> To be on the safe side, the following section authorized removal of any such case to the federal circuit court without regard to the citizenship of the parties.<sup>151</sup>

The removal provision was assailed as unconstitutional because it applied to criminal cases, to those in which there was no diversity of citizenship, and to those in which the state court had already rendered a final judgment.<sup>152</sup> As Vermont Senator Jacob Collamer observed, an 1815 statute had done precisely the same thing;<sup>153</sup> and in the first two respects, though no one mentioned it, so had the Force Act adopted in 1833 to combat nullification of the protective tariff.<sup>154</sup> As Senator Cowan pointed out, there was no need for diversity; the statute made presidential orders a defense, and the cases thus arose under federal law.<sup>155</sup> Nor was there any reason to think that, if civil cases could be made removable, criminal cases could not.<sup>156</sup> Finally, there was nothing in Article III to suggest that state court judgments could be reviewed only in the Supreme Court; appeal to a lower federal court served just as well the purposes of federal question jurisdiction identified in *Martin v Hunter's Lessee*.<sup>157</sup>

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<sup>149</sup> 12 Stat at 756, § 4.

<sup>150</sup> On the ground that a cause of action for false imprisonment was property of which under the Fifth Amendment no person could be deprived without compensation and due process, the Indiana Supreme Court held the immunity provision unconstitutional. *Griffin v Wilcox*, 21 Ind 370, 373 (1863). The U.S. Supreme Court, in upholding a statute of limitations incident to that provision, made clear it thought Congress had authority to confer immunity:

That an act passed after the event, which in effect ratifies what has been done, and declares that no suit shall be sustained against the party acting under color of authority, is valid, so far as Congress could have conferred such authority before, admits of no reasonable doubt.

These are ordinary acts of indemnity passed by all governments when the occasion requires it.

*Mitchell v Clark*, 110 US 633, 640 (1883) (dictum).

<sup>151</sup> 12 Stat at 756–57, § 5. For a thorough discussion of these “indemnity” provisions, see Randall, *Constitutional Problems under Lincoln* at 186–214 (cited in note 3).

<sup>152</sup> See Cong Globe, 37th Cong, 3d Sess 535, 1474 (Jan 27 and Mar 2, 1863) (Sen Powell); id at 537 (Jan 27, 1863) (Sen Bayard); id at 538–39 (Sen Browning); id at 547 (Sen McDougall); id at 1086 (Feb 18, 1863) (Rep Yeaman).

<sup>153</sup> Id at 534, 539 (Jan 27, 1863) (reminding the Senate that Chief Justice Marshall had supported the 1815 act). See 3 Stat 195, 198–99, § 8 (Feb 4, 1815). The 1862 statute was closely modeled on this provision.

<sup>154</sup> 4 Stat 632, 633, § 3 (Mar 2, 1833).

<sup>155</sup> Cong Globe, 37th Cong, 3d Sess 537–38 (Jan 27, 1863). See *Mayor v Cooper*, 73 US (6 Wall) 247 (1868) (upholding the constitutionality of the removal provision on this ground).

<sup>156</sup> Consider *Cohens v Virginia*, 19 US (6 Wheat) 264 (1821) (upholding Supreme Court jurisdiction to review federal questions decided by state courts in criminal as well as civil proceedings). See also Currie, *The First Hundred Years* at 98 (cited in note 13).

<sup>157</sup> 14 US (1 Wheat) 304, 347–48 (1816). Hamilton had expressly contemplated such review in Federalist 82 (Hamilton), in *The Federalist* 553, 553–57 (cited in note 42).



There was, however, one small problem. The statute provided that after removal the circuit court should “proceed to try and determine the facts and the law in such action, in the same manner as if the same had been there originally commenced, the judgment in such case notwithstanding.”<sup>158</sup> New York Senator Ira Harris allowed that it was not unusual to have a second trial in the same case,<sup>159</sup> but he forgot one thing: The Seventh Amendment provides that “no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.”<sup>160</sup>

The big event of the third session, though, was passage of the Conscription Act, which for the first time subjected citizens to a military draft for the regular army.<sup>161</sup> This bill was energetically assailed as unconstitutional, though largely on peripheral and unexpected grounds; we shall pause later on to consider it in detail. We shall do the same with the admission of West Virginia, which was intimately bound up with the war—along with a series of election contests and legislative proposals that began the great debate over Reconstruction—for it was none too early to start thinking about what would become of the so-called Confederate States once the North had won the war.

## B. Money Matters

Although it lasted only three months, the third session of the Thirty-seventh Congress produced two more major financial measures—the establishment of a national banking system and a tax on state banknotes frankly designed to drive them in part out of circulation.<sup>162</sup> President Lincoln had recommended them both, and they were connected; both were designed to ensure a uniform and reliable currency.<sup>163</sup>

In light of its troubled history—including no fewer than three presidential vetoes on constitutional grounds—there was remarkably little congressional discussion of the banking provision. Kentucky Senator Lazarus Powell denied that Congress had power to charter corporations in the states without their consent, and even Republican Senator Jacob Collamer said he thought Congress’s authority to do so was “extremely questionable”—as several Senators had unexpectedly

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<sup>158</sup> 12 Stat at 757, § 5.

<sup>159</sup> Cong Globe, 37th Cong, 3d Sess 539 (Jan 27, 1863) (citing the practice in his own state).

<sup>160</sup> See *Justices v Murray*, 76 US (9 Wall) 274, 282 (1870) (striking down the retrial provision on this ground).

<sup>161</sup> 12 Stat 731 (Mar 3, 1863).

<sup>162</sup> 12 Stat 665 (Feb 25, 1863); 12 Stat 709, 712–13, § 7 (Mar 3, 1863).

<sup>163</sup> Abraham Lincoln, Second Annual Message (Dec 1, 1862) at 129–30 (cited in note 98); Abraham Lincoln, Special Message (Jan 17, 1863), in Richardson, ed, *6 Messages and Papers of the Presidents* 149, 149–50 (cited in note 10). See also Treasury Secretary Chase’s annual report, Cong Globe App, 37th Cong, 3d Sess 21, 25 (Dec 4, 1862).

argued in connection with the Pacific railroad.<sup>164</sup> Neither Powell nor Collamer elaborated on these unadorned conclusions.<sup>165</sup>

If the arguments against the banks were conclusory, the arguments in their favor were perfunctory. Treasury Secretary Salmon P. Chase, in his report accompanying the President's second Annual Message, was the most forthcoming:

The Secretary forbears extended argument on the constitutionality of the suggested system. It is proposed as an auxiliary to the power to borrow money; as an agency of the power to collect and disburse taxes; and as an exercise of the power to regulate commerce, and of the power to regulate the value of coin. Of the first two sources of power nothing need be said. The argument relating to them was long since exhausted and is well known. Of the other two there is not room nor does it seem needful to say much. If Congress can prescribe the structure, equipment, and management of vessels to navigate rivers flowing between or through different States as a regulation of commerce, Congress may assuredly determine what currency shall be employed in the interchange of their commodities, which is the very essence of commerce. Statesmen who have agreed in little else have concurred in the opinion that the power to regulate coin is, in substance and effect, a power to regulate currency, and that the framers of the Constitution so intended. . . . [I]t is difficult to conceive by what process of logic the unquestioned power to regulate coin can be separated from the power to maintain or restore its circulation, by excluding from currency all private or corporate substitutes which affect its value, whenever Congress shall see fit to exercise that power for that purpose.<sup>166</sup>

The reader will notice that this passage contains arguments for the constitutionality of restricting state banknotes as well as of creating national banks.

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<sup>164</sup> Cong Globe, 37th Cong, 3d Sess 824, 849 (Feb 9 and 10, 1863) (Sen Powell) ("I am under the impression that we have not the power."); id at 870 (Feb 11, 1863) (Sen Collamer). For the railroad bill, see notes 62–70 and accompanying text. For the vetoes, see Currie, *Democrats and Whigs* at 59–65, 83–86 (cited in note 1) (discussing the vetoes of President Jackson and President Tyler, respectively).

<sup>165</sup> Possibly owing to squeamishness over this question, the statute scrupulously described the new banks as "associations" rather than corporations, although among other things they were to have shareholders with limited liability. 12 Stat at 666, 668, §§ 5, 12 (cited in note 162). When the statute was overhauled in the next Congress, any pretense was abandoned; thenceforth the banks were to be corporations pure and simple. 13 Stat 99, 101, § 8 (June 3, 1864).

<sup>166</sup> Salmon P. Chase, Report of the Secretary of the Treasury, in Cong Globe App, 37th Cong, 3d Sess 21, 26 (Dec 4, 1862).

New York Representative Elbridge Spaulding echoed Chase's arguments insofar as they pertained to national banking institutions:

The national bank proposed may be considered an appropriate means to carry into effect many of the enumerated powers of the Government. By its provisions it has a direct relation to the national debt, to the power of collecting taxes, internal duties, and excises; to that of borrowing money, to that of regulating commerce between the States, and to that of raising money to maintain the Army and Navy. It would, no doubt, be a useful instrument in administering the fiscal and financial operations of the Government, and it would moreover, in time, be a useful support to the credit of the Government, by providing a market for a considerable amount of the bonds issued in the prosecution of the war.<sup>167</sup>

Ohio Democrat Warren Noble, also in the House, took on Chase's arguments directly: It was hard to see how the existence of a bank would aid in borrowing, collecting taxes, or disbursing money, and the commerce and coinage powers conferred authority to regulate, not to create institutions.<sup>168</sup> That was about the extent of it; the banking bill passed both Houses with a minimum of debate, and the President signed it without comment. Secretary Chase was right about one thing: There seems to have been very little to say about the constitutional question that had not been said before.<sup>169</sup>

Both President Lincoln and Secretary Chase proposed the tax on banknotes as a means of limiting their circulation, and various members of Congress urged that it be made high enough to drive them out completely.<sup>170</sup> Opponents objected that the so-called tax was a pretext for regulating a subject beyond Congress's power—reminding us, without mentioning it, that Chief Justice Marshall in *McCulloch v Maryland* had said any such abuse would be unconstitutional.<sup>171</sup>

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<sup>167</sup> Cong Globe, 37th Cong, 3d Sess 286 (Jan 12, 1863). At this point Spaulding cited without explanation both Alexander Hamilton's 1791 report on the constitutionality of the first Bank and Chief Justice Marshall's decision in *McCulloch v Maryland*, 17 US (4 Wheat) 316.

<sup>168</sup> Cong Globe, 37th Cong, 3d Sess 1143 (Feb 20, 1863). See also Hammond, *Sovereignty and an Empty Purse* at 342 (cited in note 4) (quoting a statement by the Superintendent of New York Banks denying Congress's authority "to create corporations within the states without the assent of the state legislatures").

<sup>169</sup> The 1863 bank bill, wrote Professor McPherson, "laid the groundwork for the banking system that prevailed for a half-century after the war." McPherson, *Battle Cry of Freedom* at 594 (cited in note 8).

<sup>170</sup> See, for example, Cong Globe, 37th Cong, 3d Sess 339 (Jan 15, 1863) (Rep Walker); id at 345 (Rep Lovejoy); id at 487 (Jan 23, 1863) (Rep Washburne); Cong Globe App, 37th Cong, 3d Sess 49 (Jan 8, 1863) (Sen Sherman). For an admission that the House bill was intended to suppress excessive circulation, see Cong Globe, 37th Cong, 3d Sess 459 (Jan 22, 1863) (Rep Morrill of Vermont).

<sup>171</sup> Cong Globe, 37th Cong, 3d Sess 341 (Jan 15, 1863) (Rep Biddle); id at 489 (Jan 23, 1863) (Rep Wickliffe). See *McCulloch*, 17 US (4 Wheat) at 423. See also the later argument of Mary-

Supporters defended the bill on two distinct grounds. Some seemed to deny that pretextual taxation was problematic, although it could obviously eliminate restrictions on federal regulatory power:<sup>172</sup> Congress could tax whatever it wished, so long as the tax was uniform.<sup>173</sup> Others, like Secretary Chase, argued that Congress could tax banknotes because it could regulate them directly.<sup>174</sup> If the premise of this contention was true, the conclusion followed easily; and the Supreme Court would rely heavily on this argument when it upheld a later (and higher) tax on state banknotes in *Veazie Bank v Fenno* in 1869.<sup>175</sup>

The final objection to the banknote tax was one of intergovernmental immunity: Congress could no more tax state banks than the states could tax the Bank of the United States.<sup>176</sup> If there was an answer to this line of reasoning, it was not that immunity was a one-way street; the Supreme Court would soon hold, for perfectly convincing reasons, that the United States could not effectively tax the states.<sup>177</sup> It was that, Senator Collamer to the contrary notwithstanding,<sup>178</sup> state banks were not really like the original National Bank; they were ordi-

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land Senator Reverdy Johnson that taxes should be imposed for revenue purposes; it was unconstitutional to levy them for ulterior reasons. Cong Globe, 38th Cong, 1st Sess 2592 (May 31, 1864).

<sup>172</sup> See the *Child Labor Tax Case*, 259 US 20 (1922) (striking down a tax on the ground that it was an impermissible attempt to regulate employment of child labor).

<sup>173</sup> See Cong Globe, 37th Cong, 3d Sess 339 (Jan 15, 1863) (Rep Walker); Cong Globe App, 37th Cong, 3d Sess 49 (Dec 9, 1862) (Sen Sherman). See US Const Art I, § 8, cl 1. Direct taxes, of course, were governed by a different standard. US Const Art I, §§ 2, 9.

<sup>174</sup> See Cong Globe, 37th Cong, 3d Sess 459 (Jan 22, 1863) (Rep Morrill of Vermont); id at 520 (Jan 26, 1863) (Rep McKnight); Cong Globe App, 37th Cong, 3d Sess 49–50 (Jan 8, 1863) (Sen Sherman).

<sup>175</sup> 75 US (8 Wall) 533 (1869) (upholding the 10 percent tax enacted in 1865, which Senator Sherman frankly touted as intended “to compel the withdrawal of State bank notes”). See Cong Globe, 38th Cong, 2d Sess 1139 (Feb 27, 1865). See also Cong Globe App, 38th Cong, 2d Sess 29 (Dec 6, 1864) (Treasury Secretary William P. Fessenden) (explaining the current state of the currency); Hammond, *Sovereignty and an Empty Purse* at 346–47 (cited in note 4) (discussing the trend towards nationalization of the banking sector); Currie, *The First Hundred Years* at 317–20 (cited in note 13) (discussing *Veazie Bank*). Occasional speakers argued when the first tax was imposed that state banknotes were unconstitutional to begin with under the Bills of Credit Clause of Article I, § 10, but as Representative Biddle pointed out the Supreme Court had held to the contrary in *Briscoe v Bank of Kentucky*, 36 US (11 Pet) 257 (1837). See Cong Globe, 37th Cong, 3d Sess 340 (Jan 15, 1863) (Rep Walker); id at 341 (Rep Biddle); Cong Globe App, 37th Cong, 3d Sess 49–50 (Jan 8, 1863) (Sen Sherman).

<sup>176</sup> See Cong Globe, 37th Cong, 3d Sess 521 (Jan 26, 1863) (Rep Roscoe Conkling); id at 870 (Feb 11, 1863) (Sen Collamer), citing *McCulloch*, 17 US (4 Wheat) at 425–37.

<sup>177</sup> See *Collector v Day*, 78 US (11 Wall) 113 (1871). See also Currie, *The First Hundred Years* at 317 (cited in note 13) (noting that the case for state immunity was arguably stronger than that for federal immunity “precisely because the supremacy clause worked only one way”).

<sup>178</sup> Cong Globe, 37th Cong, 3d Sess 870 (Feb 11, 1863).

nary private businesses, while the federal bank was an instrumentality of the United States.<sup>179</sup>

As President Lincoln had suggested, Congress during its third session also took time to improve the process for paying government debts.<sup>180</sup> Because decisions of the Court of Claims were not final, as Ohio Representative John Bingham explained, they were little more than advice to Congress; and Congress had to go over the same ground again in determining whether or not to pay.<sup>181</sup>

Opponents of the bill repeated earlier arguments that judgments against the United States could not be made final because Article I, § 9 required statutory appropriations—and thus a congressional decision—before money could be paid from the Treasury.<sup>182</sup> As Senator Trumbull insisted, the bill did provide for appropriations,<sup>183</sup> though they were both general and prospective. Wisconsin Senator James R. Doolittle moved to require specific appropriations after the fact to satisfy each individual judgment.<sup>184</sup> General appropriations in advance, explained New Hampshire Senator John Hale, were contrary to the spirit of the constitutional provision.<sup>185</sup> Doolittle's amendment failed; as enacted the statute made Court of Claims judgments final (subject to Supreme Court review) and provided for their satisfaction “out of any general appropriation made by law for the payment and satisfaction of private claims.”<sup>186</sup>

There was just one fly in the ointment, as somewhere along the line the following proviso had been smuggled into the last section of the bill:

*And be it further enacted,* That no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.<sup>187</sup>

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<sup>179</sup> See Currie, *The First Hundred Years* at 318 (cited in note 13), discussing *Veazie Bank*, 75 US (8 Wall) 533.

<sup>180</sup> 12 Stat 765 (Mar 3, 1863). See Lincoln, First Annual Message at 51 (Dec 3, 1861) (cited in note 53).

<sup>181</sup> Cong Globe, 37th Cong, 2d Sess 1674 (Apr 15, 1862). See also Cong Globe App, 37th Cong, 2d Sess 124 (Apr 28, 1862) (Rep Porter); Cong Globe, 37th Cong, 3d Sess 271 (Jan 12, 1863) (Sen Trumbull).

<sup>182</sup> Cong Globe, 37th Cong, 3d Sess 304 (Jan 14, 1863) (Sen Fessenden); id at 398 (Jan 20, 1863) (Sen Doolittle); id at 399 (Sen Sherman); id at 416 (Jan 21, 1863) (Sen Hale). For the earlier controversy, see Currie, *Democrats and Whigs* at 194–203 (cited in note 1).

<sup>183</sup> Cong Globe, 37th Cong, 3d Sess 304, 309 (Jan 14, 1863); id at 418 (Jan 21, 1863).

<sup>184</sup> Id at 398 (Jan 20, 1863).

<sup>185</sup> Id at 417 (Jan 21, 1863).

<sup>186</sup> 12 Stat at 766, §§ 5, 7. For the fate of Doolittle's amendment, see Cong Globe, 37th Cong, 3d Sess 400 (Jan 20, 1863) (vote of 16-20).

<sup>187</sup> 12 Stat at 768, § 14.

It was this proposal that spelled the ultimate downfall of the statute, as the Supreme Court would hold on the principle of *Hayburn's Case* that Congress could not subject its decisions to review by a member of the executive branch.<sup>188</sup>

One final financial proposal that engaged Congress during its third session was a concerted but unsuccessful effort to adopt a new bankruptcy law to replace the one that had been repealed in 1843. What was interesting about this debate was the argument that was not made. Senator Foster opened the discussion by asserting that the constitutionality of the bill was “settled” if any question could be.<sup>189</sup> Yet the bill contained a provision for voluntary bankruptcy, and the legitimacy of such a provision had been the subject of a battle royale when the issue was debated some twenty years before.<sup>190</sup> Nevertheless, not one speaker raised the question in the Thirty-seventh Congress. It appeared that the issue had indeed been settled, and as Charles Warren wrote, without the necessity of a Supreme Court decision;<sup>191</sup> yet another prewar constitutional controversy had simply and unaccountably disappeared.

A distinct constitutional objection, however, was in fact made. Senator Doolittle moved at one point to amend the bill so as to exclude from the estate of an involuntary bankrupt such property as was exempt from ordinary execution under state law.<sup>192</sup> Indiana Senator Henry Lane objected at once that this provision offended Article I's requirement that bankruptcy laws be “uniform [throughout the United States]” because “the exemptions in certain States are greater than the exemptions in other States.”<sup>193</sup> If that is the case, Doolittle replied, I'd better rewrite my amendment to specify a uniform federal exemption; and he withdrew his proposal in order to “give to it a different form and shape.”<sup>194</sup>

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<sup>188</sup> See *Gordon v United States*, 69 US (2 Wall) 561 (1865). See also *Hayburn's Case*, 2 US (2 Dall) 409 (1792); Currie, *The First Hundred Years* at 353 (cited in note 13) (discussing *Hayburn's Case*). The statute also provided that the government might file setoffs or counterclaims against the plaintiff in the Court of Claims, and this provision was attacked as depriving the plaintiff of his right to trial by jury on the government's claim. See 12 Stat at 765, § 3; Cong Globe, 37th Cong, 2d Sess 1672 (Apr 15, 1862) (Rep Diven); US Const Amend VII. Representative Bingham responded with an argument of waiver: If the citizen wanted a jury, he could wait until the government sued him in the ordinary courts; nothing required him to proceed in the Court of Claims. Cong Globe, 37th Cong, 2d Sess 1674 (Apr 15, 1862).

<sup>189</sup> Cong Globe, 37th Cong, 3d Sess 124 (Dec 18, 1862).

<sup>190</sup> See Currie, *Democrats and Whigs* at 128–35 (cited in note 1).

<sup>191</sup> Charles Warren, *Bankruptcy in United States History* 87 (Beard 1999) (first published 1935) (“That which was of doubtful constitutionality in 1841 had become unquestioned law in 1867—and without any specific decision by the Supreme Court.”).

<sup>192</sup> Cong Globe, 37th Cong, 3d Sess 141 (Dec 19, 1862).

<sup>193</sup> Id. See also id (Sen Harris); id at 174 (Dec 23, 1862) (Sens Trumbull and Cowan).

<sup>194</sup> Id at 141 (Dec 19, 1862).

A few days later, however, he came charging back to offer the same provision again in unaltered form. On reconsidering the question, Doolittle said, he had concluded there was no constitutional problem after all. The proposal itself was uniform: It subjected to bankruptcy proceedings everywhere all property that was subject to the payment of debts. Besides, Doolittle added, even apart from exemptions the bankruptcy law applied differently in different states. State laws differed, for example, with respect to a husband's interest in his wife's property. If state law could determine what was property for bankruptcy purposes, it could also determine what property was subject to the payment of debts.<sup>195</sup>

Not so, retorted Senator Trumbull, for the two questions were not alike. Of course a third party's property could not be subjected to bankruptcy proceedings. But the homestead exemptions, replied Doolittle, effectively gave the bankrupt's family an interest in the bankrupt's property. That's as may be, said Trumbull, but "whatever property does belong to the bankrupt, whether in New York or Wisconsin, must be subjected to one uniform rule." And with that Doolittle's amendment went down in flames; the Senate was not convinced.<sup>196</sup>

The Supreme Court, however, vindicated Senator Doolittle some years later when it upheld a provision similar to the one he had proposed. The opinion quoted extensively from an earlier decision of Chief Justice Waite on circuit:

"The power to except from the operation of the law property liable to execution under the exemption laws of the several States, as they were actually enforced, was at one time questioned, upon the ground that it was a violation of the constitutional requirement of uniformity, but it has thus far been sustained, for the reason that it was made a rule of the law, to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose. This is not unjust, as every debt is contracted with reference to the rights of the parties thereto under existing exemption laws, and no creditor can reasonably complain if he gets his full share of all that the law, for the time being, places at the disposal of creditors. One of the effects of a bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. It is quite proper, therefore, to confine its operation to such property as other legal proc-

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<sup>195</sup> Id at 173-74 (Dec 23, 1862) (Sen Doolittle).

<sup>196</sup> Id at 174 (vote of 11-26).

ess could reach. A rule which operates to this effect throughout the United States is uniform within the meaning of that term, as used in the Constitution.”

We concur in this view, and hold that the system is, in the constitutional sense, uniform throughout the United States, when the trustee takes in each State whatever would have been available to the creditors if the bankrupt law had not been passed. The general operation of the law is uniform although it may result in certain particulars differently in different states.<sup>197</sup>

With all due respect, a provision that is not unjust is not necessarily uniform. The present statute continues to exempt property in accordance with state law;<sup>198</sup> the results are about as disuniform as they can be.

#### IV. THE THIRTY-EIGHTH CONGRESS

The first session of the Thirty-eighth Congress was characterized by a serious confrontation between the President and Congress over control of the process for reconstructing the governments of the self-styled Confederate States. The session began in December 1863 with President Lincoln’s program for reconstruction;<sup>199</sup> it ended the following July with his pocket veto of the competing congressional plan embodied in the famous Wade-Davis bill.<sup>200</sup> We shall consider this controversy in some detail below.

The most important legislation of the next and final session of the Civil War Congress was the act establishing the celebrated Freedmen’s Bureau to look after refugees and former slaves.<sup>201</sup> Some such provision was an obvious necessity in the aftermath of the disruption wrought by the war, but it raised challenging questions of federal authority to which Congress hardly adverted at all.

Section 1 of the statute established in the War Department a new “bureau of refugees, freedmen, and abandoned lands,” whose duties embraced “the supervision and management of all abandoned lands, and the control of all subjects relating to refugees and freedmen from rebel states.” Section 2 authorized the Secretary of War to “direct such issues of provisions, clothing, and fuel, as he may deem needful for the

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<sup>197</sup> *Hanover National Bank v Moyses*, 186 US 181, 189–90 (1902), quoting *In re Deckert*, 7 F Cases 334, 336 (CC ED Va 1874).

<sup>198</sup> See 11 USC § 522(b) (2000).

<sup>199</sup> See Abraham Lincoln, Proclamation (Dec 8, 1863), in Richardson, ed, 6 *Messages and Papers of the Presidents* 213, 215–18 (cited in note 10).

<sup>200</sup> See Abraham Lincoln, Proclamation (July 8, 1864), in Richardson, ed, 6 *Messages and Papers of the Presidents* 222, 222–23 (cited in note 10).

<sup>201</sup> 13 Stat 507 (Mar 3, 1865).



immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children.” But the heart of the law was Section 4, which empowered the commissioner of the Bureau “to set apart, for the use of loyal refugees and freedmen, such tracts of land within the insurrectionary states as shall have been abandoned, or to which the United States shall have acquired title by confiscation or sale, or otherwise.” Up to forty acres of land were to be assigned for three years to each male citizen within the class described at an annual rent not to exceed 6 percent of their value, with an option to purchase at any time.<sup>202</sup>

A minority report from two members of the House committee that recommended the legislation presented the constitutional challenge without elaboration: Congress had no power to enact the bill. A proposition to look after *Caucasians* who could not take care of themselves “would . . . be looked upon as the vagary of a diseased brain”; there was no reason to think otherwise of a bill for the relief of “freedmen of African descent.”<sup>203</sup> Although the report did not mention it, President Pierce had said much the same thing in 1854 in vetoing a bill to support asylums for the indigent insane: “I can not find any authority in the Constitution for making the Federal Government the great almoner of public charity throughout the United States.”<sup>204</sup>

The majority of the committee did not deign to respond; as was common during the Civil War Congress, there was no majority report. But the chairman of the committee, Massachusetts Representative Thomas D. Eliot, spelled out his constitutional thesis in opening the debate in the House. In a time of rebellion, Eliot argued, the President as Commander in Chief had all those powers recognized by the laws of war—including the power to free the enemies’ slaves. He had exercised this power, but it was not enough: The power to liberate slaves involved the duty to protect them. Only Congress could provide such protection; for under the Constitution it was Congress that was empowered to make “all laws necessary to carry into execution all the powers conferred upon the President.”<sup>205</sup> That was not a bad argument,

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<sup>202</sup> Id at 507–09.

<sup>203</sup> HR Rep 2, 38th Cong, 1st Sess 2 (1864) (Reps Kalbfleisch and Knapp).

<sup>204</sup> See Franklin Pierce, Veto Messages (May 3, 1854), in James D. Richardson, ed, 5 *A Compilation of the Messages and Papers of the Presidents* 247, 249 (US Congress 1900). See also Currie, *Democrats and Whigs* at 46–49 (cited in note 1) (discussing Pierce’s veto); McPherson, *Battle Cry of Freedom* at 842 (cited in note 8) (“[T]he Freedmen’s Bureau represented an unprecedented extension of the federal government into matters of social welfare and labor relations.”).

<sup>205</sup> Cong Globe, 38th Cong, 1st Sess 572 (Feb 10, 1864). See US Const Art I, § 8, cl 18.

but it was essentially all there was;<sup>206</sup> and practically no one took the trouble to answer it.

One Representative who did was Democrat Samuel Cox of Ohio. Echoing the minority report's doubt whether Congress could establish what he called an "eleemosynary system for the blacks," Cox dismissed Eliot's war-powers argument as "sophistry." Since the President's proclamation was illegal to begin with, he argued, Congress had no authority to implement it: "If the proclamation be unconstitutional, how can this or any other measure based on it be valid?"<sup>207</sup> Representatives Knapp and Kalbfleisch, who had written the minority report, repeated their conclusion that the bill was unconstitutional, and several other speakers agreed; none of them gave any substantial reasons for their position.<sup>208</sup>

One possible constitutional basis for the first element in the Bureau's famous policy of "forty acres and a mule" was a broad construction of Article IV's grant of authority to dispose of the public lands.<sup>209</sup> A similarly audacious interpretation seems to have underlain Congress's first foray into the business of public parks, a grant of Mariposa Grove and the Yosemite Valley to the state of California for "public use, resort, and recreation."<sup>210</sup> If Congress could give away land for agricultural colleges, there was no reason why it could not do so for parks as well. As noted above, however, a narrower understanding had prevailed before the war, and the issue was no more explored in the debates in the one case than in the other.

The Thirty-eighth Congress also rewrote the internal revenue and banking laws,<sup>211</sup> raised tariffs again,<sup>212</sup> declared federal obligations immune from state taxation,<sup>213</sup> incorporated a second transcontinental

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<sup>206</sup> Less convincingly, Eliot added that the bill might be supported by Congress's powers to "make rules concerning captures on land" and "to make rules for the government and regulation of the land and naval forces." Cong Globe, 38th Cong, 1st Sess 572 (Feb 10, 1864). See US Const Art I, § 8, cls 11, 14. Iowa Republican Hiram Price, conceding that no specific grant of power supported the bill, appallingly suggested that in a case of necessity "I presume we should act without any specific constitutional provision." Cong Globe, 38th Cong, 1st Sess 888 (Mar 1, 1864).

<sup>207</sup> Cong Globe, 38th Cong, 1st Sess 709 (Feb 17, 1864) (Rep Cox).

<sup>208</sup> Id at 761 (Feb 19, 1864) (Rep Kalbfleisch) ("Necessity or any similar excuse will hardly avail us an answer for the assumption of doubtful powers, especially when coupled with very questionable expediency."); id at 763 (Rep Brooks); id at 891 (Mar 1, 1864) (Rep Pendleton); id at 2933 (June 14, 1864) (Sen Saulsbury) ("The bill under consideration, in my judgment, has not a single section in it which is not liable to a constitutional objection."); id at 3346 (June 28, 1864) (Sen Hendricks); Cong Globe App, 38th Cong, 1st Sess 53-54 (Mar 1, 1864) (Rep Knapp).

<sup>209</sup> US Const Art IV, § 3.

<sup>210</sup> 13 Stat 325 (June 30, 1864).

<sup>211</sup> 13 Stat 223 (June 30, 1864); 13 Stat 99 (June 3, 1864).

<sup>212</sup> 13 Stat 202 (June 30, 1864).

<sup>213</sup> 13 Stat 218 (June 30, 1864).

railroad,<sup>214</sup> and authorized the copyright of photographs and the issuance of postal money orders.<sup>215</sup> None of these measures raised significant constitutional questions or provoked significant discussions of constitutional power. Less obvious were new provisions banning futures contracts in gold or foreign exchange and validating contracts for labor in exchange for transportation of immigrants into the country.<sup>216</sup> The former was defended on the nonobvious ground that gold speculation tended to depreciate the currency;<sup>217</sup> the latter may arguably have been necessary and proper to the regulation of foreign commerce or even to naturalization, but the issue was not discussed.

In 1864 Congress passed enabling acts looking toward the future admission of three additional states: Nevada, Nebraska, and Colorado.<sup>218</sup> What was new about these statutes was the recrudescence of explicit conditions on statehood, which (except for the constitutionally mandated republican form of government) had been out of fashion since the great Missouri controversy of 1819–1821. Indeed the very condition that had raised such a storm of protest at that time (and that the compromise ultimately rejected) found its way into all three of the new enabling acts, and in more draconian form: Each state was to make an irrevocable commitment to forbid slavery entirely.<sup>219</sup> No one even bothered to raise the question of constitutionality; proponents of the slavery restriction had plenty of votes, and the subject had been done to death in the case of Missouri.<sup>220</sup>

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<sup>214</sup> 13 Stat 365 (July 2, 1864). This was the Northern Pacific, to run from Lake Superior to Puget Sound. This time the federal corporation was authorized to construct the entire roadway, even through the states of Minnesota and Wisconsin; recent constitutional reservations had by this time been overcome. *Id.* at 366, § 1 (also authorizing a branch line into the state of Oregon).

<sup>215</sup> 13 Stat 540 (Mar 3, 1865); 13 Stat 76 (May 17, 1864). There was no doubt the Post Office could be authorized to transport the money itself, and no reason it could not be authorized to transport a promise to pay. The provision for photographic copyrights was upheld in *Burrow-Giles Lithographic Co v Sarony*, 111 US 53 (1884). For a discussion, see Currie, *The First Hundred Years* at 435 (cited in note 13).

<sup>216</sup> 13 Stat 132 (June 17, 1864); 13 Stat 385 (July 4, 1864).

<sup>217</sup> See Cong Globe, 38th Cong, 1st Sess 1640 (Apr 15, 1864) (Sens Sherman and Fessenden); *id.* at 1668 (Apr 16, 1864) (Sen Trumbull). This law was repealed barely two weeks after its passage, Senator Johnson arguing that it had produced nothing but “mischief.” See *id.* at 3446, 3468 (July 1, 1864); 13 Stat 344 (July 2, 1864).

<sup>218</sup> 13 Stat 30 (Mar 21, 1864); 13 Stat 47 (Apr 19, 1864); 13 Stat 32 (Mar 21, 1864).

<sup>219</sup> Other conditions included a guarantee of religious toleration, a disclaimer of public lands and of the right to tax them, and a promise of nondiscriminatory taxation of nonresidents. The first of these was as debatable as the slavery condition in constitutional terms; the other three were probably required by the Constitution itself. The conditions are listed in § 4 of the respective statutes, 13 Stat at 31, 33–34, 48.

<sup>220</sup> See Currie, *The Jeffersonians* at 232–45 (cited in note 1). Nevada was declared a state in October 1864. See Abraham Lincoln, Proclamation (Oct 31, 1864), in Richardson, ed, 6 *Messages and Papers of the Presidents* 229, 229 (cited in note 10). Nebraska and Colorado were delayed.

In June 1864 Congress enacted a brief statute with the astonishing title “*An Act to repeal the Fugitive Slave Act of eighteen hundred and fifty, and all Acts and Parts of Acts for the Rendition of Fugitive Slaves.*” A close look at the statute confirms that it did just what the title said it was intended to do. The statute repealed the entire 1850 law and “sections three and four” of its 1793 antecedent—leaving in place only the companion provisions for the extradition of fugitives from justice. According to Article IV, fugitive slaves were still to be “delivered up”; but there no longer was any provision specifying whose duty it was to deliver them.<sup>221</sup> Opponents seized upon this consequence to argue that repeal of the implementing statutes effectively nullified the Fugitive Slave Clause of the Constitution: A right without a remedy was a dead letter and an absurdity; it was Congress’s duty to carry out the constitutional provision.<sup>222</sup>

Occasional supporters of the bill ineffectually countered that what Congress could enact it could repeal, which hardly answered the question whether implementing legislation was necessary to begin with.<sup>223</sup> Senator Sumner’s committee report, disdaining the argument of congressional discretion, advanced two more radical suggestions. The constitutional provision, Sumner argued, applied only to apprentices, not to slaves; and in any event it did not *authorize* Congress to pass legislation to implement its provisions.<sup>224</sup>

It is difficult to believe anyone in Sumner’s audience was naive enough to think the Fugitive Slave Clause inapplicable to slaves. It had been called the Fugitive Slave Clause from the beginning; Sumner conceded that at least three members of the Constitutional Convention had told their state conventions it dealt with runaway slaves; Jus-

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<sup>221</sup> 13 Stat 200 (June 28, 1864). See 1 Stat 302, 302–05, §§ 3–4 (Feb 12, 1793); 9 Stat 462 (Sept 18, 1850); US Const Art IV, § 2, cl 3.

<sup>222</sup> See S Rep 24, 38th Cong, 1st Sess 26, 28, 33–34 (1864) (minority report of Sen Buckalew); Cong Globe, 38th Cong, 1st Sess 1709–10 (Apr 19, 1864) (Sen Hendricks); id at 1710 (Sen Johnson); id at 1780 (Apr 21, 1864) (Sen Van Winkle); id at 2916–17 (June 13, 1864) (Rep Cox); Cong Globe App, 38th Cong, 1st Sess 129 (June 23, 1864) (Sen Davis). This argument was strengthened by the fact that the Supreme Court had held in *Prigg v Pennsylvania* that federal authority to implement the Fugitive Slave Clause was exclusive; the states could not legislate to enforce the constitutional provision. 41 US (16 Pet) 539, 622–25 (1842) (alternative holding).

<sup>223</sup> Cong Globe, 38th Cong, 1st Sess 2913 (June 13, 1864) (Rep Hubbard); id at 2919 (Rep Morris of New York).

<sup>224</sup> S Rep 24, 38th Cong, 1st Sess 2–13 (1864). See also Cong Globe, 38th Cong, 1st Sess 2913 (June 13, 1864) (Rep Hubbard). Sumner, reprising the 1850 debates, added that existing legislation was unconstitutional because it denied the right of jury trial and entrusted judicial duties to commissioners not enjoying the independence guaranteed judges by Article III, § 1. S Rep 24 at 14–18. For a general discussion of these arguments see Currie, *Descent into the Maelstrom* at 186–91 (cited in note 1).

tice Story had repeated what everyone knew in *Prigg v Pennsylvania*.<sup>225</sup> As an original matter there was something to be said for the argument that Congress had no implementing authority, but Congress had twice rejected it, and so had the Supreme Court;<sup>226</sup> it seemed a little late to raise the issue once again. Why Sumner resorted to the most difficult of the available arguments is a mystery; it would have been far more plausible to point out that Congress ordinarily has discretion whether or not to exercise its powers.<sup>227</sup>

Of greater lasting importance, Congress in early 1865, at the President's request and by the requisite two-thirds vote in each House, proposed what was to become the first constitutional amendment adopted since 1804:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.<sup>228</sup>

Anguished cries went up in Congress when this provision was put forward. Among other things, the usual argument was made that the

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<sup>225</sup> 41 US (16 Pet) 539 (1842). See S Rep 24 at 8 (cited in note 222) (citing remarks by Madison, Iredell, and Pinckney); Elliot, 3 *The Debates in the Several State Conventions* at 453 (cited in note 26); Jonathan Elliot, 4 *The Debates in the Several State Conventions on the Federal Constitution* 176, 286 (Taylor & Maury 1836); Cong Globe, 38th Cong, 1st Sess 1714 (Apr 19, 1864) (Sen Johnson), quoting *Prigg*, 41 US (16 Pet) at 611. See also Elliot, 3 *The Debates in the Several State Conventions* at 599.

<sup>226</sup> See *Ableman v Booth*, 62 US 506, 526 (1859), *Prigg*, 41 US (16 Pet) at 543. Both cases were cited by Buckalew in his minority report. S Rep No 24 at 28 (cited in note 222). For the original argument see Currie, *The Federalist Period* at 170 (cited in note 1).

<sup>227</sup> Story in *Prigg* had spoken loosely of the "duty" to enact implementing legislation, 41 US (16 Pet) at 620, but since Congress *had* legislated the question was not before the Court.

<sup>228</sup> 13 Stat 567 (Feb 1, 1865). For the President's recommendation see Lincoln, Fourth Annual Message in Richardson, ed, 6 *Messages and Papers of the Presidents* 243, 252 (cited in note 10). President Lincoln signed the resolution proposing the amendment, but at Senator Trumbull's urging the Senate resolved that the President's signature was unnecessary. As Senator Howe argued, the words of the Constitution seemed to fit like a glove: Not only bills but "[e]very order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment)" was to be presented to the President, and both Houses had to agree to propose a constitutional amendment. Trumbull was right, however, that the Supreme Court had held the presentation provision inapplicable to proposed amendments in 1798, and practice had generally agreed with the Court. See Cong Globe, 38th Cong, 2d Sess 588, 629-31 (Feb 4-7, 1865) (noting also that a few years earlier, a proposed amendment had been "inadvertently presented to the President" but claiming that no precedent was created, because the States never acted on that amendment); US Const Art I, § 7; *Hollingsworth v Virginia*, 3 US (3 Dall) 378, 381 (1798); Currie, *The First Hundred Years* at 21-22 (cited in note 13) (discussing *Hollingsworth*).

proposal went beyond the amending power.<sup>229</sup> This was all poppycock. As supporters too numerous to mention pointed out, Article V confers a general power of amendment subject to three explicit limitations, and the Convention rejected as undesirable a fourth providing that “no state shall without its consent be affected in its internal police.”<sup>230</sup>

Arguments against the constitutionality of the amendment were rejected handily, but the road to ratification would be anything but smooth. Already in the Thirty-eighth Congress, for example, differences of opinion emerged over the meaning of the constitutional requirement of approval by “three fourths of the several states”: Did that mean three-fourths of the thirty-six states that had been admitted to the Union, or three-fourths of the twenty-five that had not attempted to secede?<sup>231</sup> There was no need to resolve this or other issues

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<sup>229</sup> See, for example, Cong Globe, 38th Cong, 1st Sess 1365 (Mar 31, 1864) (Sen Saulsbury) (arguing that Article V conferred no power to require states to alter their domestic institutions); id at 1458 (Apr 7, 1864) (Sen Hendricks) (arguing that slavery was not a subject entrusted to federal authority); id at 1483 (Apr 8, 1864) (Sen Powell) (arguing that the Constitution could not be amended to destroy property); id at 2939–40 (June 14, 1864) (Rep Pruyn) (arguing that Congress had no power to add to federal authority or invade reserved rights of the states); id at 2941 (Rep Fernando Wood) (arguing that reserved rights were implicitly excepted from the amending power); id at 2992–93 (June 15, 1864) (Rep Pendleton) (arguing that Congress had no power to propose an amendment that would “subvert the structure, spirit, and theory of this Government”); Cong Globe App, 38th Cong, 1st Sess 106 (Mar 30, 1864) (Sen Davis) (arguing that the amending power was not meant to alter the “great principles” of the Constitution); Cong Globe, 38th Cong, 2d Sess 178 (Jan 9, 1865) (Rep Mallory) (contending the Constitution could not be amended to deprive states of authority over domestic affairs); id at 181 (Rep Voorhees) (claiming that no amendment could destroy vested rights or violate established principles of public law); id at 527 (Jan 31, 1865) (Rep Brown of Wisconsin) (arguing that amendments must be consistent with the “original fabric” of the Constitution).

<sup>230</sup> See, for example, Cong Globe, 38th Cong, 1st Sess 1423 (Apr 5, 1864) (Sen Reverdy Johnson); id at 2943 (June 14, 1864) (Rep Higby); Cong Globe, 38th Cong, 2d Sess 238–39 (Jan 12, 1865) (Rep Cox); id at 265–66 (Jan 13, 1865) (Rep Stevens); Farrand, 2 *The Records of the Federal Convention* at 630 (cited in note 27) (rejecting the proviso by a vote of 8-3). See also Andrew C. McLaughlin, *A Constitutional History of the United States* 635 (Appelton 1935) (“This argument against freedom of amendment would scarcely merit refutation were it not that it emerges from obscurity at critical times and has remarkable longevity.”). For fuller discussion of this issue see Currie, *The Jeffersonians* at 54–56 (cited in note 1). See also Jason Mazzone, *Unamendments*, 90 Iowa L Rev 1747 (2005) (providing modern evidence of the persistence of the argument).

<sup>231</sup> See, for example, Cong Globe, 38th Cong, 1st Sess 1314 (Mar 28, 1864) (Sen Trumbull); id at 1437 (Apr 6, 1864) (Sen Harlan); Cong Globe, 38th Cong, 2d Sess 150 (Jan 7, 1865) (Rep Bliss) (all taking the position that all states should be counted); Cong Globe, 38th Cong, 1st Sess 2614 (May 31, 1864) (Rep Morris) (arguing that the measure should be three-fourths of loyal states); Cong Globe, 38th Cong, 2d Sess 140 (Jan 6, 1865) (Rep Ashley) (arguing that the measure should be three-fourths of states represented in Congress). See also Currie, *Descent into the Maelstrom* at 244 (cited in note 1); Cong Globe, 38th Cong, 1st Sess 1458 (Apr 7, 1864) (Sen Hendricks) (raising the question whether the rump Union governments of Arkansas and Virginia were entitled to vote on the amendment).

A related question was raised when Ohio Senator John Sherman proposed a resolution declaring a quorum of the Senate to be a majority of those chosen or qualified, not of all those who *could* have been elected. Garrett Davis of Kentucky pointed out that Article I, § 3 provided that

of ratification at the time the amendment was proposed; we shall return to them in due course.

Finally, in light of subsequent developments, a word may be in order as to the understanding of Congress with respect to the meaning of the amendment it proposed. The language of the provision seems to speak for itself: Slavery is abolished, and Congress may legislate to enforce the prohibition. Occasional later commentators, however, have professed to find in the debates on the Thirteenth Amendment evidence that its framers intended to authorize Congress to ban not only slavery but simple race discrimination as well, in the teeth of the plain words of the provision.<sup>232</sup> Senator Trumbull, in arguing for the constitutionality of the Civil Rights Act of 1866, would make the same assertion: “[A]ny statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is . . . a badge of servitude which, by the Constitution, is prohibited.”<sup>233</sup> Indeed, in 1968 the Supreme Court would hold that the amendment did empower Congress to ban ordinary racial discrimination.<sup>234</sup>

If this was Congress’s intention, my research does not reveal it. Senator Trumbull himself, at the time the amendment was debated, touted it merely as “the only effectual way of ridding the country of slavery,”<sup>235</sup> and Senator Henderson—another prominent supporter—went out of his way to deny that it would enable Congress to forbid mere discrimination:

I will not be intimidated by the fears of negro equality. . . . [I]n passing this amendment we do not confer upon the negro the right to vote. We give him no right except his freedom, and leave the rest to the states.<sup>236</sup>

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the Senate should consist of two members from each state; Reverdy Johnson of Maryland responded that the provision actually referred to Senators “chosen” by the states. Sherman modified his resolution to define a quorum as a majority of those duly chosen, and the Senate passed it by a vote of 26-11. See Cong Globe, 38th Cong, 1st Sess 2051, 2082-87 (May 3-4, 1864). House Speaker Galusha Grow had reached the same conclusion on the same ground in 1861. See Cong Globe, 37th Cong, 1st Sess 210 (July 19, 1861). For a complete survey of congressional precedents on the quorum question see De Alva Stanwood Alexander, *History and Procedure of the House of Representatives* 155-79 (Houghton Mifflin 1916). See also Currie, *Descent into the Maelstrom* at 248 (cited in note 1).

<sup>232</sup> See, for example, Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 Cal L Rev 171, 174-83 (1951); G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 Houston L Rev 1, 9-12 (1974).

<sup>233</sup> Cong Globe, 39th Cong, 1st Sess 474 (Jan 29, 1866).

<sup>234</sup> See generally *Jones v Alfred H. Mayer Co.*, 392 US 409 (1968) (upholding title VIII of the Civil Rights Act of 1968).

<sup>235</sup> Cong Globe, 38th Cong, 1st Sess 1314 (Mar 28, 1864) (Sen Trumbull).

<sup>236</sup> Id at 1465 (Apr 7, 1864) (Sen Henderson). For an honest view of the relevant debates see Charles Fairman, 6 *History of the Supreme Court of the United States* 1136-59 (Macmillan 1971).

Congress's power, after all, is to enforce the amendment, not to expand it.<sup>237</sup>

The Thirteenth Amendment was epochal enough without an attempt to stretch it beyond its terms and its intention. What it wrought in any event was no less than a revolution—a great step forward for mankind.

## PART TWO: THE BIG CONTROVERSIES

Having completed our preliminary survey of the work of the Civil War Congress, we come at last to the five great controversies we have reserved for more extended treatment: legal tender, confiscation, conscription, West Virginia, and the beginnings of Reconstruction. We shall consider them in that order.

### I. LEGAL TENDER

To enable the Government to obtain the necessary means for prosecuting the war to a successful issue, without unnecessary cost, is a problem which must engage the most careful attention of the Legislature.<sup>238</sup>

So wrote Salmon P. Chase, Secretary of the Treasury, in his report to the Thirty-seventh Congress when it met for its second session in December 1861. He proceeded to give the legislators the benefit of his own thinking on the subject.

Banking institutions chartered by the states, wrote Chase, had issued enormous sums of promissory notes that circulated as currency. Apart from the serious question whether such notes constituted bills of credit the states were forbidden to issue by Article I, § 10 (the Supreme Court had held they did not),<sup>239</sup>

[t]he whole of this circulation constitutes a loan without interest from the people to the banks . . . and it deserves consideration whether sound policy does not require that the advantages of this loan be transferred, in part at least, from the banks, representing only the interests of the stockholders, to the Government, representing the aggregate interests of the whole people.<sup>240</sup>

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<sup>237</sup> *City of Boerne v Flores*, 521 US 507, 528–29 (1997) (construing comparable language in the Fourteenth Amendment). See also Currie, *The First Hundred Years* at 400–01 (cited in note 13) (describing the interpretation embraced in the *Jones* case as “a triumph of the Trojan Horse theory of constitutional adjudication”).

<sup>238</sup> Cong Globe App, 37th Cong, 2d Sess 23, 25 (Dec 9, 1861).

<sup>239</sup> *Briscoe v Bank of Kentucky*, 36 US (11 Pet) 257 (1837). See Currie, *The First Hundred Years* at 206–08 (cited in note 13) (discussing *Briscoe*).

<sup>240</sup> Cong Globe App, 37th Cong, 2d Sess 23, 25 (Dec 9, 1861).



Chase accordingly recommended that Congress authorize the Treasury to distribute notes of its own, secured by a pledge of United States bonds and receivable for most obligations to the government.<sup>241</sup>

Within a month New York Representative Elbridge Spaulding introduced a bill to authorize the issuance of Treasury notes, apparently in response to the Secretary's urging. Not long afterward the Committee on Ways and Means reported a substitute bill that became the focus of spirited debate.<sup>242</sup> For the substitute not only provided that the new notes (and similar notes already issued) should be receivable in payment of obligations to the government; it also declared them "lawful money and a legal tender in payment of all debts, public and private, within the United States."<sup>243</sup>

Secretary Chase had said nothing about making the new notes legal tender. Paper money had never been made legal tender in this country since the Constitution was adopted. Indeed, said Ohio Representative George Pendleton, such a thing had never even been proposed.<sup>244</sup> But times had changed, said Spaulding, since the Secretary had made his suggestion. The government was about to run out of money with which to meet its daily expenses. To borrow more money through ordinary channels would be ruinous.<sup>245</sup> Opponents argued that Congress should raise taxes, and proponents agreed.<sup>246</sup> But it would be some time, said Ohio Senator John Sherman, before new taxes would produce the needed funds; the issuance of notes was necessary in the meantime.<sup>247</sup> Significantly, Secretary Chase had reluctantly come around to the position that paper tender was indispensable:

Immediate action is of great importance. The Treasury is nearly empty. I have been obliged to draw for the last installment of the November loan. So soon as it is paid, I fear the banks generally will refuse to receive the United States notes, [unless made a le-

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<sup>241</sup> Id at 25–26. Customs duties were excepted from the proposal.

<sup>242</sup> Cong Globe, 37th Cong, 2d Sess 181, 435 (Jan 22, 1862) (introducing the bill and scheduling debate).

<sup>243</sup> Id at 522 (Jan 28, 1862).

<sup>244</sup> Id at 549 (Jan 29, 1862).

<sup>245</sup> Id at 524 (Jan 28, 1862). There was no written committee report on the bill; Spaulding presented the views of the committee orally to the House. A fair number of committee reports were printed during the Thirty-seventh Congress, but not one of them dealt with a major proposal for legislation.

<sup>246</sup> For opponents see, for example, Cong Globe, 37th Cong, 2d Sess 633 (Feb 4, 1862) (Rep Roscoe Conkling); id at 662 (Feb 5, 1862) (Rep Wright); id at 682 (Feb 6, 1862) (Rep Thomas). For proponents see, for example, id at 524 (Jan 28, 1862) (Rep Spaulding); id at 615 (Feb 3, 1862) (Rep Hooper).

<sup>247</sup> Id at 789 (Feb 13, 1862).

gal tender]. You will see the necessity of urging the bill through without more delay.<sup>248</sup>

The substitute bill was reported to the House on January 22, 1862. The House passed it February 6 by a vote of 93-59. The Senate passed it (with amendments) a week later over a mere seven dissenting votes. A conference committee ironed out the differences, and both Houses approved. On February 25 the President signed the bill; paper money was now legal tender for most debts, public and private.<sup>249</sup> Meanwhile there was a good deal of debate over the question whether Congress had power to make paper money legal tender, and there was more when a second issue of notes was proposed later in the same session.

If a state had attempted to do what Congress did, the answer would have been clear: Article I, § 10 flatly provides that “[n]o State shall . . . make any thing but gold and silver coin a tender in payment of debts.” But this clause by its terms applies only to the states, and there is no comparable prohibition applicable to Congress; Article I, § 9, the locus of many limitations on federal authority, contains no parallel provision.<sup>250</sup>

Senator Cowan suggested that the bill impaired the obligation of existing contracts by requiring creditors to accept less than they had bargained for, but as Representative Stevens observed this was a non-starter; the Contract Clause, like the Legal Tender Clause, applies only to the states.<sup>251</sup> Vermont Representative Justin Morrill argued that as to existing agreements the bill was ex post facto, but Stevens shot him down too: although Congress, as well as the states, is barred from passing ex post facto laws, the clause applies only to criminal matters, not to retroactive legislation generally.<sup>252</sup> Representative Crisfield came closest to finding a prohibition on congressional paper tender when he

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<sup>248</sup> Id at 618 (Feb 4, 1862). Professor Hammond tells us the bracketed words were not actually in Chase’s letter, but they do not alter the meaning of the quoted passage. See Hammond, *Sovereignty and an Empty Purse* at 184–85 (cited in note 4).

<sup>249</sup> Cong Globe, 37th Cong, 2d Sess 435, 695, 804, 929, 939, 947, 953 (Jan 22–Feb 25, 1862). The Act excepted customs duties and the interest on federal bonds and notes. Id.

<sup>250</sup> See Cong Globe, 37th Cong, 2d Sess 525 (Jan 28, 1862) (Rep Spaulding), quoting an unpublished opinion by Attorney General Bates.

<sup>251</sup> Id at 792 (Feb 13, 1862) (Sen Cowan); id at 688 (Feb 6, 1862) (Rep Stevens). Representative Edwards argued that there would be no impairment because all contracts were made with the understanding that the law might be changed in the future, Representative Walton because contracts should be interpreted to require payment in lawful money. Id at 684, 692 (Feb 6, 1862). See also id at 688 (Rep Stevens) (echoing these sentiments). The first of these arguments would annihilate the Contract Clause; the second raises an uncertain question of state law. Neither was necessary; the Contract Clause applies only to the states.

<sup>252</sup> Id at 631 (Feb 4, 1862) (Rep Morrill); id at 688 (Feb 6, 1862) (Rep Stevens). See US Const Art I, §§ 9–10; *Calder v Bull*, 3 US (3 Dall) 386, 390 (1798); Currie, *The First Hundred Years* at 41–49 (cited in note 13).

suggested that as to existing contracts the bill would take property without compensation and without due process of law, by which he meant a trial.<sup>253</sup> The Supreme Court would later lend fleeting support to this argument, but it was not without its difficulties; among other things, it seemed to be an attempt to smuggle the Contract Clause into Article I, § 9 by conflating contracts with property for purposes of the Fifth Amendment.<sup>254</sup>

But Representative Crisfield made the obvious point that raised the real issue about congressional authority: It was not enough that paper tender was not prohibited; Congress had only those powers granted it by the Constitution. And no clause of that document, Crisfield continued, gave Congress power to make paper money legal tender.<sup>255</sup>

Speaking for the committee that reported the bill, Representative Spaulding defended it principally as “a war measure . . . to sustain the Army and Navy”:

This bill is a *necessary means* of carrying into execution the powers granted in the Constitution “to raise and *support* armies” and “to provide and *maintain* a navy.”

“Necessary” did not mean indispensable, said Spaulding, quoting Justice Story; Congress had a choice of means to achieve its legitimate ends:

If the *end* be legitimate, and within the scope of the Constitution, all the *means* that are appropriate, which are plainly adapted to that end, and which are not prohibited, may be constitutionally employed to carry it into effect.<sup>256</sup>

The reader will recognize in this passage a close paraphrase of Chief Justice Marshall’s words in *McCulloch v Maryland*.<sup>257</sup>

Thus, Spaulding concluded, Congress could sustain the armed forces by imposing taxes, by selling bonds, or by issuing Treasury notes as legal tender—and it ought to do all three.

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<sup>253</sup> Cong Globe App, 37th Cong, 2d Sess 49 (Feb 5, 1862).

<sup>254</sup> See *Hepburn v Griswold*, 75 US (8 Wall) 603, 624–25 (1870), overruled by the *Legal Tender Cases*, 79 US (12 Wall) 457, 553 (1871); Currie, *The First Hundred Years* at 327–28 (cited in note 13) (discussing these decisions).

<sup>255</sup> Cong Globe App, 37th Cong, 2d Sess 48 (Feb 5, 1862). See also Cong Globe, 37th Cong, 2d Sess 550 (Jan 29, 1862) (Rep Pendleton); id at 635–36 (Feb 4, 1862) (Rep Roscoe Conkling).

<sup>256</sup> Cong Globe, 37th Cong, 2d Sess 524–25 (Jan 28, 1862), quoting US Const Art 1, § 8, cl 12–13. See also id at 791 (Feb 13, 1862) (Sen Sherman) (“I rest my vote upon the proposition that this is a necessary and proper measure to furnish a currency—a medium of exchange—to enable the Government to borrow money to maintain an army and to support a navy.”).

<sup>257</sup> 17 US (4 Wheat) at 421 (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

Our Army and Navy . . . must have food, clothing, and the material of war. Treasury notes issued by the Government, on the faith of the whole people, will purchase these indispensable articles, and the war can be prosecuted until we can enforce obedience to the Constitution and laws, and an honorable peace be thereby secured.<sup>258</sup>

Pennsylvania Representative James Campbell put it more concisely: Congress could do whatever was necessary to suppress the rebellion.<sup>259</sup>

Stated so baldly, this was a pretty sweeping proposition; it would mean Congress could impose taxes and raise armies even if the Constitution did not expressly say so. Spaulding's deft paraphrase of *McCulloch* may have been close, but it was incomplete, for Marshall had insisted not only that the means chosen be appropriate and not prohibited but also that they be consistent with the "spirit of the constitution"—which in context can only mean with the fundamental principle that the federal government is one of limited powers.<sup>260</sup>

The question, in short, was one of degree. And just why was it so "necessary" to make the new notes legal tender? Secretary Chase had suggested the reason: Banks would refuse to accept them if they were not.<sup>261</sup> Senator Sherman, quoting a letter from a banker in New York, expanded on this contention: The banks could not afford to take non-tender notes, "simply because they cannot use them if they do. . . . They cannot pay out these notes to those who are not obliged to receive them."

If you strike out this tender clause, you do it with the knowledge that these notes will fall dead upon the money market of the world; that they will be refused, as they are now refused by the banks; that they will be a subordinate, disgraced currency, that will not pass from hand to hand; that they will have no legal sanction; that any man . . . may decline to receive them, and thus discredit the obligations of the Government.<sup>262</sup>

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<sup>258</sup> Cong Globe, 37th Cong, 2d Sess 526 (Jan 28, 1862). See also Cong Globe App, 37th Cong, 2d Sess 54 (Feb 12, 1862) (Sen Howe).

<sup>259</sup> Cong Globe, 37th Cong, 2d Sess 686 (Feb 6, 1862). See also id at 658 (Feb 5, 1862) (Rep Pike). Vermont Senator Jacob Collamer protested that the Constitution itself specified how money was to be raised, namely by borrowing or taxation. Id at 769 (Feb 12, 1862). Unfortunately for his argument, Representative Spaulding had already suggested that purchasing goods and services with legal tender notes was a form of borrowing, and Collamer produced no evidence that these methods were meant to be exclusive.

<sup>260</sup> *McCulloch*, 17 US (4 Wheat) at 421. See also Currie, *The First Hundred Years* at 164 (cited in note 13) (discussing *McCulloch*).

<sup>261</sup> See text accompanying note 248.

<sup>262</sup> Cong Globe, 37th Cong, 2d Sess 791 (Feb 13, 1862).

As the Secretary had told members of the committee, the Tender Clause was “indispensably necessary to the security and negotiability” of the notes.<sup>263</sup>

I find this argument convincing, and opponents of the clause did not seriously attempt to refute it on the facts. They took refuge instead in history and the opinions of great men.

Several opponents quoted Daniel Webster:

The States are expressly prohibited from making anything but gold and silver a tender in payment of debts; and although no such express prohibition is applied to Congress, yet, as Congress has no power granted to it, in this respect, but to coin money and to regulate the value of foreign coins, it clearly has no power to substitute paper, or anything else, for coin, as a tender in payment of debts.<sup>264</sup>

Mr. Webster was a great man and a great interpreter of the Constitution. His views were entitled to serious consideration, but of course they were not binding on Congress.

More challenging was the opponents’ reliance on the records of the Constitutional Convention. An early draft would have expressly authorized Congress to “emit bills on the credit of the United States.”<sup>265</sup> Gouverneur Morris moved to delete this provision: “The Monied interest will oppose the plan of Government, if paper emissions be not prohibited.” Oliver Ellsworth added that the time was ripe “to shut and bar the door against paper money,” and James Wilson agreed: “It will have a most salutary influence on the credit of the U[nited] States to remove the possibility of paper money.” Pierce Butler allowed as how he was “urgent for disarming the Government of such a power,” and the Convention voted nine states to two to omit the offending provision.<sup>266</sup> The Convention, opponents of the Tender Clause suggested, had intended to deny Congress the power to create paper money.<sup>267</sup>

Now the reasons for omitting an express grant of power are not always clear; sometimes language may be excised as redundant. There is no doubt, however, that the delegates I have quoted wished to deny Congress the power in question. But we have not yet told the whole story. Nathaniel Gorham of New Hampshire also wished to delete the

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<sup>263</sup> Id at 789.

<sup>264</sup> See id at 551 (Jan 29, 1862) (Rep Pendleton); id at 682 (Feb 6, 1862) (Rep Thomas). See also id at 640 (Feb 4, 1862) (Rep Sheffield); id at 662 (Feb 5, 1862) (Rep Wright); id at 803 (Feb 13, 1862) (Sen Pearce) (also invoking John C. Calhoun).

<sup>265</sup> See Farrand, 2 *The Records of the Federal Convention* at 182 (cited in note 27).

<sup>266</sup> Id at 308–10.

<sup>267</sup> See Cong Globe, 37th Cong, 2d Sess 550 (Jan 29, 1862) (Rep Pendleton); id at 768–69 (Feb 12, 1862) (Sen Collamer).

bills of credit provision; he thought its inclusion an open invitation to issue paper money: “[I]f the words stand they may suggest and lead to the measure.” Yet Gorham did not believe the effect of deletion would be to deny Congress authority: “The power as far as it will be necessary or safe, is involved in that of borrowing.”<sup>268</sup> In short, the Convention record is not so unambiguous as opponents of the Tender Clause would have us believe. We do not know how many of those who voted to delete the provision intended to deny Congress authority, and how many agreed with Gorham that it was implicit in the power to borrow.

Moreover, the argument from the Convention record proves too much. For what was omitted was not simply the power to make bills of credit legal tender; it was authority to issue them, period. Yet as supporters of the tender provision never ceased to point out, Congress had issued bills of credit ever since the War of 1812,<sup>269</sup> and only two speakers appear to have questioned their validity;<sup>270</sup> it was a trifle late to suggest that Congress had no power to issue them at all. Insofar as the Convention record is concerned, there is no basis for distinguishing those bills of credit which were legal tender from those that were not, though Madison had urged such a distinction;<sup>271</sup> if the power to issue bills of credit was implicit in the Constitution, as Congress had always assumed, nothing done by the Convention precludes the conclusion that Congress had implicit authority to make them legal tender as well.<sup>272</sup>

The war powers were not the sole source of asserted authority for the issuance of paper tender. Various speakers invoked the commerce power,<sup>273</sup> the power to coin money,<sup>274</sup> the power to regulate its

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<sup>268</sup> Farrand, 2 *The Records of the Federal Convention* at 309 (cited in note 27).

<sup>269</sup> See, for example, Cong Globe, 37th Cong, 2d Sess 680 (Feb 6, 1862) (Rep Kellogg); id at 684 (Rep Edwards); id at 688 (Rep Stevens); id at 790 (Feb 13, 1862) (Sen Sherman); id at 797–98 (Feb 13, 1862) (Sen Sumner); Currie, *The Jeffersonians* at 254 n 32 (cited in note 1).

<sup>270</sup> See Cong Globe, 37th Cong, 2d Sess 551 (Jan 29, 1862) (Rep Pendleton); id at 663 (Feb 5, 1862) (Rep Wright).

<sup>271</sup> Farrand, 2 *The Records of the Federal Convention* at 309 (cited in note 27) (“[W]ill it not be sufficient to prohibit the making them a tender? This will remove the temptation to emit them with unjust views. And promissory notes in that shape may in some emergencies be best.”). In a note to himself Madison seemed to think he had won the battle: While “striking out the words would not disable the Gov[ernmen]t from the use of public notes as far as they could be safe [and] proper,” it would “cut off the pretext for a paper currency and particularly for making the bills a tender either public for or private debts.” Id at 310 n\*.

<sup>272</sup> See Currie, *The First Hundred Years* at 323 n 270 (cited in note 13).

<sup>273</sup> Cong Globe, 37th Cong, 2d Sess 637 (Feb 4, 1862) (Rep Bingham); id at 790 (Feb 13, 1862) (Sen Sherman). But see, for example, id at 663 (Feb 5, 1862) (Rep Wright); id at 681 (Feb 6, 1862) (Rep Thomas); id at 769 (Feb 12, 1862) (Sen Collamer); Cong Globe App, 37th Cong, 2d Sess 49 (Feb 5, 1862) (Rep Crisfield).

<sup>274</sup> Cong Globe, 37th Cong, 2d Sess 690 (Rep Hickman) (Feb 6, 1862); Cong Globe App, 37th Cong, 2d Sess 60 (Mar 3, 1862) (Sen McDougall). But see, for example, Cong Globe, 37th Cong, 2d Sess 630 (Feb 4, 1862) (Rep Morrill); id at 662 (Feb 5, 1862) (Rep Wright); id at 795 (Feb 13, 1862) (Sen Bayard).

value,<sup>275</sup> and the power to borrow.<sup>276</sup> None of these arguments was developed in any detail, and only the last seems to me to have much force. Coins were traditionally understood to be metal,<sup>277</sup> to make paper legal tender is hardly to regulate their value, and only with some difficulty can the fact that money is necessary for trade be stretched into a justification for issuing tender notes as a regulation of commerce<sup>278</sup>—although a similar argument was urged for years with respect to the construction of roads and canals.<sup>279</sup> But the war power arguments reported above suggest that when the government pays for men and materiel with paper tender it effectively borrows money to support the army and navy; the war power and borrowing arguments thus tend to coincide.<sup>280</sup>

In any event, the argument that paper tender was necessary and proper to support the armed forces was effectively made in Congress, and I find it rather persuasive. Nothing more was needed to sustain the tender provision.<sup>281</sup>

## II. CONFISCATION

By far the most protracted constitutional debate in the Thirty-seventh Congress concerned the confiscation of rebel property. I have twenty pages of notes on this controversy alone; let us see whether I can boil them down to reasonable size.

In its extraordinary summer session Congress had already provided for forfeiture of property actually used in furtherance of the

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<sup>275</sup> See Cong Globe, 37th Cong, 2d Sess 525 (Jan 28, 1862) (Rep Spaulding) (“In regulating the value of ‘coin’—either foreign or domestic—Congress may provide that gold and silver shall be of no greater value in the payment of debts . . . than the Treasury notes issued on the credit of this Government.”).

<sup>276</sup> Id at 790 (Feb 13, 1862) (Sen Sherman); id at 796–97 (Feb 13, 1862) (Sen Howard). But see id at 803 (Feb 13, 1862) (Sen Pearce) (giving no reasons).

<sup>277</sup> See id at 681 (Feb 6, 1862) (Rep Thomas); id at 803 (Feb 13, 1862) (Sen Pearce).

<sup>278</sup> “You might as well contend,” said Maryland Senator James Pearce, “that Congress had the power of building a mercantile navy for the purpose of transporting all the articles of commerce which are grown or produced in our country to other parts of the world, in execution of the power to regulate commerce.” Id at 803.

<sup>279</sup> See Currie, *The Jeffersonians* at 120, 262 (cited in note 1).

<sup>280</sup> See the quotation from Senator Sherman in note 256.

<sup>281</sup> It was Treasury Secretary Salmon P. Chase who urged Congress to authorize the issuance of legal tender notes; it was Chief Justice Salmon P. Chase who wrote for a divided Court a few years later to hold his own statute unconstitutional—only to be overruled a year later after changes in the membership of the Court. See *Hepburn*, 75 US (8 Wall) at 624, overruled by the *Legal Tender Cases*, 79 US (12 Wall) at 553 (1871); Currie, *The First Hundred Years* at 320–29 (cited in note 13) (discussing the decisions). Chief Justice Taney, we are told, prepared a draft opinion declaring the tender provision unconstitutional; he never had a chance to use it, and it rests apparently unpublished in the New York Public Library. See Carl B. Swisher, *Roger B. Taney* 570 (Archon 1961).

insurrection. That was easy and largely uncontested; as I have said, there was a long tradition of forfeiture of the tools of crime.<sup>282</sup> What was proposed and ultimately adopted during the following session proved far more controversial and raised a hornet's nest of constitutional questions. For this time Congress was asked to confiscate *all* the property of certain persons engaged in the rebellion.

There were occasional efforts to justify the second confiscation act as an extension of the first: All rebel property was effectively used to support the rebellion.<sup>283</sup> That argument seemed to wander far beyond the precedents,<sup>284</sup> and it is not surprising that proponents sought a more secure ground for their action.

The most straightforward explanation was that confiscation could be justified as punishment for crime. To participate in an insurrection was to make war against the United States and thus to commit treason as defined by Article III, § 3; and the same article explicitly gave Congress authority "to declare the Punishment of Treason." The principal difficulty with this argument lay in the clause that immediately follows: "[B]ut no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."<sup>285</sup>

Just what that meant was the subject of heated disputation, which we shall rehearse anon. But one response to the problem was to shift the entire basis of the argument. Confiscation was not punishment for crime at all; it was a purely military measure designed to weaken the enemy's efforts and strengthen our own, and thus an exercise of the power to suppress rebellion.<sup>286</sup>

This formulation raised constitutional questions of its own. Congress might well be exercising its military authority, but it was still required to pay heed to limitations found elsewhere in the Constitution. To determine who was a rebel, it was argued, required all the trappings of a criminal proceeding; to authorize seizure without trial was to enact a forbidden bill of attainder. We shall take up these objections

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<sup>282</sup> See text accompanying notes 47–49.

<sup>283</sup> See, for example, Cong Globe, 37th Cong, 2d Sess 2235 (May 20, 1862) (Rep Eliot).

<sup>284</sup> See, for example, id at 2921 (June 25, 1862) (Sen Browning) (arguing that in rem condemnation proceedings had always been limited to *guilty* property).

<sup>285</sup> US Const Art 3, § 3, cl 2.

<sup>286</sup> See US Const Art I, § 8, cl 15. Indeed proponents of this theory tended to downplay reliance on the Constitution, basing their argument essentially on the international laws of war. See, for example, Cong Globe, 37th Cong, 2d Sess 2358 (May 26, 1862) (Rep Eliot). To the modern mind this appears a most unsatisfactory position: As opponents of paper tender kept saying, Congress has only those powers the Constitution grants it. It was more convincing to argue that the power to suppress insurrections included authority to employ whatever means, not prohibited by the Constitution itself, were consistent with the laws of war. See id at 1136 (Mar 10, 1862) (Sen Browning); id at 1572 (Apr 8, 1862) (Sen Henderson).



as well. But let us do so in the context of following the bill in its passage through Congress.

On December 5, 1861—three days after the session began—Illinois Senator Lyman Trumbull introduced a bill to confiscate rebel property. The theory of the bill was not punishment for crime but suppression of the rebellion; Trumbull described it as an exercise of belligerent rather than sovereign rights. The power to put down insurrection, he argued, embraced authority to do whatever was consistent with the law of nations to achieve that end—including the confiscation of enemy property.<sup>287</sup> Under the bill, property owned by rebels who were beyond the reach of judicial process (such as those behind enemy lines) was to be confiscated by legislative fiat. Those assets themselves beyond the reach of process were to be seized by military authorities as the armies advanced; those in areas in which the courts were open were to be condemned by judicial decree in proceedings in rem. In both cases slaves were included; the very premise of the institution was that slaves were property.<sup>288</sup>

Pennsylvania Senator Edgar Cowan, himself a Republican, led the opposition to Trumbull's bill. Confiscation, Cowan insisted, was a terrible idea; it would stiffen Southern resistance and lengthen the war. More to the point, the bill was unconstitutional. It would “set aside and ignore” the Constitution “in all its most valuable and fundamental provisions; those which guaranty the life, liberty, and property of the citizen, and those which define the boundaries between the powers delegated to the several departments of the Government.”<sup>289</sup>

To begin with, rebellion was treason, and Article III made clear that no forfeiture of a traitor's property could extend beyond his death; the courts would have to whittle the confiscation provision down to constitutional size or refuse to enforce it. Moreover, the bill purported to deprive owners of their property without the intervention of either a grand or a petit jury and indeed without a trial; it would thus do so without due process, “which all commentators and lawyers agree, means proceedings according to the course of the common law.” Finally, said Cowan, Trumbull's proposal was a forbidden bill of attainder, be-

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<sup>287</sup> The Supreme Court, Trumbull said, had recognized this right in the analogous area of foreign war. See generally *Brown v United States*, 12 US (8 Cranch) 110 (1814) (requiring action by Congress to confiscate enemy property, for the power to do so was not conferred on the executive by a simple declaration of war).

<sup>288</sup> Cong Globe, 37th Cong, 2d Sess 18–19 (Dec 5, 1861); see also id at 942–44 (Feb 25, 1862).

<sup>289</sup> Id at 1050 (Mar 4, 1862).

cause in Justice Story's words it would inflict punishment "without any conviction in the ordinary course of judicial proceedings."<sup>290</sup>

Other Senators echoed Cowan's misgivings;<sup>291</sup> Senator Trumbull undertook to allay them. The lifetime limit on forfeiture applied only to convicted traitors; the bill would confiscate property only of those who could not be convicted.<sup>292</sup> As for due process and the jury provisions, the war powers authorized Congress to put down insurrection "by force and violence," not according to the course of the common law; no one would suggest that a trial was necessary before an enemy soldier could be shot in battle or taken as a prisoner of war.<sup>293</sup> The bill convicted no one of crime; it was "no more like a bill of attainder than is an act imposing a fine as a punishment for assault and battery."<sup>294</sup>

Virginia Senator John Carlile gave what seems to me a crushing response to Trumbull's argument on forfeiture beyond death:

I thank the Senator, because I desire to understand his position. I now understand him to say that, while it is not in the power of Congress, aided by the judicial department of the Government, upon trial and conviction for treason, to confiscate the real estate of the traitor beyond his life, Congress can yet of itself, without the intervention of the judicial department of the Government, inflict that punishment, not upon a convicted traitor, but upon one who in the eye of the law is presumed to be innocent until he is proven to be guilty. That is to say, you may without conviction impose a heavier penalty than can be imposed upon guilt being ascertained and judgment being pronounced. It is worse than I supposed. Such a proposition I shall not detain the Senate by discussing.<sup>295</sup>

Trumbull appears right, in contrast, that his bill was not one of attainder, for it made no attempt to determine who was or was not a

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<sup>290</sup> Id at 1051 (Mar 4, 1862), quoting Justice Story. See Story, 3 *Commentaries on the Constitution* § 1338 at 209 (cited in note 20); US Const Art I, § 9 (outlawing bills of attainder). Cowan also maintained that the modern law of nations exempted private property on land from confiscation. See Cong Globe, 37th Cong, 2d Sess 1053 (Mar 4, 1862). But the Supreme Court had already disposed of this contention in *Brown*, 12 US (8 Cranch) at 122–23 (concluding that narrower modern practice did not restrict the *power* of a belligerent to seize private property).

<sup>291</sup> Cong Globe, 37th Cong, 2d Sess 1136–38 (Mar 10, 1862) (Sen Browning); id at 1157–58 (Mar 11, 1862) (Sen Carlile); id at 1572–75 (Apr 8, 1862) (Sen Henderson); id at 1757–62 (Apr 22, 1862) (Sen Davis).

<sup>292</sup> Id at 1158 (Mar 11, 1862) ("It is not a bill against persons who can be reached by judicial process."); see also id at 1558, 1813 (Apr 7 and 24, 1862); id at 1875 (Apr 30, 1862) (Sen Wilmot); id at 2191 (May 19, 1862) (Sen Sumner).

<sup>293</sup> Id at 1558 (Apr 7, 1862). See also id at 1875 (Apr 30, 1862) (Sen Wilmot).

<sup>294</sup> Id at 1559 (Apr 7, 1862). See also id at 1875 (Apr 30, 1862) (Sen Wilmot).

<sup>295</sup> Id at 1158 (Mar 11, 1862). See also Cong Globe App, 37th Cong, 2d Sess 140 (May 2, 1862) (Sen Doolittle) (insisting the constitutional prohibition could not be avoided by failing to convict the offender).

rebel.<sup>296</sup> The hard question thus seems one of procedure: Was it permissible to leave it to military authorities, rather than to the courts, to make that determination?

On this issue I find Trumbull's analogies challenging but not compelling. Unlike the decision to shoot or capture a soldier, the decision to seize property under the bill was not to be made in the heat of battle; it was a matter for calm deliberation after enemy territory had been pacified. Captured rebels, Representative Crittenden noted in the House debate, could not be executed without trial.<sup>297</sup> On the other hand, the military was to decide who was a rebel only in areas beyond the reach of judicial process; to insist on a judicial proceeding was to preclude seizure entirely. *Ex parte Milligan*, while adamant about procedural regularity in criminal matters when the courts were open, would plainly suggest that there might be room for exceptions when the courts were closed.<sup>298</sup>

Senator Collamer proposed a substitute for Trumbull's bill that would have solved the due process problem by imposing sanctions as punishment upon conviction for treason.<sup>299</sup> Unfortunately, in eliminating one constitutional difficulty this approach threatened to exacerbate another, for it could no longer be said (as Trumbull had maintained) that the prohibition of forfeiture beyond death was inapplicable because there was no "attainder" of treason.<sup>300</sup>

A variety of ingenious efforts were made to avoid the apparent effect of this provision. Perhaps least effective was the attempt to argue that "forfeiture" within the meaning of Article III was corruption of blood, which meant that even an innocent heir could not inherit

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<sup>296</sup> See Rawle, *A View of the Constitution* at 119 (cited in note 26) (defining bills of attainder as "those by which a person without a judicial trial, is declared by the legislature to be guilty of some particular crime"); Story, 3 *Commentaries on the Constitution* § 1338 at 215 (cited in note 20) (defining a bill of attainder as an act that might inflict capital punishment against an alleged traitor, even though he had yet to be tried).

<sup>297</sup> Cong Globe, 37th Cong, 2d Sess 1803 (Apr 23, 1862).

<sup>298</sup> 71 US (4 Wall) 2, 127 (1866) (citing, in dictum, such instances as foreign invasion and civil war as "occasions when martial rule can be properly applied"). Running through these debates was a continuing dispute over the division of military authority between Congress and the president as commander in chief. Senator Browning, who took a dim view of Congress's authority to confiscate rebel property, maintained that the president could seize it without legislative authorization in many cases; Trumbull insisted the president was merely to carry out congressional orders. Cong Globe, 37th Cong, 2d Sess 1857-58 (Apr 29, 1862) (Sen Browning); id at 1559-60 (Apr 7, 1862) (Sen Trumbull).

<sup>299</sup> Cong Globe, 37th Cong, 2d Sess 1809, 1812 (Apr 24, 1862). Collamer's bill is printed in id at 1895 (May 1, 1862).

<sup>300</sup> Ohio Senator Benjamin Wade pointed out an additional practical difficulty with Collamer's solution: South of the Potomac it would be impossible to convict anyone of treason. Id at 1957 (May 6, 1862). See also id at 1959 (May 6, 1862) (Sen Trumbull); US Const Art III, § 2; US Const Amend VI.

from an innocent ancestor of the offender.<sup>301</sup> The trouble with this contention was patent: The constitutional provision forbids *both* corruption of blood and forfeiture beyond life, so the two cannot very well be the same.<sup>302</sup>

Senator Doolittle, who thought Trumbull's bill went too far, drew a surprising distinction that suggested the forfeiture provision nevertheless meant less than it seemed to say. What the Constitution said was that no *attainder* of treason should work forfeiture beyond the offender's life. Quoting Blackstone, Doolittle concluded that this prohibition applied only to real property. For attainder meant judgment, not conviction; and personal property was forfeited the moment the jury pronounced the defendant guilty:

There is a remarkable difference or two between the forfeiture of lands and of goods and chattels. 1. Lands are forfeited upon *attainder*, and not before; goods and chattels are forfeited by *conviction*. Because, in many of the cases where goods are forfeited, there never is any attainder, which happens only where judgment of death or outlawry is given.<sup>303</sup>

In other words, the prohibition applied only to property that otherwise would be forfeited by a criminal judgment; since it was not the judgment but the conviction that resulted in the loss of personal property, the prohibition did not apply.<sup>304</sup>

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<sup>301</sup> Cong Globe, 37th Cong, 2d Sess 1785 (Apr 23, 1862) (Sen Hale); *id* at 2170 (May 16, 1862) (Sen Wade). Blackstone defined corruption of blood as follows:

Another immediate consequence of attainder is the *corruption of blood*, both upwards and downwards; so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture: and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor.

Morrison, ed, 4 *Blackstone* at \*388 (cited in note 26). See also Story, 3 *Commentaries on the Constitution* § 1294 at 170–71 (cited in note 20) (“By corruption of blood, all inheritable qualities are destroyed.”).

<sup>302</sup> See Cong Globe, 37th Cong, 2d Sess 1786 (Apr 23, 1862) (Sen Doolittle) (“The forfeiture is an entirely distinct thing from the corruption of blood. The forfeiture of estate is the consequence which follows to [the offender's] own property, that over which he has control, power of disposition, by the judgment of outlawry or of death.”). A superficially more appealing version of Hale's argument was that the clause forbade only the forfeiture of remainders or of estates in tail, not what the offender owned outright. *Id* at 2928 (June 25, 1862). But that is not what the provision says.

<sup>303</sup> *Id* at 1786 (Apr 23, 1862) (quoting Blackstone). See also Morrison, ed, 4 *Blackstone* at \*388 (cited in note 26); Cong Globe App, 37th Cong, 2d Sess 138 (May 2, 1862) (citing additional authorities).

<sup>304</sup> See also Cong Globe, 37th Cong, 2d Sess 2171 (May 16, 1862) (Sen Browning).

The original reasons for this distinction are lost in the mists of time, and the distinction itself seems to make little sense: If it is unjust to punish innocent heirs by depriving them of the offender's land, why is it not equally unjust to deprive them of his goods and chattels—or, to speak in modern terms, of his stocks and bonds? Should one really place such emphasis on the Framers' use of the word "attainder," when the purpose of the provision seems as applicable to one form of property as to another?<sup>305</sup>

Maybe; for the consequence of extending the ban to personal property would be to forbid the imposition of fines for treason, which the Framers could hardly have intended. In any event Senator Doolittle had a strategy of his own for getting hold of rebels' lands without running afoul of the forfeiture provision: They should be sold for non-payment of the direct tax that Congress had levied the year before.<sup>306</sup>

Senator Collamer had another plan for avoiding the forfeiture provision altogether. As noted, his bill would avoid procedural problems by imposing sanctions only after conviction for crime. Article III would therefore appear to limit forfeiture of real property to the life of the offender. But Senator Collamer's bill, as he described it, did not provide for forfeiture at all. Rather it defined the punishment for treason as death or fine and imprisonment, in the discretion of the court; and the fine should be set "large enough to strip any man who was incorrigible."<sup>307</sup>

I further provide [said Collamer] that the effect of the conviction shall be that [the offender] shall be incapable of holding any office under the Government, and that his slaves shall be free, and that this fine shall be levied and collected out of any property he possessed at the time the act was committed.<sup>308</sup>

Thus Collamer would succeed in depriving the rebel of his property forever without offending the forfeiture provision, for his bill did not provide for forfeiture at all:

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<sup>305</sup> See *id* at 2198–99 (May 19, 1862) (Sen Henderson) (arguing that the limit on forfeiture applied to personal as well as real property and that to hold otherwise would mean Congress could provide for permanent deprivation of real property too upon conviction). At a later point in the debate Senator Sumner made a distinct argument based on a literal reading of the term "attainder": Since attainder meant a capital sentence, the forfeiture provision applied only when the punishment was death. *Id* at 2190. Along the same lines was Representative Noell's argument that the prohibition did not apply unless the statute defined the offense as treason, even if the elements of the offense were the same. *Id* at 2238 (May 20, 1862). With respect, this may be carrying historical literalism too far.

<sup>306</sup> *Id* at 1786 (Apr 23, 1862). For Doolittle's bill to this effect see *id* at 2017, 2040 (May 8–9, 1862) (insisting that this alternative was free from constitutional objection). For the resulting statute see 12 Stat 422, 422–26 (June 7, 1862).

<sup>307</sup> Cong Globe, 37th Cong, 2d Sess 1812 (Apr 24, 1862) (Sen Collamer).

<sup>308</sup> *Id*.

What is forfeiture? It is the taking of some specific thing, as all the visible property a man now possesses—his farm, his horse, his ship. . . . A fine has no such quality. A fine is but the mulcting of the respondent in a sum of money. If he pays it, well; if he does not pay it, you may levy and collect it out of his property. I have created no forfeiture by my bill. The act creates none, but it enables the courts to levy and collect the fine out of the convicted traitor's property.<sup>309</sup>

Clever, yes? Perhaps it was too clever by half. For the *effect* of Collamer's bill would be the same as if he had employed the term "forfeiture"; it seems hard to square his proposal with the purposes of the constitutional provision.<sup>310</sup> Yet fines are clearly not forbidden, and if they are not paid they must be satisfied out of property; it seems equally difficult to read the forfeiture provision as limiting ordinary procedures for the enforcement of fines.<sup>311</sup>

It was at this point in the proceedings that the entire confiscation question was sent back to a special committee for reconsideration,<sup>312</sup> and perhaps it was none too soon. It was not too much longer before the Senate found itself confronted with a choice between two contrasting proposals. The one was a Senate committee bill embodying Collamer's approach of punishment for crime;<sup>313</sup> the other was a House bill reflecting Trumbull's initial idea of confiscation as a non-punitive measure to weaken the rebellion.<sup>314</sup>

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<sup>309</sup> *Id.* Collamer's bill did seem to envision the forfeiture of slaves, but if Senator Doolittle was right that the Forfeiture Clause was inapplicable to personal property, there would be a problem only if people were implausibly classified as real estate for this purpose.

<sup>310</sup> See *id.* at 1959 (May 6, 1862) (Sen Trumbull):

He proposes in that way to take the property of a convicted traitor, when the Constitution of the United States says that no attainer of treason . . . shall work corruption of blood or forfeiture, except during the life of the person attainted. The Senator from Vermont proposes that it shall work a destruction of all his real estate if you do it under the name of a fine; just call it a fine, and you may take the real estate forever.

See also *id.* at 2170 (May 16, 1862) (Sen Howard) (characterizing the bill as "a mere attempt to evade the plain language of the Constitution"). Senator Browning also reminded the Senate that even apart from this difficulty the Eighth Amendment forbade excessive fines. *Id.* at 2920 (June 25, 1862). See also *Austin v United States*, 509 US 602, 622 (1993) (recognizing that forfeiture was limited by the excessive fines provision).

<sup>311</sup> See Cong Globe, 37th Cong, 2d Sess 2166 (May 16, 1862) (Sen Clark); *id.* at 2171 (Sen Browning).

<sup>312</sup> *Id.* at 1965 (May 6, 1862).

<sup>313</sup> See *id.* at 2165 (May 16, 1862).

<sup>314</sup> *Id.* at 2360–61 (May 26, 1862). As Senator Cowan observed, the fact that the bill discriminated according to degrees of guilt made this characterization less convincing; it looked more like punishment for crime. *Id.* at 2960 (June 27, 1862).

After much repetitive discussion the Senate basically combined the two provisions,<sup>315</sup> and the House, with modifications, agreed.<sup>316</sup> As it went to the President, the bill provided substantially as follows.<sup>317</sup>

Section 1 was taken almost verbatim from Senator Collamer's bill. The punishment for treason was to be death or fine and imprisonment, together with emancipation of the offender's slaves. Fines were to be collected out of the offender's property, real and personal, with the exception of slaves.

Section 2 created a new and overlapping offense of engaging in or giving aid to the rebellion, punishable by fine and/or imprisonment and liberation of the offender's slaves.<sup>318</sup>

Section 3 provided that persons guilty of either of the above offenses should be "forever incapable and disqualified to hold any office under the United States."

The following sections took an entirely different approach more reminiscent of Senator Trumbull's original bill. In order "to insure the speedy termination of the present rebellion," the President was directed to seize all the property of a long list of leading rebels and to employ it or its proceeds "for the support of the army of the United States" (§ 5). Section 6 applied the same medicine to lesser rebels who persisted in aiding the insurrection after a presidential warning; § 7 provided for in rem judicial proceedings "to secure the condemnation and sale" of any property seized under the two preceding provisions.<sup>319</sup> Finally, § 9 granted freedom to several categories of slaves belonging to rebels without the necessity of judicial proceedings.<sup>320</sup>

Even before the President signed the bill, the House passed an explanatory joint resolution limiting the application of the seizure provisions in the case of state officers in the Confederacy.<sup>321</sup> When this resolution reached the Senate, Daniel Clark of New Hampshire

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<sup>315</sup> See id at 3006 (June 30, 1862).

<sup>316</sup> Id at 3266–68, 3276 (July 11 and 12, 1862).

<sup>317</sup> See 12 Stat 589, 589–92 (July 17, 1862).

<sup>318</sup> See Randall, *The Civil War and Reconstruction* at 372 n 1 (cited in note 128) (calling the emancipation provisions of this Act "a bit of imperfect and ill-studied legislation which was not enforced").

<sup>319</sup> See McPherson, *Battle Cry of Freedom* at 500 (cited in note 8) ("[T]he law's provisions for enforcing the sovereign right were vague, consisting of *in rem* proceedings by district courts that were of course not functioning in the rebellious states.").

<sup>320</sup> Section 10 required an oath of loyalty and rightful ownership for the return of fugitive slaves and forbade members of the army and navy to surrender them and/or resolve ownership claims; § 11 authorized the president to employ "persons of African descent" in the armed forces; § 12 empowered him to make provision for the voluntary colonization of persons "of the African race" freed by the act "in some tropical country" willing to accept them. 12 Stat at 591–92. My research reveals no effort to explain the constitutional basis of this last provision; perhaps the most plausible source is a broad understanding of the spending power.

<sup>321</sup> Cong Globe, 37th Cong, 2d Sess 3370 (July 16, 1862).

moved to insert the following language at the end of the provision: “Nor shall any punishment or proceedings under said act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life.”<sup>322</sup> Both Houses approved this amendment,<sup>323</sup> and President Lincoln signed both the bill and the resolution the following day.<sup>324</sup>

Why? Senator Clark was pretty coy about it, but he finally let slip that the President had informally objected to what he viewed as a provision for forfeiture beyond the life of the offender in violation of Article III. Senator Trumbull protested that all the bill did was impose a fine, and several Senators huffily objected to informal communication of the President’s views. But Clark sensibly observed that without the resolution there would be no confiscation law, and even the fiery Sumner agreed that half a loaf was better than nothing at all.<sup>325</sup>

And so the controversial confiscation bill became law at last, modified by the explanatory resolution to conform to the President’s understanding of the forfeiture provision. For Lincoln really did believe that without this qualification the bill was unconstitutional. In signing the two documents he sent Congress a veto message he had drafted in case no modification was made. “For the causes of treason and the ingredients of treason,” he wrote, the bill “declares forfeiture extending beyond the lives of the guilty parties, whereas the Constitution of the United States declares that ‘no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.’” Senator Collamer’s clever evasions, in other words, did not persuade the President. He did, however, agree with Senator Doolittle that the Forfeiture Clause was inapplicable to personal property: “I may remark that the provision of the Constitution, put in language borrowed from Great Britain, applies only in this country . . . to real or landed estate.”<sup>326</sup>

Nine years later, in *Miller v United States*,<sup>327</sup> the Confiscation Act came before the Supreme Court. The case was an in rem proceeding to condemn certain stocks and bonds owned by a Confederate officer who, among other things, had allegedly continued to give aid and support to the rebellion after the President issued the proclamation envisioned by § 6—and who, in violation of the earlier Confiscation Act of

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<sup>322</sup> Id at 3374.

<sup>323</sup> Id at 3383 (Senate); id at 3400 (House).

<sup>324</sup> 12 Stat at 589–92; 12 Stat 627, 627 (July 17, 1862).

<sup>325</sup> Cong Globe, 37th Cong, 2d Sess 3374–83 (July 16, 1862).

<sup>326</sup> Abraham Lincoln, Special Message (July 17, 1862) in Richardson, ed, 6 *Messages and Papers of the Presidents* 85, 87 (cited in note 10); Cong Globe, 37th Cong, 2d Sess 3406 (July 17, 1862).

<sup>327</sup> 78 US (11 Wall) 268 (1871).



1861, had also allegedly employed the property in support of the insurrection. The Supreme Court upheld the constitutionality of both Acts.<sup>328</sup>

The principal objection was one that Senator Cowan had made early in the congressional debates on the 1862 legislation: that because the purpose of the forfeiture provisions was to punish offenses against the United States, the Fifth and Sixth Amendments required indictment by a grand jury, trial before a petit jury in the district where the crime was committed, and all the paraphernalia of due process of law.<sup>329</sup> Justice Strong, writing for the Court, gave the answer Senator Trumbull had given to Cowan: The purpose of the provisions in question was not punishment at all but rather to suppress the rebellion by weakening the enemy.<sup>330</sup>

And thus we have come full circle to the point at which our discussion began, with the distinction between the sovereign and the belligerent powers of the government. We might leave it at that were it not for one observation, not of the majority but of the dissenters in *Miller*, that one hopes was meant to be hyperbolic: that the exercise of the war powers was subject to no constitutional limitations at all.<sup>331</sup>

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<sup>328</sup> Id at 293–314.

<sup>329</sup> Id at 304.

<sup>330</sup> Id at 308 (noting that the act “defined no crime . . . [,] imposed no penalty . . . [,] declared nothing unlawful . . . [, and] was aimed exclusively at the seizure and confiscation of property used, or intended to be used, to aid, abet, or promote the rebellion”). Dissenting, Justices Field and Clifford questioned only the application of the majority’s principle to the 1862 provision in issue. Id at 315–17 (Field dissenting) (arguing that because that provision confiscated the property not of enemies generally but of traitors, its purpose was punitive, and that there could be no forfeiture as punishment for crime without conviction).

<sup>331</sup> Id at 315 (Field dissenting) (“The war powers of the government have no express limitation in the Constitution, and the only limitation to which their exercise is subject is the law of nations. That limitation necessarily exists.”). Eighteen months after the second Confiscation Act was adopted, a concerted effort was made in Congress to repeal or dilute the proviso—added at the President’s request—limiting forfeitures of land to the life of the offender. The leading argument, apparently inspired by the opinion of a federal district judge in Virginia, was that the constitutional provision merely forbade the *imposition* of forfeiture after the offender’s demise; judgment had to be pronounced during his life. See 3 *The American Annual Cyclopaedia of 1863* 221–22 (Appleton 1872) (providing an excerpt of the opinion). Defenders of the challenged proviso, in addition to insisting that such an interpretation would make no sense, pointed out that James Madison in the *Federalist* (among others) had said the Forfeiture Clause restrained Congress, in punishing treason, “from extending the consequences of guilt beyond the person of its author.” *Federalist* 43 (Madison) in *The Federalist* 271, 273 (cited in note 42). See also, for example, Cong Globe, 38th Cong, 1st Sess 188 (Jan 13, 1864) (Rep Orth) (suggesting of the Virginia district judge’s position: “We are told that taking the property of the traitor and placing its proceeds in the national Treasury, is . . . a visiting of the sins of the father upon his children. Even . . . so, it would be but a just fulfillment of the scriptural denunciation against the wicked”); id at 213 (Jan 14, 1864) (Rep Garfield) (suggesting the same: “Why should not the children of traitors suffer the same kind of loss and inconvenience as the children of thieves and of other felons do?”). But see id at 301 (Jan 21, 1864) (Rep Rogers) (refuting the judge’s position and stating that “it is clear evidence that the . . . Constitution was not simply intended to apply to attainder of treason, but was intended to prevent . . . the forfeiture of the estate for a longer time than the

## III. CONSCRIPTION

When the Confederates attacked Fort Sumter, President Lincoln called out the militia; when more men were needed he called for volunteers.<sup>332</sup> By early 1863 it had become clear that something more was needed. There were not enough volunteers, explained Massachusetts Senator Henry Wilson, and to federalize more militiamen would produce whole new untried regiments; what was needed were individual soldiers to bring existing units up to full strength.<sup>333</sup> And so it came to pass that Congress in March 1863 adopted a statute conscripting individuals into the armed forces for the first time in its history.<sup>334</sup>

The case for the constitutionality of such a measure was simple and straightforward. The Constitution, said Senator Wilson, “confers upon Congress the absolute and complete power ‘to raise and support armies,’ qualified only by the provision that appropriations for that purpose shall be for not more than two years.”<sup>335</sup> It followed that Congress had a choice of means: It could raise troops either “by voluntary enlistment or by compulsory process. If men cannot be raised by voluntary enlistment,” he continued, “then the Government must raise men by involuntary means, or the power to raise and support armies for the public defense is a nullity.”<sup>336</sup>

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life of the offender”); Cong Globe App, 38th Cong, 1st Sess 40 (Jan 20, 1863) (Rep Sweat) (“It is . . . clear . . . that the meaning of [the] third section of the Constitution is to confine forfeiture of estates to the lives of the offenders.”). The proviso remained unaltered.

<sup>332</sup> See text accompanying notes 18–20.

<sup>333</sup> Cong Globe, 37th Cong, 3d Sess 976 (Feb 16, 1863).

<sup>334</sup> 12 Stat at 731–37. The central provision was § 1:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared on oath their intention to become citizens under and in pursuance of the laws thereof, between the ages of twenty and forty-five years, except as hereinafter excepted, are hereby declared to constitute the national forces, and shall be liable to perform military duty in the service of the United States when called out by the President for that purpose.

Something akin to conscription had been accomplished under the Militia Act of 1862 by extending the period of militia service; by this means “President Lincoln ordered a ‘draft’ of 300,000 militia, with quotas assigned to the States.” Randall, *Constitutional Problems under Lincoln* at 244–47, 254–55 (cited in note 3) (referring to the act that was passed at 12 Stat 597 (July 17, 1862)).

<sup>335</sup> Cong Globe, 37th Cong, 3d Sess 976 (Feb 16, 1863), quoting US Const Art I, § 8, cl 12.

<sup>336</sup> Cong Globe, 37th Cong, 3d Sess 977 (Feb 16, 1863), quoting an 1814 letter of Secretary of State James Monroe to the same effect. See also Cong Globe, 37th Cong, 3d Sess 736 (Feb 5, 1863) (Sen Sherman) (“There is no limitation to the power to raise armies. They can be raised by volunteering, by conscription, by any of those modes that were recognized among nations, at the time the Constitution was formed, as a proper mode of raising armies.”). President Lincoln said much the same thing in an unpublished draft apparently written in September 1863. See Basler, ed, 6 *Collected Works of Abraham Lincoln* at 445–47 (cited in note 130).

The Senate debated the conscription bill for a single day and passed it without taking the yeas and nays.<sup>337</sup> Such discussion as there was concerned details. No one questioned the basic principle of conscription; the only constitutional objection was to the drafting of members of Congress, who under Article I, § 6 were privileged from arrest during attendance in their Houses or while traveling to and from a congressional session—except for treason, felony, or breach of the peace.<sup>338</sup>

More central constitutional objections surfaced when the bill reached the House. Of course, said Ohio Representative Chilton White, the Constitution gave Congress power to raise and support armies. But the Constitution also specified *how* this power was to be exercised; “and where the mode and manner of exercising a given power is laid down and defined it is a rule of construction and a principle of constitutional law that every other power and mode than that laid down and defined is excluded.” Thus Congress could raise armies by voluntary enlistment or by calling out the militia, but not otherwise: “You have no power to force soldiers into the service of the United States in any other way than through and by means of the militia organizations established under the laws of the States.”<sup>339</sup>

The flaws in this argument are manifest. Not only does it assume that calling out the militia is a means of raising armies rather than an alternative to doing so; it also would seem to preclude a volunteer army as well as a draft, though White conceded the constitutionality of volunteers. But the militia clauses also formed the basis of a more sophisticated argument that had to be taken a little more seriously.

It was Charles Wickliffe of Kentucky who first stated this objection in detail. Whom did the bill propose to define as the national forces and subject to conscription? Male citizens between the ages of eighteen and forty-five. But the very same men constituted the militia under a statute passed by Congress in 1792.<sup>340</sup> Thus, Wickliffe concluded, the bill would deprive the states of their militias and deny them the right to appoint their officers, which Article I guaranteed.<sup>341</sup>

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<sup>337</sup> Cong Globe, 37th Cong, 3d Sess 976–1002 (Feb 16, 1863).

<sup>338</sup> Id at 990 (Sens Wilkinson and Nesmith). Since the bill would make failure to report when drafted a federal offense, see id at 977, there does not appear to be much to this objection. There were also questions about the drafting of aliens, but they appeared based essentially on the law of nations, and there seems no basis for doubting Congress’s power to include them. See id at 991, 993, 1001 (Sen Howard). Proposed exemptions for ministers and conscientious objectors appear to have been based on policy, not perceived constitutional compulsion. Id at 994 (Sens Sumner, Eyck, Lane and Harris).

<sup>339</sup> Id at 1224 (Feb 23, 1863).

<sup>340</sup> 1 Stat 271, 271–72 § 1 (May 8, 1792).

<sup>341</sup> Cong Globe, 37th Cong, 3d Sess 1258–59 (Feb 24, 1863) (“This bill proposes to give you an army of conscripts; and I should like to know what then becomes of the militia which belongs to the several States of this Union.”). See also id at 1225 (Feb 23, 1863) (Rep White) (“This bill

And of course, added Ohio Representative Samuel Cox, the Second Amendment guaranteed each state the right to maintain a militia for its own defense.<sup>342</sup>

As Senator Wilson explained, Secretary of State James Monroe had answered this contention in part in advocating a draft in 1814:

But it is said that by drawing men from the militia service into the regular Army, and putting them under regular officers, you violate a principle of the Constitution, which provides that the militia shall be commanded by their own officers. If this was the fact, the conclusion would follow. But it is not the fact. The men are not drawn from the militia, but from the population of the country. When they enlist voluntarily, it is not as militiamen that they act, but as citizens. If they are drafted it must be in the same sense. In both instances they are enrolled in the militia corps, but that, as is presumed, cannot prevent the voluntary act in the one instance or the compulsive in the other. The whole population of the United States within certain ages belong to these corps. If the United States could not form regular armies from them they could raise none.<sup>343</sup>

Representative Stevens put it more succinctly in the House: Of course, when Congress called out the militia the states would appoint its officers. But the bill did not provide for calling out the militia; it provided for raising armies, under “an entirely distinct and separate provision” of Article I.<sup>344</sup>

The House was unpersuaded by Wickliffe’s argument; it passed the bill by a vote of 115-48.<sup>345</sup> When the Senate came to consider House amendments, Wickliffe’s argument was repeated and expanded

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takes away from the States the right to appoint the officers, while it subjects the entire militia of every State in the Union to be brought into the service at the pleasure of the President.”); id at 1249 (Rep Mallory) (Feb 24, 1863) (“It has always been the practice of our Federal Government . . . in calling out the militia force in time of war . . . to recognize the *right* of the State authorities to organize and officer their respective forces.”); id at 1269 (Feb 24, 1863) (Rep Cox) (“[T]his bill seeks to take from the States certain rights over their own militia—a right never to be yielded by a free people without dishonor and danger.”); US Const Art I, § 8, cl 16.

<sup>342</sup> Cong Globe, 37th Cong, 3d Sess 1269 (Feb 24, 1863). See also US Const Amend II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”). Cox added a new twist on Wickliffe’s objection:

The militia is to be called out, under this bill, directly by the President or his subordinate Federal agents acting upon the individual citizens. It never was the custom of the Government so to call them. They should be called through the intervention of the States, and in that way alone.

Cong Globe, 37th Cong, 3d Sess 1269 (Feb 24, 1863).

<sup>343</sup> Cong Globe, 37th Cong, 3d Sess at 977 (Feb 16, 1863).

<sup>344</sup> Id at 1261 (Feb 24, 1863).

<sup>345</sup> Id at 1293 (Feb 25, 1863).

upon,<sup>346</sup> but even apart from Monroe and Stevens's refutation it was ultimately unconvincing. Whenever Congress raised armies, it took from the states men who might otherwise form part of the militia—whether Congress conscripted the men or accepted only volunteers. In other words, Congress reduced the militia *however* it raised armies—and the militia clauses can hardly be read to deny Congress an independent power expressly granted it by another provision of the Constitution. Indeed the militia clauses themselves plainly contemplate that a state may be deprived of its militia; for when the President calls them into federal service, there may be none left for defense of the state.

Delaware's two senators propounded a final argument against conscription, and it was the most fundamental of all. Heretofore, said Senator Bayard, it had been understood that armies were to be raised voluntarily. The constitutional provision, Senator Saulsbury added, should be interpreted in light of its history—and that history was, as Bayard had said, one of voluntary enlistments. Great Britain had never resorted to conscription, said Bayard, and the power to raise armies should be construed to mean by methods known and practiced in England at the time the Constitution was written—that is, by the enlistment of volunteers.<sup>347</sup>

Arguments for cutting down broad constitutional terms on the basis of tradition had a respectable pedigree. They had succeeded in the case of *ex post facto* laws<sup>348</sup> and would fail in that of bankruptcy.<sup>349</sup> The difficulty in the conscription case was that tradition was not so

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<sup>346</sup> See, for example, *id* at 1363–65 (Feb 28, 1863) (Sen Bayard) (objecting that the bill would obliterate the state militia, destroying an important constitutional check on the centralized federal powers); *id* at 1388 (Sen Saulsbury) (arguing that a congressional right to raise armies by conscription “would destroy not only the recognized right of the States to officer their militia, but the existence of a State militia itself”). Bayard also objected that the bill did not itself raise armies but unconstitutionally empowered the president to do so. *Id* at 1365 (“This bill . . . does not propose to do, but to authorize another to do that which we shrink from the responsibility of attempting ourselves. . . [and] does not come within the language of the Constitution.”). See also *id* at 1367 (Sen Turpie) (arguing that the conscription bill would empower the president to enroll, organize, officer and pay the militia). Senator Howard sarcastically inquired whether Turpie would require Congress to open a recruiting office in the Capitol, *id*, but he missed the point. Bayard had said Congress ought to specify, for example, how many troops should be drafted and for what purpose, *id* at 1365–66; the point of the nondelegation doctrine is that Congress itself must make the basic policy decisions.

<sup>347</sup> *Id* at 1363–64 (Sen Bayard) (arguing that “the Crown itself . . . had no right of conscription”); *id* at 1388 (Sen Saulsbury) (comparing the potential effects of the bill to the Roman “military empire” and Praetorian guard).

<sup>348</sup> See *Calder v Bull*, 3 US (3 Dall) 386, 388, 396 (concluding that the Ex Post Facto Clause applied only to criminal cases); Currie, *The First Hundred Years* at 42–45 (cited in note 13) (discussing *Calder*).

<sup>349</sup> See Currie, *Democrats and Whigs* at 128–36 (cited in note 1) (describing earlier congressional debates); *Hanover National Bank v Moyses*, 186 US 181, 185 (1902) (upholding the constitutionality of a voluntary bankruptcy provision).

one sided as opponents would have had others believe. With the example of England Senator Sherman juxtaposed that of France.<sup>350</sup> New York Representative Abraham Olin reminded the House that the 1814 draft proposal had the support of President Madison as well as of his Secretary of State.<sup>351</sup> Finally, and perhaps most important, compulsory military service had in fact been practiced in the United States from the beginning: The 1792 statute that first organized the militia provided that it included all able-bodied males of fighting age, willy-nilly; there was not one word to limit the militia to volunteers.<sup>352</sup> The words of the Constitution, as Wilson had reminded his colleagues, imposed no such limit for regular soldiers either;<sup>353</sup> if it was all right to force men to join the militia, it was hard to see why they could not be forced to join the army as well.<sup>354</sup>

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<sup>350</sup> Cong Globe, 37th Cong, 3d Sess 734–35 (Feb 5, 1863) (noting that the law of France provided for compulsory military duty in times of war or danger). See also Vattel, *The Law of Nations* bk III, ch II, § 8 at 295–96 (cited in note 130) (“Every member of society is obliged to serve and defend the state as far as he is capable . . . . Every man capable of carrying arms, should take them up, at the first order of him who has the power of making war.”). Even in England, moreover, men had commonly been impressed into the Navy against their will, as Chief Justice Taney recognized in the draft opinion cited in note 281.

<sup>351</sup> Cong Globe, 37th Cong, 3d Sess 1234 (Feb 23, 1863).

<sup>352</sup> 1 Stat at 271. Indeed in a later controversy over whether volunteers were part of the militia it was strongly urged that they were not because militia service was compulsory. See Currie, *The Federalist Period* at 248–50 (cited in note 1). See also Randall, *Constitutional Problems under Lincoln* at 240 (cited in note 3) (“During the Revolution some of the States filled their Continental quotas by means of the draft.”).

<sup>353</sup> See Federalist 23 (Hamilton) in *The Federalist* 146, 147–48 (cited in note 42):

The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation: *Because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.*

...

... [T]here can be no limitation of that authority which is to provide for the defense and protection of the community, in any matter essential to its efficacy—that is, in any matter essential to the *formation, direction, or support* of the NATIONAL FORCES.

<sup>354</sup> Miscellaneous constitutional objections were made to several ancillary provisions of the conscription bill. Representative White was concerned lest a critic of the war be subject to criminal penalties under a provision making it an offense to counsel resistance to the draft; Representative Bingham replied that freedom of expression had its limits and that Congress could punish enticement to the commission of a crime. Cong Globe, 37th Cong, 3d Sess 977–78 (Feb 16, 1863); id at 1226–29 (Feb 23, 1863). By treating no shows as deserters, Representative Cox objected, the bill would subject citizens to military law and court-martial before they entered the federal service, which Justice Story had said Congress could not do. Id at 977 (Feb 16, 1863); id at 1269 (Feb 24, 1863). See also Story, 3 *Commentaries on the Constitution* §§ 1202, 1208 at 85–86, 93–94 (cited in note 20) (insisting that only those who were in the “actual service of the United States” could be subjected to martial law). When this point had been made in connection with an earlier bill to draft the militia itself, Senator Doolittle had responded that Justice Story dissented in the case that Senator Carlile cited in support of his conclusion. Senator Sherman also asserted that,

And so the conscription bill became law, a year after the Confederate Congress had adopted a similar provision.<sup>355</sup> The Pennsylvania Supreme Court initially declared it unconstitutional.<sup>356</sup> Chief Justice Taney prepared an opinion to the same effect in which he retraced the various arguments made in Congress,<sup>357</sup> but he never had to use it; the draft issue did not reach the U.S. Supreme Court until the First World War. When it did the Court unanimously upheld it.<sup>358</sup> Are you surprised?

#### IV. WEST VIRGINIA

On May 29, 1862, Virginia Senator Waitman Willey presented a memorial purporting to come from the Virginia legislature, asking Congress to admit a new state from within the boundaries of Virginia. The relevant constitutional provision reads as follows:

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.<sup>359</sup>

It had long been settled that the Consent Clause of this section applied to the dismemberment as well as to the consolidation of states; Kentucky had been carved out of Virginia and Maine out of

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even under Story's view, Congress could define the point at which federal service began. Cong Globe, 37th Cong, 3d Sess 716, 729-30, 732-34 (Feb 4-5, 1863). Senator Turpie protested that a provision subjecting soldiers to court-martial for all serious offenses invaded both state rights and the right to jury trial. Id at 978 (Feb 16, 1863); id at 1368 (Feb 28, 1863). Senator Davis, who didn't like the provision either, nevertheless thought its constitutionality assured by Congress's power to make rules for the government of the armed forces. Id at 1377 (Feb 28, 1863); see US Const Art I, § 8, cl 14. Finally, Senator Powell at the last minute offered an amendment to exempt conscientious objectors, suggesting that it offended the spirit if not the letter of the First Amendment to make them fight; the Senate rolled over him without explanation by a vote of 32-8. Id at 1389-90 (Feb 28, 1863).

<sup>355</sup> See Currie, 90 Va L Rev at 1277-95 (cited in note 2).

<sup>356</sup> See *Kneedler v Lane*, 45 Pa 238, 251-52 (1863). The only new argument put forward in the various opinions was essentially one of intergovernmental immunity: that by drafting state officers the United States could in effect put an end to state government. Id at 246 (majority); id at 269-70 (Thompson concurring). This is a plausible argument, much pressed in the controversy over the Confederate draft, see Currie, 90 Va L Rev at 1277-95 (cited in note 2), but it would affect the validity of the law only as applied to state officers, not on its face. The initial decision was 3-2; after one of the judges in the majority was replaced, the court reversed itself and upheld the law, again by a vote of 3-2. *Kneedler*, 45 Pa at 294-300. Other state court decisions are cited in Randall, *Constitutional Problems under Lincoln* at 270-71 n 58 (cited in note 3).

<sup>357</sup> See Philip G. Auchampaugh, ed, *A Great Justice on State and Federal Power. Being the Thoughts of Chief Justice Taney on the Federal Conscription Act*, 18 Tyler's Q Hist & Genealogical Mag 72 (1936) (reproducing Chief Justice Taney's "Undelivered Opinion").

<sup>358</sup> See *Selective Draft Law Cases*, 245 US 366, 377-88 (1918).

<sup>359</sup> US Const Art IV, § 3.

Massachusetts, with the blessing of the states concerned.<sup>360</sup> And now, the memorial proclaimed, the Virginia legislature had given the required consent to the erection of another new state within its borders.<sup>361</sup>

Virginia Senator Waitman Willey? But Virginia had voted to secede from the Union and withdrawn its Senators; Mr. Willey was elected after the secession ordinance took effect. And how magnanimous of a state that considered itself out of the Union to agree to the admission of a portion of its territory to a federation of which it was no longer a part!

Senator Willey explained what had happened. When the Virginia convention voted to secede, loyal citizens in the northwestern part of the state had held a convention of their own to consider what to do. This first convention denounced secession as unconstitutional, urged citizens to vote for members of Congress despite a prohibitory decree issued by the secession convention, and called for the election of delegates to a second convention, “to devise such measures and take such action as the safety and welfare of the people they represent may demand.”<sup>362</sup> This second convention, which met in Wheeling in June of 1861, declared the offices of Governor, Lieutenant Governor, and Attorney General vacant by reason of the treasonable behavior of their incumbents and proceeded to replace them. It also redefined a quorum of the legislature as a majority of those members taking an oath to support the Constitution of the United States, ordered a referendum on the question whether a new state should be formed, and provided for the election of delegates to a constitutional convention for the new state in case its formation was approved. The voters endorsed

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<sup>360</sup> See Cong Globe, 37th Cong, 3d Sess 38 (Dec 9, 1862) (Rep Brown of Virginia). As Brown noted, New York had also consented to the admission of Vermont, though whether Vermont had been part of New York was disputed. *Id.* See Currie, *The Federalist Period* at 100–01 (cited in note 1). As Senator Van Winkle observed in a later debate, Madison had recognized the possibility of dividing states in the Federalist. See Cong Globe, 38th Cong, 1st Sess 1775 (Apr 21, 1864); Federalist 43 (Madison) in *The Federalist* at 290–91 (cited in note 331) (noting that the new Constitution corrected the Articles of Confederation’s “defect” in overlooking the “eventual establishment” of other states). Attorney General Bates, in urging President Lincoln to veto the West Virginia bill, professed to believe there was still some question whether the ban on partitioning states was not absolute after all. See *Act for the Admission of West Virginia into the Union*, 10 Op Atty Gen 426, 427–28 (1862) (Edward Bates, AG). Navy Secretary Gideon Welles found Bates’s objections “decisive and conclusive.” Welles, 1 *Diary of Gideon Welles* at 188, 191, 206–09 (cited in note 141). For an exhaustive analysis of this question, see Vasan Kesavan and Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 Cal L Rev 291, 332–95 (2002), quoting Farrand, 2 *The Records of the Federal Convention* at 578 (cited in note 27) (finding (almost) decisive the fact that the draft presented to the Committee of Style at the Constitutional Convention for polishing rather than substantive change had expressly permitted a state to be divided with its consent).

<sup>361</sup> See Cong Globe, 37th Cong, 2d Sess 2415 (May 28, 1862).

<sup>362</sup> *Id.* at 2415–16.



the creation of a new state and the constitutional convention drafted a constitution for it, which the people endorsed in a second referendum. It was then that the reorganized Virginia legislature gave its consent to the formation of the new state and that Senator Willey—himself elected by the reformed legislature under the new quorum rule—presented the legislature’s memorial to Congress.<sup>363</sup>

Four weeks afterward the Senate Committee on Territories reported a bill to admit West Virginia to the Union on two conditions: that fifteen named counties be added to the new state, and that its constitution be revised to provide for the gradual abolition of slavery.<sup>364</sup> There were policy objections to the inclusion of additional counties, which were thought not sufficiently sympathetic to the Union cause,<sup>365</sup> and the provision disappeared. An amended version of the bill passed the Senate on July 14 (two days before the end of the session) and the House when Congress met again in December.<sup>366</sup> West Virginia duly amended its constitution, and the President declared it a state on April 20, 1863.<sup>367</sup> But the matter was not so simple as this brief chronology would make it appear.

The first objection was to the requirement that West Virginia gradually abolish slavery. Senator Sumner wanted to alter it to require immediate abolition;<sup>368</sup> others wanted to omit it entirely. It was “the right of each State,” insisted Virginia’s other Senator, John Carlile, “to form and regulate . . . its own domestic institutions”; the people of West Virginia would “never submit to congressional dictation or control in

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<sup>363</sup> Id at 2415–17. The early portions of this story are briefly told in Nevins, 1 *The War for the Union* at 139–44 (cited in note 8). More complete accounts include Richard Orr Curry, *A House Divided: A Study of Statehood Politics and the Copperhead Movement in West Virginia* (Pittsburgh 1964), and James C. McGregor, *The Disruption of Virginia* (Macmillan 1922). Proceedings of the two conventions are printed in Virgil A. Lewis, ed, *How West Virginia Was Made* (News-Mail 1909). The whole West Virginia saga is discussed in Randall, *Constitutional Problems under Lincoln* at 433–76 (cited in note 3).

<sup>364</sup> Cong Globe, 37th Cong, 2d Sess 2942 (June 26, 1862). The slavery provision read as follows: “[T]he convention shall make provision that from and after the 4th day of July, 1863, the children of all slaves born within the limits of said State shall be free.” Id.

<sup>365</sup> Id at 3037–38 (July 1, 1862) (Sens Willey and Wade).

<sup>366</sup> Id at 3320 (July 14, 1862) (Senate vote: 23-17); Cong Globe, 37th Cong, 3d Sess 59 (Dec 10, 1862) (House vote: 96-55). For the amendments see Cong Globe, 37th Cong, 2d Sess 3316 (July 14, 1862); for the statute see 12 Stat 633, 633–34 (Dec 31, 1862).

<sup>367</sup> Abraham Lincoln, Proclamation (Apr 20, 1863) in Richardson, ed, 6 *Messages and Papers of the Presidents* 167, 167 (cited in note 10). More precisely, the President said the Act would take effect sixty days after the proclamation itself was issued, which is to say in June of 1863.

<sup>368</sup> Cong Globe, 37th Cong, 2d Sess 2942, 3034, 3316 (June 26, July 1 and 4, 1862). But the alternative to gradual emancipation, replied Willey, was no emancipation at all. Id at 3318 (July 14, 1862). And it would be odd, Senator Hale added, to reject West Virginia for doing what we have urged other states to do. Id at 3034 (July 1, 1862). Sumner’s proposed amendment was defeated by a vote of 24-11. Id at 3308 (July 14, 1862).

matters relating to their own internal government.”<sup>369</sup> Joseph Segar of Virginia made the same point in the House: To condition West Virginia’s admission on the abolition of slavery was “a flagrant departure from the great doctrine that the States may of right manage their domestic affairs, and fashion their social institutions as they choose.”<sup>370</sup>

Carlile and Segar had focused on state rights; Republican Senator Jacob Collamer of Vermont emphasized state equality. Congress, he said, had discretion to refuse to admit a state for any reason it liked, but all states had to be on an equal footing:

[W]hat is implied in being a sovereign State and a State of this Union? A State with the power to regulate its own internal concerns in its own way, including the relation of master and slave, and if the State is shorn of that power, if it is stated that that shall be a condition precedent, a prerequisite to their being a State, they are not admitted on the footing of the other States; they are shorn of their power. However we may consider it a reprehensible power, it is still a sovereign power which other States possess and that does not. Therefore I say, Mr. President, it has always been my opinion that when we admit a State, we must admit it sincerely to be what we declare it to be, on the same footing as other States, and hence I say we cannot make such prerequisites and conditions precedent to the right of admission that they shall exclude slavery or prohibit it, or prohibit common schools or any other thing that the other States at large have a right to do.<sup>371</sup>

Perhaps the proposed condition that West Virginia recede from slavery seems familiar. If so, it is because a similar condition had been proposed in the case of Missouri some forty years before. As Ohio Congressman John Bingham observed, Congress had often imposed conditions on the admission of states.<sup>372</sup> But the proposed slavery provision in the Missouri case had provoked violent objections on grounds both of unconstitutional conditions and of equal footing that were barely hinted at in the West Virginia debates, and of course the Missouri provision had not been adopted.<sup>373</sup>

There is no point in reviewing the earlier arguments in detail. Suffice it to say that in West Virginia’s case the objections did not prevail:

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<sup>369</sup> Id at 3314.

<sup>370</sup> Cong Globe, 37th Cong, 3d Sess, 54–55 (Dec 10, 1862).

<sup>371</sup> Cong Globe, 37th Cong, 2d Sess, 3035 (July 1, 1862).

<sup>372</sup> Cong Globe, 37th Cong, 3d Sess 58 (Dec 10, 1862) (“There is scarcely a single bill which has passed the Congress . . . for the admission of a new State without conditions annexed.”).

<sup>373</sup> See Currie, *The Jeffersonians* at 232–45 (cited in note 1) (discussing the Missouri controversy).

Carlile's motion to admit the new state without conditions failed badly, and admission was conditioned on the gradual abolition of slavery.<sup>374</sup>

The second objection to the West Virginia bill was more basic: Virginia had not consented to its proposed partition, as Article IV required. As Virginia Representative Jacob Blair argued, a body calling itself the Virginia legislature had indeed purported to give its consent.<sup>375</sup> But, said Representative Crittenden, that body was not the Virginia legislature; that legislature still sat in Richmond.<sup>376</sup> The Wheeling government, Representative Olin declared, was without a shadow of legitimacy.<sup>377</sup> Indeed, Senator Powell added, only 38 of Virginia's 160 or so counties were represented in the Wheeling "legislature."

I do not believe it was ever contemplated by the Constitution of the country, that less than one-fourth of the people constituting a State should in revolutionary times like these form themselves into a Legislature and give their consent to themselves to form a new State within the limits of one of the States of this Union.

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... If the cities of New York and Brooklyn and the counties in which they are, were to get up a little bogus legislature and say they were the State of New York, and ask to be admitted and cut off from the rest of the State, I would as soon vote for their admission as for the admission of this new State.<sup>378</sup>

As Crittenden said, the people of western Virginia were consenting to make themselves a state: "[H]ere is an application to make a new State at the instance of the parties desiring to be made a new State,

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<sup>374</sup> See Cong Globe, 37th Cong, 2d Sess 3316 (July 14, 1862) (rejecting the motion by a vote of 25-11); 12 Stat at 634, §§ 1-2 (finalizing the act with the antislavery provision included). In its final form the provision read as follows:

The children of slaves born within the limits of this State after the fourth day of July, eighteen hundred and sixty-three, shall be free; and that all slaves within the said State who shall, at the time aforesaid, be under the age of ten years, shall be free when they arrive at the age of twenty-one years; and all slaves over ten and under twenty-one years shall be free when they arrive at the age of twenty-five years; and no slave shall be permitted to come into the State for permanent residence therein.

Id at 634, § 1.

<sup>375</sup> Cong Globe App, 37th Cong, 2d Sess 328 (July 16, 1862).

<sup>376</sup> Cong Globe, 37th Cong, 3d Sess 46-47 (Dec 9, 1862) ("[W]e are gravely told that a seceding part of the State of Virginia . . . is the government of Virginia.").

<sup>377</sup> Id at 45 ("It was simply a movement of the people without any of the forms of law, when the formation of a State government was attempted by the people of Western Virginia."). See also id at 37 (Rep Conway) (arguing that the Wheeling government could not properly consent in the name of Virginia).

<sup>378</sup> Cong Globe, 37th Cong, 2d Sess 3320 (July 14, 1862).

and nobody else consenting . . . . It is the party applying for admission consenting to the admission.”<sup>379</sup>

These arguments seem to me quite irrefutable.<sup>380</sup> As Olin said, the new Virginia government was revolutionary; it could be justified only by resort to “that great ‘higher law’ of self-protection and fidelity to the Union.”<sup>381</sup> Virginia Representative William G. Brown frankly defended the Wheeling regime as the product of an act of popular sovereignty:

If my friend, who is rather inclined to call the convention at Wheeling a mob, will turn to the Declaration of Independence, he will there find the great principle laid down that the legislative powers of the people cannot be annihilated; that when the functionaries to whom they are intrusted become incapable of exercising them, they revert to the people, who have the right to exercise them in their primitive and original capacity.<sup>382</sup>

As invocation of the Declaration demonstrates, we believe in the right of revolution; we owe to it our existence as a nation. When a revolution succeeds in another country, we recognize the legitimacy of the new government (as we had done in the cases of Mexico and Texas); and a revolution had succeeded in northwestern Virginia. It had not, however, succeeded in the state as a whole; and yet the Wheeling government claimed to act on behalf of the entire state of Virginia.<sup>383</sup> To recognize its right to do so would appear to go far be-

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<sup>379</sup> Cong Globe, 37th Cong, 3d Sess 47 (Dec 9, 1862). See also *id* at 48 (Rep Dawes) (“[T]his new State, within itself, has consented to the doing [and one] cannot pretend that the portion of the old State which is left has consented.”); Welles, 1 *Diary of Gideon Welles* at 208 (cited in note 141) (“This action was not predicated on the consent of the people of Virginia, legitimately expressed.”).

<sup>380</sup> See Randall, *The Civil War and Reconstruction* at 241 (cited in note 128) (arguing that Virginia’s consent was obtained by a species of “legal fiction”).

<sup>381</sup> Cong Globe, 37th Cong, 3d Sess 45 (Dec 9, 1862).

<sup>382</sup> *Id* at 38. See also *id* at 57 (Dec 10, 1862) (Rep Bingham) (invoking the inherent power of self-government).

<sup>383</sup> See 10 Op Atty Gen at 431–32 (recommending that President Lincoln veto the West Virginia bill on the ground, among others, that the new legislature, which he had recognized on revolutionary grounds, did not represent the state as a whole). See also Randall, *Constitutional Problems under Lincoln* at 443 (cited in note 3) (arguing that the June revolutionary convention “was in no sense representative of the State of Virginia for which it presumed to act”). See also 10 Op Atty Gen at 429–30 (pedantically relying on the plural form of the constitutional provision—“the consent of the legislatures of the States concerned”—to add that the bill was also defective because “[i]t is not pretended that the legislature of *West Virginia* has consented, nor that there is, in fact, any such legislature to give consent”) (emphasis added). In a draft opinion prepared apparently at the time he signed the bill, President Lincoln dismissed this latter argument: “I do not think the plural form of the words ‘Legislatures’ and ‘States’ . . . has any reference to the *new* State concerned. That plural form sprang from the contemplation of two or more old States contributing to form a new one.” See Abraham Lincoln, Opinion on the Admission of West Virginia into the Union (Dec 31, 1862) in Basler, ed, 6 *Collected Works of Abraham Lincoln* 26, 27 (cited in note 130).

yond even revolutionary theory; we have not yet proved the validity of Virginia's consent.

Representatives Blair and Bingham suggested that the Wheeling government *did* represent the entire state of Virginia, for the state consisted of its loyal citizens.<sup>384</sup> But in this country, at least, people do not lose their citizenship by committing treason; as Representative Stevens said, “[t]he majority of the people of Virginia was the State of Virginia.”<sup>385</sup> The Wheeling government had no mandate to speak for the entire state.

Perhaps the most persuasive argument for the legitimacy of the Wheeling legislature was put forward by Representative John Noell of Missouri, who relied on the Guarantee Clause of Article IV, § 4:

We have undertaken, by the Constitution, to guaranty to every State a republican form of government. How are we to comply with that clause of the Constitution, when the organized government of the State of Virginia has gone into a treasonable conspiracy, and has undertaken to draw the whole State into the jurisdiction of a usurpation and a foreign government? How are we to comply with this provision of the Constitution in guarantying to the people of West Virginia a republican form of government, unless we recognize in them a State in operation—a reorganization of the old system, still attached to the Union to which we belong? That is the only way in which we will be able to comply with this provision of the Constitution.

. . . Why, sir, the courts of Virginia, the laws of Virginia, and the whole social and political system of Virginia were broken, destroyed, perverted, and carried away; and the people of that section of the country were deprived of all means of regulating and controlling their own domestic affairs, for the machinery by which those things were to be accomplished was taken away from them. They were left without law, without courts, without officers, without everything, unless we undertake here to say that the State of Virginia was a State within the southern confederacy.<sup>386</sup>

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<sup>384</sup> Cong Globe App, 37th Cong, 2d Sess 328 (July 16, 1862) (Rep Blair); Cong Globe, 37th Cong, 3d Sess 57 (Dec 10, 1862) (Rep Bingham). President Lincoln made the same argument in his draft opinion on the admission of West Virginia. See Lincoln, Opinion on the Admission of West Virginia into the Union at 26–27 (cited in note 383) (“Much less than to non-voters, should any consideration be given to those who did not vote, *in this case*: because . . . they were not merely neglectful of their rights under, and duty to, this government, but were also engaged in open rebellion against it.”).

<sup>385</sup> Cong Globe, 37th Cong, 3d Sess 50 (Dec 9, 1862).

<sup>386</sup> Id at 53 (Dec 10, 1862).

This was a creative argument, but as I say a plausible one. The people of western Virginia were without a government, and it was the duty of the United States to see that it got one; the most appropriate means to that end was to recognize the new government they had established for themselves. Yet this argument too was subject to the same objection we encountered in discussing the revolutionary thesis: By what alchemy did the anarchy in northwestern Virginia entitle the United States to recognize a new government for the entire state?<sup>387</sup>

Representative Stevens accepted the argument that the admission of West Virginia was unconstitutional. I can never agree, he said, “that the Legislature chosen by a vast majority of the people of a State is not the Legislature of the State”—however disloyal its members.<sup>388</sup> “Now, then,” he continued:

[H]ow has [Virginia] ever given its consent to this division? A highly respectable but very small number of the citizens of Virginia—the people of West Virginia—sembled together, disapproved of the acts of the State of Virginia, and with the utmost self-complacency called themselves Virginia. Now, is it not ridiculous? Is not the very statement of the facts a ludicrous thing to look upon—although a very respectable gentleman, Governor Pierpont, was elected by them Governor of Virginia? . . . The State of Virginia . . . has never given its consent to this separation of the State.<sup>389</sup>

Yet Stevens added that he could vote for the admission of West Virginia “without any compunctions of conscience,” for the Constitution no longer applied to Virginia. That state, by rebelling against the Union, had repudiated the Constitution; and “[i]t is idle to tell me that the obligations of an instrument are binding on one party while they are repudiated by the other.” Moreover, by blockading southern ports the United States had recognized the Confederacy as a belligerent power, “entitled to all the privileges and subject to all the rules of war, according to the law of nations.”

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<sup>387</sup> The most thorough scholarly analysis of this controversy, invoking the arguments discussed in the text, concludes that the requirement of state consent was indeed met:

The legal fiction of Virginia’s consent to the creation of West Virginia follows logically . . . from the sound premises that secession is unlawful and that the federal government has the power to recognize a lawful, alternative State government where rebellion has displaced the lawful, loyal, republican regime.

Kesavan and Paulsen, 90 Cal L Rev at 325 (cited in note 360). The supporting arguments are found in id at 313–25.

<sup>388</sup> Cong Globe, 37th Cong, 3d Sess 50 (Dec 9, 1862).

<sup>389</sup> Id.

I say, then, that we may admit West Virginia as a new State, not by virtue of any provision of the Constitution, but under our absolute power which the laws of war give us in the circumstances in which we are placed. I shall vote for this bill upon that theory and upon that alone; for I will not stultify myself by supposing that we have any warrant in the Constitution for this proceeding.<sup>390</sup>

Mr. Stevens wins the prize for candor, and we would see variants of his thesis more than once again;<sup>391</sup> but I must say it is no simple matter to reconcile his argument with the standard Northern position that secession was unconstitutional and void.<sup>392</sup>

Supporters of the West Virginia bill had one final string to their bow, and precedent was its name. President Lincoln, said Representative Blair, had recognized the legitimacy of the Wheeling government when he sent troops at Governor Pierpont's request to put down domestic violence under Article IV.<sup>393</sup> The Secretary of the Interior had done so when he sent Governor Pierpont official notice of the new apportionment of seats in Congress in June. The House had done so when it seated Blair himself and his colleague Segar, both chosen in special elections ordered by Governor Pierpont to fill vacancies in accordance with Article I, § 2.<sup>394</sup> Finally, the Senate had recognized the legitimacy of the reorganized legislature itself by voting almost unanimously to seat two Senators chosen by that legislature under the terms of Article I, § 2.<sup>395</sup>

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<sup>390</sup> Id at 50–51. Representative Noell, who concluded that Congress had “an undoubted right” to admit West Virginia, also suggested that in such parlous times “we cannot afford, while the nation is trembling on the brink of destruction, to split hairs on technical constitutional points.” Id at 53 (Dec 10, 1862).

<sup>391</sup> See, for example, id at 38 (Dec 9, 1862) (Rep Conway) (arguing that when state officers abandon their functions sovereignty is forfeited to the United States, and the area becomes a territory).

<sup>392</sup> See, for example, id at 39 (Rep Brown) (insisting that for that reason Virginia was still in the Union). Representative Horace Maynard of Tennessee otherwise added he would have no right to be present, because he would be an enemy alien. Id at 49. See also id at 55 (Rep Sheffield).

<sup>393</sup> See US Const Art IV, § 4 (“The United States . . . shall protect each [State] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”). See also Lincoln, Special Session Message (July 4, 1861) at 24 (cited in note 18) (declaring that it was the obligation of the federal government “to recognize and protect” the loyal citizens of the state “as being Virginia”); Abraham Lincoln, Executive Order (Nov 16, 1861), in Richardson, ed, 6 *Messages and Papers of the Presidents* 44, 44 (cited in note 10) (giving orders to arrest state officers acting contrary to the declaration and ordinances of the Wheeling convention and the acts of the new general assembly).

<sup>394</sup> “When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.” US Const Art I, § 2, cl 4. Other Virginia Representatives, elected before the Wheeling convention even met, were seated over objection on the ground that the secession convention had had no authority to repeal the statute providing for their election. Cong Globe, 37th Cong, 1st Sess 3, 5–6 (July 4, 1861).

<sup>395</sup> See US Const Art I, § 3, cl 1 (“The Senate . . . shall be composed of two Senators from each State, chosen by the Legislature thereof.”).

If, then, the Legislature of the restored government is the proper and legitimate Legislature to choose Senators to represent the State of Virginia in the Senate of the United States, it follows, I think, as a logical conclusion, that it possesses the power and is the proper body to give its consent to the erection of a new State within the jurisdiction of the State of Virginia.<sup>396</sup>

Of course, as Representative Conway reminded the House, none of this was binding;<sup>397</sup> either chamber was free to change its mind. But the question had not slipped by unnoticed; the Senate had debated it in the cases of Willey and Carlile.<sup>398</sup>

I think opponents of the West Virginia bill were right that the self-styled “Virginia” legislature was a farce and a sham, but the new state was admitted anyway. I suspect you’re no more surprised than I am.

## V. THE BEGINNINGS OF RECONSTRUCTION

### A. The Thirty-seventh Congress

Almost as soon as the nation fell apart, members of Congress began arguing about how to put it back together again.<sup>399</sup>

In discussing West Virginia we have encountered Representative Stevens’s contention that by attempting to secede the rebel states had forfeited their constitutional rights. We have seen that during the first two years of the conflict this view did not prevail, as both the House

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<sup>396</sup> Cong Globe App, 37th Cong, 2d Sess 329 (July 16, 1862). See also Cong Globe, 37th Cong, 2d Sess 3319 (July 14, 1862) (Sen Ten Eyck) (“I apprehend the Senate by the vote which it gave on that occasion has fixed the legality of the action of the Legislature of Virginia.”); Cong Globe, 37th Cong, 3d Sess 38 (Dec 9, 1862) (Rep Brown of Virginia) (adding the Attorney General and an Ohio court to the list of those supporting the legitimacy of the Wheeling legislature); id at 43 (Rep Colfax) (asserting that the Wheeling legislature represented “the loyal people of Virginia”); id at 49 (Rep Maynard) (“[W]e have again and again, in every department of the Government of the United States, recognized this government of Virginia.”).

<sup>397</sup> Cong Globe, 37th Cong, 3d Sess 37 (Dec 9, 1862).

<sup>398</sup> See Cong Globe, 37th Cong, 1st Sess 103 (July 13, 1861) (Sen Bayard) (challenging the right of Willey and Carlile to sit); id at 107 (Sen Powell) (echoing Bayard’s sentiments); id at 106 (Sen Collamer) (arguing that the legitimacy of the new legislature was a political question settled by executive recognition when the President agreed to send troops). Senators Saulsbury and Bayard also argued that at the time of the election there had been no vacancies to fill, as the Senate had treated the withdrawn predecessors as members by later expelling them. Id at 103, 105, 108. Tennessee’s Andrew Johnson pointed out that the gentlemen in question had voluntarily withdrawn before their expulsion. Id at 103. Trumbull noted that most Senators were elected in anticipation of a future vacancy. Id at 104. That was only for new terms, replied Bayard. Id. Article I does provide that special writs of election shall be issued “[w]hen vacancies happen,” US Const Art I, § 2, cl 4, but to require that the seat remain vacant while an election is held would be so inconvenient that one can hardly believe it was intended.

<sup>399</sup> For a complete account of reconstruction efforts during Lincoln’s Presidency see Herman Belz, *Reconstructing the Union: Theory and Policy during the Civil War* (Cornell 1969).



and the Senate continued to seat members from Virginia, which (like Tennessee, whose Representatives were also admitted<sup>400</sup>) had attempted to secede. But in February 1862 Senator Sumner had offered a formal resolution espousing a particularly virulent variant of what came to be known as the “state suicide” theory:

*Resolved*, That any vote of secession or other act by which any State may undertake to put an end to the supremacy of the Constitution within its territory is inoperative and void against the Constitution, and when sustained by force it becomes a practical *abdication* by the State of all rights under the Constitution, while the treason which it involves still further works an instant *forfeiture* of all those functions and powers essential to the continued existence of the State as a body-politic, so that from that time forward the territory falls under the exclusive jurisdiction of Congress as other territory, and the State being, according to the language of the law, *felo-de-se*,<sup>401</sup> ceases to exist.

A further resolution would have declared it the duty of Congress under the Guarantee Clause to “assume complete jurisdiction of such vacated territory” and “to establish therein republican forms of government under the Constitution.”<sup>402</sup>

Other Senators, including Republicans in good standing, took issue with this assessment. “The doctrine of the Senator from Massachusetts,” said his Ohio colleague John Sherman, “is substantially an acknowledgement . . . of the right to secede.”<sup>403</sup> Massachusetts Unionist Benjamin F. Thomas said the same thing in the House:

To say that an act of secession is inoperative and void against the Constitution, and that this void act sustained by force is a practical abdication of the rights of the State under the Constitution, is to blow hot and blow cold, to deny and affirm in the same breath, to state a proposition which is *felo de se*.<sup>404</sup>

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<sup>400</sup> Cong Globe, 37th Cong, 2d Sess 2 (Dec 2, 1861) (admitting Rep Maynard); id at 297 (Jan 13, 1862) (admitting Rep Clements).

<sup>401</sup> Id at 737 (Feb 11, 1862).

<sup>402</sup> Id. See also id at 1204 (Mar 12, 1862) (Rep Bingham). Along the same lines was a bill introduced by Ohio Representative John Hutchins to establish territorial governments in “recent States” that had attempted to secede. Id at 399 (Jan 20, 1862). See also McPherson, *Battle Cry of Freedom* at 700 (cited in note 8) (“What Lincoln well understood . . . was that the ‘metaphysical question’ of reconstruction theories concealed a power struggle between Congress and the Executive over control of the process. If the southern states had reverted to the status of territories, Congress had the right to frame the terms of their readmission.”).

<sup>403</sup> Cong Globe, 37th Cong, 2d Sess 1495 (Apr 2, 1862).

<sup>404</sup> Id at 1615 (Apr 10, 1862). See also id at 1630 (Apr 11, 1862) (Rep Nixon) (“It is not the State that is in rebellion and deserving punishment, but individuals who . . . owing fealty to the

Sherman and Thomas were right: State suicide was inconsistent with the incontestable premise on which the whole war was fought, namely that secession was illegal and void.<sup>405</sup>

But the ineffectiveness of secession did not answer the daunting legal and practical question of what to do about reconquered areas in which, as in western Virginia, disloyal state officers had disappeared. Something had to be done to preserve order in the absence of state government; not surprisingly, the President had appointed Andrew Johnson and Edward Stanly as military “governors” of Tennessee and North Carolina, respectively.<sup>406</sup> Senator Sumner loudly disputed his right to do so, arguing among other things that he had acted in derogation of the rights of Congress;<sup>407</sup> Connecticut Senator James Dixon replied that the President could appoint military governors as a means of suppressing the rebellion.<sup>408</sup> More precisely, it had long been established under the law of nations that a conquering army could govern the provinces it had subdued,<sup>409</sup> and the Supreme Court had accordingly sustained the President’s right to institute a temporary government in California after it was captured during the Mexican War.<sup>410</sup> Whether this precedent could be applied to a state to which the Con-

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Government, raised their hands for its overthrow.”); id at 1795 (Apr 23, 1862) (Rep Lehman) (arguing that the federal “offensive” should properly be targeted against “the disloyal people in the seceded States” rather than the states themselves); id at 2294 (May 22, 1862) (Rep Wallace) (“How an act that was void could divest a State of any of her constitutional functions is beyond my comprehension.”). Senator Dixon introduced a resolution to establish the principle that attempted secession did not alter a state’s relations to the Union. Id at 2652 (June 11, 1862). See also id at 2925–26 (June 25, 1862) (Sen Dixon) (defending the resolution).

<sup>405</sup> See Belz, *Reconstructing the Union* at 9 (cited in note 399) (“The theory of the Union as perpetual implied the indestructibility of the states.”). On the unconstitutionality of secession see Currie, *Descent into the Maelstrom* at 230–37 (cited in note 1).

<sup>406</sup> See Cong Globe, 37th Cong, 2d Sess 1796 (Apr 23, 1862) (debating whether the President had the right to appoint new governors to rebel states); id at 2596 (June 6, 1862) (Sen Sumner) (offering a resolution providing for the cancellation of Stanley’s appointment as “military Governor of North Carolina”); id at 2927 (June 25, 1862) (Sen Dixon) (adding that Lincoln had appointed a governor for Louisiana as well).

<sup>407</sup> See id at 2596 (June 6, 1862). Congress had never created the office of military governor, but the Senate confirmed Johnson’s simultaneous appointment as Brigadier General. Stanly held no military office, and his appointment was not submitted to the Senate. See Belz, *Reconstructing the Union* at 71–72, 88 n 32 (cited in note 399) (discussing the appointment—and subsequent Senate confirmation—of Johnson as military governor of Tennessee); Cong Globe, 37th Cong, 2d Sess 2973–74 (June 27, 1862) (Sen Trumbull) (distinguishing the two cases on grounds of Senate approval).

<sup>408</sup> Cong Globe, 37th Cong, 2d Sess at 2927 (June 25, 1862). See id at 1796 (Apr 23, 1862) (Reps Lehman and Mallory) (invoking military necessity and the powers of the commander in chief).

<sup>409</sup> See Randall, *Constitutional Problems under Lincoln* at 216 (cited in note 3) (“When a nation at war obtains effective possession of a portion of the enemy’s territory, the conquering State assumes, during the period of such possession, the governing power over the territory held.”).

<sup>410</sup> See *Cross v Harrison*, 57 US (16 How) 164, 190 (1853).

stitution guaranteed a republican form of government was less clear;<sup>411</sup> we shall return to this question momentarily.

It was not long before the Senate found itself considering a bill, introduced by New York Republican Ira Harris, to establish “provisional” governments in the reconquered states.<sup>412</sup> The governments in question were to be patterned after the first stage of territorial government established by the Northwest Ordinance in 1787. The President was to appoint a governor and three judges to exercise the executive and judicial powers respectively; the governor and judges together were to constitute the legislature, with authority to make laws on all subjects of rightful legislation not inconsistent with the Constitution and laws of the United States.<sup>413</sup>

Where did Congress find authority for this sweeping proposal? Opponents went up in flames. This bill virtually turns states into provinces, shouted Senator Powell of Kentucky; it deprives them of their constitutional right of republican government.<sup>414</sup> It effectively recognizes secession, said New Jersey Republican John Ten Eyck; the President can appoint a military governor to keep order, but we cannot set up a government to displace that of the state itself.<sup>415</sup> The appointment of a military governor, Senator Cowan emphasized, was a military function for the president as commander in chief; no clause of the Constitution purported to confer such authority on Congress.<sup>416</sup>

Senator Harris found support for the bill in the Guarantee Clause: If the states would not govern themselves, the only way to ensure republican government was to provide a government for them.<sup>417</sup> Thus although the governments Harris envisioned would be based on a territorial model, the theory of the bill was not that the rebel states had reverted to territorial status; for by its plain terms the Guarantee Clause applies only to states.

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<sup>411</sup> The Supreme Court, in a case coming from Tennessee, later said that it could. *Coleman v Tennessee*, 97 US 509, 517 (1878). (“The right to govern the territory of the enemy during its military occupation is one of the incidents of war.”).

<sup>412</sup> Cong Globe, 37th Cong, 2d Sess 815 (Feb 14, 1862). For further discussion of such bills, see Belz, *Reconstructing the Union* at 40–99 (cited in note 399) (discussing no fewer than five diverse bills introduced during the second session of the Thirty-seventh Congress, of which the Harris bill provoked the most interesting debate).

<sup>413</sup> As reported by the committee this last provision was modified to prevent the federal authorities from “interfering with the laws and institutions existing in such State.” Belz, *Reconstructing the Union* at 90–91 (cited in note 399). The original bill is summarized at Cong Globe, 37th Cong, 2d Sess 3138 (July 7, 1862). For the corresponding Ordinance provisions see 32 Journals of the Continental Congress at 334–43 (cited in note 42); 1 Stat at 51 n (a) (“An Ordinance for the Government of the Territory of the United States north-west of the river Ohio”).

<sup>414</sup> Cong Globe, 37th Cong, 2d Sess 3141 (July 7, 1862).

<sup>415</sup> Id at 3140.

<sup>416</sup> Id at 3142.

<sup>417</sup> Id at 3141–42.

Senator Powell had already pointed out that the governments the bill would set up would not be republican: “A republican form of government is one in which the people shape their own domestic policy.”<sup>418</sup> Far from authorizing the establishment of provisional governments, he added, the Guarantee Clause plainly forbade them: “In my humble judgment, it is the very clause that will be grossly violated by the passage of the bill.”<sup>419</sup>

Harris emphasized that the governments he contemplated were a temporary expedient:

It is a bill to govern these States *ad interim* during the interval that shall elapse between the time when the rebellion is subdued and the States are conquered, and when they shall be willing to reorganize themselves and come back and govern themselves in the Union under their own constitution and laws.<sup>420</sup>

In other words, a government that was not itself republican would be established as a first step toward the restoration of republican government.<sup>421</sup> This was a pretty decent argument, and it could be applied as well to the governments the President had set up, which were no more republican than those to be established under Harris’s plan;<sup>422</sup> but the session ended without final action on the bill.

Meanwhile, presidential reconstruction was proceeding in Louisiana.<sup>423</sup> General George F. Shepley, whom President Lincoln had appointed as military governor, had authorized a special election to fill two vacancies in the House of Representatives.<sup>424</sup> When the victorious candidates presented themselves at the bar of the House, their right to sit was challenged. The Constitution provided that if vacancies existed

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<sup>418</sup> Id at 3141.

<sup>419</sup> Id at 3142.

<sup>420</sup> Id at 3141–42.

<sup>421</sup> See id at 3145 (Sen Clark) (“[A] nucleus of a new State government . . . around which . . . all the Union citizens may rally.”). See William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* 173 (Cornell, 1972) (noting “the dilemma of depriving a state of republican government temporarily in order to assure its restoration permanently”).

<sup>422</sup> Lincoln’s instructions to Tennessee’s military Governor Andrew Johnson expressly invoked the Guarantee Clause:

[Y]ou are hereby authorized to exercise such powers as may be necessary and proper to enable the loyal people of Tennessee to present such a republican form of State government, as will entitle the State to the guaranty of the United States therefor.

Basler, ed, 6 *Collected Works of Abraham Lincoln* at 469 (cited in note 130).

<sup>423</sup> For the full story of these efforts, see Peyton McCrary, *Abraham Lincoln and Reconstruction: The Louisiana Experiment* (Princeton 1978).

<sup>424</sup> See Cong Globe, 37th Cong, 3d Sess 831–32 (Feb 9, 1863) (Rep Dawes); HR Rep No 22, 37th Cong, 3d Sess 1 (1863). See also Abraham Lincoln, Executive Order (Oct 20, 1862) in Richardson, ed, 6 *Messages and Papers of the Presidents* 122, 122 (cited in note 10) (establishing a provisional court in Louisiana, the civil institutions of the state having been “swept away”).

in the House “the executive authority” of the state should issue writs of election to fill them.<sup>425</sup> And “no military governor,” said Massachusetts Republican Thomas Eliot, could be “the ‘executive authority’ clothed with power under the Constitution to issue ‘writs of election.’”<sup>426</sup> The writs were issued, Representative Thomas retorted, “by the only executive authority of that State which the Government of the United States or the people in these districts in any way recognize,”<sup>427</sup> and the House voted 92-44 to seat the aspiring members.<sup>428</sup> In so doing it implicitly acknowledged that Louisiana remained a state and that the President had a right to appoint its governor.

#### B. The Thirty-eighth Congress

On December 8, 1863, just after the second Civil War Congress had convened, President Lincoln announced a general plan for the reconstruction of state governments in the seceding states. The essence of this plan was that when 10 percent of the registered voters in a state swore to support the Constitution, the Emancipation Proclamation, and congressional legislation respecting slaves they could reestablish their own government:

[W]henever, in any of the States of Arkansas, Texas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, Florida, South Carolina, and North Carolina, a number of persons, not less than one-tenth in number of the votes cast in such State at the Presidential election of the year A.D. 1860, each having taken the oath aforesaid, and not having since violated it, and being a qualified voter by the election law of the State existing immediately before the so-called act of secession, and excluding all others, shall reestablish a State government which shall be republican and in nowise contravening said oath, such shall be recognized as the true government of the State.<sup>429</sup>

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<sup>425</sup> US Const Art I, § 2.

<sup>426</sup> Cong Globe, 37th Cong, 3d Sess 860 (Feb 10, 1863). See also *id* at 1011 (Feb 16, 1863) (Rep Menzies) (“The election must be in pursuance of writs of election issued by the executive, and there was no executive.”); Cong Globe App, 37th Cong, 3d Sess 114 (Feb 17, 1863) (Rep Crisfield) (arguing that General Shepley was “not Governor of the State, but only a military officer exercising his authority over civilians within the district subjected to his arms”). Representative Dawes invoked the analogy of Virginia, but as questioners pointed out, Governor Pierpont, unlike Shepley, had been installed by the revolutionary government of Virginia. See Cong Globe, 37th Cong, 3d Sess 833 (Feb 9, 1863). See also *id* at 864 (Feb 10, 1864) (Rep Bingham) (invoking the Virginia analogy).

<sup>427</sup> Cong Globe, 37th Cong, 3d Sess at 1015 (Feb 16, 1863).

<sup>428</sup> *Id* at 1036 (Feb 17, 1863).

<sup>429</sup> Lincoln, Proclamation (Dec 8, 1863) at 213, 214 (cited in note 199). A subsequent paragraph quite properly noted that “whether members sent to Congress from any State shall be

The President's plan was attacked from both sides. On the one hand it was argued that reconquered states could resume their rights at any time without federal intervention,<sup>430</sup> on the other that Lincoln's program was too lenient and that reconstruction was a congressional responsibility, not a presidential one.<sup>431</sup> If the plan was to be defended, it was on the ground that it prescribed steps to restore republican government, and Lincoln mentioned the Guarantee Clause in his proclamation; yet he expressly relied only on the pardon power, as the proclamation made the oath in question a condition of amnesty.<sup>432</sup> As Professor Herman Belz gently observed, it was not obvious that the power to pardon justified the imposition of conditions for recognition of state government.<sup>433</sup>

After much hemming and hawing, Congress in the waning days of the session passed a reconstruction plan of its own, sponsored by Maryland Representative Henry Winter Davis and Ohio Senator Benjamin Wade, that differed in several crucial respects both from the President's scheme and from the one Senator Harris had proposed in the preceding Congress.

Under the new bill the president was to appoint for each rebellious state a provisional governor, who was to be "charged with the civil administration of such State until a State government therein shall be recognized as hereinafter provided."<sup>434</sup> Once military resistance was suppressed in any of those states and a majority of its white male citizens swore to support the Constitution, loyal voters who had neither held office under a rebel government nor voluntarily borne arms against the United States were to elect delegates to a convention to draft a new state constitution. That constitution was required to

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admitted to seats constitutionally rests exclusively with the respective Houses, and not to any extent with the Executive." Id at 215. See US Const Art I, § 5, cl 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members.").

<sup>430</sup> See, for example, Cong Globe, 38th Cong, 1st Sess 22 (Dec 14, 1863) (Sen Holman); id at 70 (Dec 21, 1863) (Rep Yeaman); id at 191 (Jan 13, 1864) (Rep Yeaman); id at 852 (Feb 27, 1864) (Rep Harding); id at 1738-39 (Apr 19, 1864) (Rep J.C. Allen) (criticizing the plan as lacking sense or authority); id at 2029-30 (May 2, 1864) (Rep Harding). The President himself, if eyewitnesses are to be believed, had once taken a similar position. When asked how the Southern states could achieve a restoration of the Union if they desired it, the President is said to have responded "by disbanding their armies and permitting the national authorities to resume their functions." Rhodes, *5 History of the United States* at 69 (cited in note 8).

<sup>431</sup> See, for example, Cong Globe App, 38th Cong, 1st Sess 83-85 (Mar 22, 1864) (Rep H.W. Davis); id at 1357-58 (Mar 30, 1864) (Rep Ashley); id at 1740 (Apr 19, 1864) (Rep Smithers); id at 2002 (Apr 30, 1864) (Rep Thayer); id at 2012 (Rep Longyear).

<sup>432</sup> Lincoln, Proclamation (Dec 8, 1863) at 213-14 (cited in note 429).

<sup>433</sup> Belz, *Reconstructing the Union* at 160 (cited in note 399) ("Though the pardoning power was unquestionably valid in dealing with individuals . . . its validity for imposing conditions on the rebel states was less obvious.").

<sup>434</sup> The bill is printed as an appendix to the President's veto message. See Lincoln, Proclamation (July 8, 1864) at 223-26 (cited in note 200).

abolish slavery, repudiate rebel debts, and disqualify significant rebel officeholders from voting for or serving as legislator or governor. If the voters approved it, the president, “after obtaining the assent of Congress,” was to recognize the new government “as the constitutional government of the State.” From that time on, and not before, the state might elect senators, representatives, and electors for President and Vice President of the United States. Finally, to be on the safe side, § 12 of the bill declared that “all persons held to involuntary servitude or labor in the States aforesaid are hereby emancipated and discharged therefrom, and they and their posterity shall be forever free.”<sup>435</sup>

The Wade-Davis bill was defended on the same basis as the Harris bill of the preceding term: as necessary and proper to the reestablishment of republican government where it had been overthrown.<sup>436</sup> It was attacked on the familiar grounds that it would deprive the states of the right of self-determination and establish a despotism that was the antithesis of republican government.<sup>437</sup> There were new twists as well: By what warrant did Congress undertake to abolish slavery, and to require the states to do so as a condition of recognizing their new governments?

If Congress was to restore republican government, it clearly had authority to impose conditions to ensure that the new government was in fact republican. The slavery condition, however, did not appear to meet this criterion. Massachusetts Representative George Boutwell hazarded the opinion that no government that recognized slavery could be republican,<sup>438</sup> but that argument was a clear loser: As several opponents pointed out, slavery had once existed in virtually all the original thirteen states.<sup>439</sup> Representative Davis’s defense was more subtle: Slavery was inconsistent with the *permanence* of representative government, apparently because it tended to induce rebellion.<sup>440</sup> This seems a pretty feeble effort to me; I think the requirement that the new constitutions abolish slavery was beyond congressional authority.

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<sup>435</sup> *Id.*

<sup>436</sup> See Cong Globe App, 38th Cong, 1st Sess 82–83 (Mar 22, 1864) (Rep Davis).

<sup>437</sup> See, for example, Cong Globe, 38th Cong, 1st Sess 1739 (Apr 19, 1864) (Rep J.C. Allen); *id.* at 2068–69 (May 3, 1864) (Rep Kernan); *id.* at 2074 (Rep Fernando Wood); *id.* at 2096 (May 4, 1864) (Rep Cox); *id.* at 3458 (July 1, 1864) (Sen Carlile).

<sup>438</sup> *Id.* at 2104 (May 4, 1864).

<sup>439</sup> *Id.* at 2069 (May 3, 1864) (Rep Kernan); *id.* at 2097 (May 4, 1864) (Rep Cox); *id.* at 2106 (Rep Pendleton). If slavery and republican government could not coexist in Louisiana, Professor Donald mildly inquired, what did that say about Kentucky? See Donald, *Charles Sumner and the Rights of Man* at 199–200 (cited in note 8). As a theoretical matter Professor Wiecek was correct that “slavery was the most abhorrent way of denying self-government to men.” Wiecek, *The Guarantee Clause* at 172 (cited in note 421). As I have suggested, however, this argument ignores history.

<sup>440</sup> Cong Globe App, 38th Cong, 1st Sess 85 (Mar 22, 1864).

President Lincoln pocket-vetoed the bill. Not primarily on constitutional grounds: He too had envisioned provisional governments as way stations on the road to republicanism, and he too would have required states to accept abolition, though his formula differed somewhat from that in the Wade-Davis bill. Indeed he *endorsed* the congressional program as “one very proper plan for the loyal people of any State choosing to adopt it” and said that in such a case he would appoint military governors “with directions to proceed according to the bill.” At the same time, however, he objected to the bill’s Procrustean, one-size-fits-all approach (“I am . . . unprepared . . . to be inflexibly committed to any single plan of restoration.”). He was also unprepared to set aside “the free State constitutions and governments already adopted and installed in Arkansas and Louisiana,” as the bill would require him to do, “or to declare a constitutional competency in Congress to abolish slavery in States,” which the bill itself presupposed.<sup>441</sup>

Renewed efforts were made in the next session to enact a congressional reconstruction plan, but they were unavailing; Representative Davis lamented that the President’s veto had temporarily taken the wind out of the proponents’ sails.<sup>442</sup> And thus the Civil War Congress came to an end in March, 1865 with President Lincoln’s restoration program still in place; congressional reconstruction would have to await further developments.

### C. Election Contests

The Thirty-seventh Congress had seated representatives from Louisiana and Tennessee and both senators and representatives from Virginia. Claimants from Arkansas, Louisiana, and Virginia knocked on the doors of the following Congress, but not one of them got in.

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<sup>441</sup> Lincoln, Proclamation (July 8, 1864) at 222–23 (cited in note 200). The reader may think it odd that the President would deny Congress a power he himself had exercised in issuing the Emancipation Proclamations, but the cases are not congruent. For the Proclamations were battlefield measures designed to weaken the enemy and thus to promote the progress of the war. Congress might perhaps have done the same thing on the same basis while the fighting continued. Once an area was subdued, however, this argument was no longer available, as the President himself acknowledged in exempting such areas from the Proclamations. See Abraham Lincoln, To Salmon P. Chase (Sep 2, 1863), in Basler, ed, 6 *Collected Works of Abraham Lincoln* 428, 428–29 (cited in note 127) (“The original proclamation has no constitutional or legal justification, except as a military measure.”). Thus to the extent it applied to conquered territory the Wade-Davis provision depended essentially upon the untenable argument that a government that recognized slavery was not republican. For the intemperate response by Wade and Davis to the President’s veto (first published in the *New York Tribune*, Aug 5, 1864), see *Henry W. Davis, Speeches and Addresses* 415–26 (Harper 1867).

<sup>442</sup> Cong Globe, 38th Cong, 2d Sess 969 (Feb 21, 1865). The basic House bill is printed in id at 280–81 (Jan 16, 1865); it was tabled in id at 970–71 (Feb 21, 1865).



Three putative Virginia representatives were rejected on the straightforward ground that there was no proof they represented the choice of their constituents: The bulk of their districts remaining in rebel hands, many loyal residents had had no opportunity to vote.<sup>443</sup> In so ruling the House followed precedents set during the preceding Congress,<sup>444</sup> but it was hard to reconcile them with Congress's decision in connection with the admission of West Virginia that a legislature chosen by the northwestern counties represented the entire state.<sup>445</sup> Indeed, when another Virginia Senator presented his credentials in February 1865—and his right to a seat was defended on the basis of precedent—Senator Sumner pointed out that most of the state was under Confederate control, and the question was postponed until the following Congress.<sup>446</sup> The new government of “Virginia” having shucked off all but a smidgen of the territory in its possession, the case for recognizing it was even weaker than before; the legislature having completed its task as surrogate mother for West Virginia, there was no need to continue the charade.

Louisiana, as we have seen, had sent two representatives to the Thirty-seventh Congress after an election held under military auspices, and the House had seated them.<sup>447</sup> The next time around, however, the same military governor had forbidden the holding of an election in New Orleans, and nine-tenths of the claimant's district had had no chance to participate. By analogy to the Virginia cases, and because the state had failed to redistrict itself after the 1860 census as the apportionment law required, the House refused to seat the aspiring victor.<sup>448</sup>

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<sup>443</sup> See HR Rep No 9, 38th Cong, 1st Sess 3 (1864) (recommending that Joseph Segar be denied a seat as Representative of Virginia); HR Rep No 14, 38th Cong, 1st Sess 5 (1864) (recommending the same with regard to Lewis McKenzie and B.M. Kitchen); HR Rep No 59, 38th Cong, 1st Sess 2 (1864) (Lucius H. Chandler); Cong Globe, 38th Cong, 1st Sess 850, 1676–78, 2311–23 (Feb 26, May 17, 1864).

<sup>444</sup> See, for example, HR Rep No 12, 37th Cong, 2d Sess 8 (1862) (Segar); HR Rep No 42, 37th Cong, 2d Sess 7 (1862) (Beach); HR Rep 33, 37th Cong, 3d Sess 4 (1863) (McKenzie); HR Rep 41, 37th Cong, 3d Sess 2 (1863) (Pigott); Cong Globe, 37th Cong, 2d Sess 759 (Feb 11, 1862) (rejecting Segar by a vote of 85-40); id at 1452 (Mar 31, 1862) (reading the resolution that rejected Beach); Cong Globe, 37th Cong, 3d Sess 1036–37 (Feb 17, 1863) (rejecting an amendment to grant a seat to McKenzie); id at 1211–12 (Feb 23, 1863) (rejecting Pigott as a North Carolina representative).

<sup>445</sup> See Randall, *Constitutional Problems under Lincoln* at 466 (cited in note 3) (“[T]his principle of free election, if recognized in the first two years of the war, would have defeated the whole process by which West Virginia was created.”).

<sup>446</sup> Cong Globe, 38th Cong, 2d Sess 845–49 (Feb 16, 1865).

<sup>447</sup> See notes 424–25 and accompanying text.

<sup>448</sup> See HR Rep No 8, 38th Cong, 1st Sess 3 (1864); Cong Globe, 38th Cong, 1st Sess 411–14, 543–47 (Jan 29, Feb 9, 1864).

Louisiana duly redistricted itself and chose new representatives, and the Elections Committee recommended that they be seated.<sup>449</sup> An ominous minority report, however, suggested a more fundamental reason for rejecting them. The rebel states, the dissenters wrote, were not entitled to representation in Congress until they reestablished their own governments, and the creation of the new Louisiana government was not the act of the people. In the first place, as in the Virginia cases, many loyal citizens had been prevented from voting because large portions of the state had not yet been recovered; it was not clear that the new government had the sanction of a majority of the loyal voters of Louisiana. Moreover, the entire election had been conducted under military compulsion, and the government could maintain itself only because of the presence of federal troops.<sup>450</sup>

In the meantime Representative Eliot had introduced a resolution declaring that Louisiana might resume its political relations with the United States, and it had been sent to committee.<sup>451</sup> It never emerged, and the House took no action on the recommendation to accept Louisiana's representatives.<sup>452</sup> Concurrently, in the Senate, Lyman Trumbull's committee report on the credentials of purported Louisiana senators concluded that the reconstructed government fairly represented the majority of loyal voters but recommended against seating the claimants because according to the President's earlier proclamation the state was still in rebellion. Under the circumstances, wrote Trumbull, it would be improper to seat anyone without joint action of both Houses recognizing the legitimacy of the Louisiana government.<sup>453</sup> He accordingly accompanied his report with a proposed joint resolution declaring that "the United States do hereby recognize the government of the State of Louisiana."<sup>454</sup> But nothing came of that resolution either, and Louisiana remained unrepresented in the Thirty-eighth Congress.

Arkansas had begun to reorganize itself before President Lincoln even announced his reconstruction plan, and the state sent both senators and representatives to Washington—in vain. On the strength of

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<sup>449</sup> HR Rep No 13, 38th Cong, 2d Sess 5 (1865); HR Rep No 16, 38th Cong, 2d Sess 1 (1865); HR Rep No 17, 38th Cong, 2d Sess 1 (1865).

<sup>450</sup> HR Rep No 13 at 6–14.

<sup>451</sup> Cong Globe, 38th Cong, 2d Sess 26 (Dec 13, 1864).

<sup>452</sup> At one point Eliot offered his Louisiana resolution as an amendment to the general reconstruction bill, but that got nowhere either—nor, as we have seen, did the bill. See Cong Globe, 38th Cong, 2d Sess 281, 300 (Jan 16–17, 1865) (Rep Eliot); *id* at 301 (Jan 17, 1865) (voting to "kill the bill" by a count of 103–34).

<sup>453</sup> S Rep No 127, 38th Cong, 2d Sess 1–3 (1865).

<sup>454</sup> Cong Globe, 38th Cong, 2d Sess 903 (Feb 18, 1865).

the following committee report the Senate in 1864 voted to exclude Arkansas' senators:

While a portion of Arkansas is at this very time . . . in the actual possession and subject to the control of the enemies of the United States, other parts of the State are only held in subordination to the laws of the Union by the strong arm of military power. While this state of things continues, and the right to exercise armed authority over a large part of the State is claimed and exerted by the military power, it cannot be said that a civil government, set up and continued only by the suffrance of the military, is that republican form of government which the Constitution requires the United States to guarantee to every State in the Union.<sup>455</sup>

The following year a Senate committee, noting that Arkansas was still under the President's proclamation declaring it to be in a state of insurrection, suggested that the question of admitting an Arkansas senator be postponed "to the next session of Congress, and until Congress shall take action in regard to the recognition of the alleged existing State government in Arkansas"<sup>456</sup>—much as the same committee had recommended in the case of Louisiana a few weeks before. The committee report was accepted and the question postponed.<sup>457</sup>

In the House, the Elections Committee in 1864 recommended that a commission be dispatched to determine whether Arkansas (or any other seceding state) was ready for representation, but the proposal was unceremoniously tabled a week later.<sup>458</sup> The following year, as it had done in the case of Louisiana, the committee urged that Arkansas representatives be seated, but they were not; the House never took up the question.<sup>459</sup>

What are we to think of all this? As Wisconsin Republican Timothy Howe reminded his Senate colleagues, the Constitution guarantees each state two senators—just as it guarantees them proportional representation in the House.<sup>460</sup> I have elsewhere argued that attempted

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<sup>455</sup> S Rep No 94, 38th Cong, 1st Sess 3 (1864) (recommending that William M. Fishback and Elisha Baxter be denied seats); Cong Globe, 38th Cong, 1st Sess 3368 (June 29, 1864) (rejecting the candidates by a vote of 27-6).

<sup>456</sup> S Rep No 1, Senate Special Session of March, 1865, in S Repts, 38th Cong, 2d Sess 1. Senator Howard put it more pungently on the floor of the Senate. Cong Globe, 38th Cong, 2d Sess 1427 (Mar 6, 1865) ("I can conceive of no greater absurdity than this attempt to foist upon us Senators of a so-called State which is at war with the United States.")

<sup>457</sup> Cong Globe, 38th Cong, 2d Sess 1433 (Mar 9, 1865).

<sup>458</sup> Cong Globe, 38th Cong, 1st Sess 3178 (June 22 1864); id at 3394 (June 29, 1864).

<sup>459</sup> HR Rep No 18, 38th Cong, 2d Sess 4 (1865) (recommending that T.M. Jacks and J.M. Johnson be seated); Cong Globe, 38th Cong, 2d Sess 870 (Feb 17, 1865) (laying the committee's resolutions on the table).

<sup>460</sup> Cong Globe, 38th Cong, 1st Sess 2905 (June 13, 1864). See also US Const Art I, §§ 2-3.

secession, being illegal, ought not to deprive a sitting member of his congressional seat;<sup>461</sup> and the Thirty-seventh Congress was right, I believe, in seating representatives chosen by loyal voters in Tennessee after that state had purported to secede. But in the case of the House there is always the question, as the cases discussed in this section indicate, whether the claimant for a seat was actually the choice of his constituents, and that depends in part on whether they had a meaningful opportunity to vote. In the case of the Senate—as in the case of partitioning Virginia—the legality of an election depended upon the legitimacy of the legislature whose action was in question, and thus the Senate was right to inquire into the process by which the state legislature was chosen.<sup>462</sup> I have already questioned the bona fides of the new “Virginia” legislature on the ground that it represented only a portion of the state, and Senator Cowan was clearly right that it mattered whether the voters had exercised their own free will.<sup>463</sup> I think a case-by-case investigation was in order whenever the Senate undertook to judge the “Elections, Returns and Qualifications of its own Members.”<sup>464</sup>

#### D. The Electoral College

The Wade-Davis bill, as I have noted, would have forbidden rebel states to elect senators, representatives, or presidential electors until Congress had recognized their reconstructed governments.<sup>465</sup> President Lincoln’s veto put an end to that proposal, but as the time approached for counting the votes cast after the 1864 election Congress turned its attention once again to the question of electoral votes from states that had attempted to secede.

Article II, § 1 guaranteed each state a number of presidential electors equal to the number of senators and representatives to which it was entitled, but it was understandable that Congress did not relish the prospect of the nation’s enemies participating in the choice of its

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<sup>461</sup> See Currie, *Descent into the Maelstrom* at 249–50 (cited in note 1). See also *id.* at 210–11 (discussing the question whether a rebellion in Utah ought to deprive the territory of its delegate in the House).

<sup>462</sup> See Cong Globe, 38th Cong, 1st Sess 3365 (June 29, 1864) (Sen Trumbull) (noting that the committee had not denied that Arkansas was entitled to elect senators, but only that it was the Arkansas legislature that had chosen them). More generally, Chief Justice Taney had said in *Luther v Borden*, 48 US (7 How) 1 (1849), that each House in determining to seat a putative member necessarily passed upon both the legitimacy and the republican nature of the government under whose auspices he was elected. *Id.* at 42.

<sup>463</sup> See Cong Globe, 38th Cong, 1st Sess 3365 (June 29, 1864).

<sup>464</sup> See US Const Art I, § 5, cl 1.

<sup>465</sup> See text accompanying notes 434–35.

President.<sup>466</sup> There was as we have seen some question whether the seceding states were entitled to *any* senators or representatives; and the Constitution required that electors be chosen as the state legislature prescribed.<sup>467</sup> If the reconstructed legislature either chose electors itself or promulgated rules for their selection, the legitimacy of the legislature was in issue; if electors were chosen by the people, someone would have to determine, as in the case of contested representatives, whether they were the real choice of their constituents. In short it was not so obvious as it might appear at first glance that electoral votes cast in seceding states ought necessarily to be counted.

Only a few days before the ballots were to be opened before a joint session of Congress, Iowa Representative James F. Wilson reported a proposed joint resolution declaring that the eleven states of the Confederacy, having been in a state of armed rebellion on election day, were not entitled to representation in the electoral college. Kentucky Representative Robert Mallory argued that Congress ought not to prejudge the question but leave it to be decided when it was time to count the votes, but his colleagues were unimpressed; the House passed Wilson's resolution on the spot.<sup>468</sup>

The Senate amended the preamble to say that on election day the named states had been "in such condition . . . that no valid election for electors . . . was held"; and in this form the resolution was approved.<sup>469</sup> Senator Trumbull explained the reason for the change. "There could be no election according to the laws and Constitution of the United States in the State of Louisiana," said Trumbull, "when a very considerable portion of that State was overrun by the enemy, and the legal voters had no opportunity to vote one way or the other." And to put it in these terms, he added, made it unnecessary to decide the controversial question whether Louisiana was still in the Union.<sup>470</sup>

Senator Ten Eyck moved to exclude Louisiana from the list of disenfranchised states on the ground that that state had reconstructed itself and held a valid election, but his motion was defeated.<sup>471</sup> There was more discussion of the institutional question Representative Mal-

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<sup>466</sup> See Cong Globe, 38th Cong, 2d Sess 551 (Feb 2, 1865) (Sen Trumbull): ("[I]s the ground to be assumed here that South Carolina in a state of rebellion against this Government . . . has a right to elect a President for us?").

<sup>467</sup> US Const Art II, § 1, cl 2.

<sup>468</sup> Cong Globe, 38th Cong, 2d Sess 505 (Jan 30, 1865). The resolution in its original form is printed in id at 533 (Feb 1, 1865).

<sup>469</sup> 13 Stat 567, 567–68 (Feb 8, 1865). See also Cong Globe, 38th Cong, 2d Sess 593–94 (Feb 4, 1865) (discussing the proposed amendment).

<sup>470</sup> Cong Globe, 38th Cong, 2d Sess 535 (Feb 1, 1865).

<sup>471</sup> Id at 533, 535–36, 582 (Feb 1 and 3, 1865).

lory had raised: Whose responsibility was it to decide whether or not to count electoral votes?

The issue had arisen after the 1856 election, in which a snowstorm had prevented Wisconsin electors from reaching the state capital on the prescribed date.<sup>472</sup> The question had been ducked then, and some suggested it should be ducked again: Whether the few Southern votes were counted or not, Lincoln had been reelected to the presidency.<sup>473</sup> Senator Hale wisely suggested the question should be decided now, precisely because it would not affect the outcome of the election.<sup>474</sup> But who indeed should make the decision? The Vice President in opening the ballots, or the joint session before whom they were opened, or someone else? The Constitution did not say, as it spoke delphically in the passive voice (“the Votes shall then be counted”).<sup>475</sup> Since the Constitution did not answer the question, said Senator Trumbull, Congress ought to settle it by legislation; as Senator Hale argued, such a provision was necessary and proper to the election of the president.<sup>476</sup>

Unfortunately Congress did something else, resolving the merits of the question whether the votes should be counted in the instant election. The President signed the joint resolution while saying it was unnecessary: Congress itself had the right to exclude illegal votes when the official tally was made.<sup>477</sup> When the time came for counting, Vice President Hamlin reported that he had received ballots from Louisiana and Tennessee but—in pursuance of the resolution—had not presented them.<sup>478</sup> The basic question of who was to decide in the absence of congressional action remained unresolved; it would come back to haunt Congress after the disputed election of 1876.<sup>479</sup>

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<sup>472</sup> See Currie, *Democrats and Whigs* at 273–77 (cited in note 1) (discussing the Wisconsin controversy). See also the earlier discussion of the same issue in Currie, *The Federalist Period* at 288–91 (cited in note 1).

<sup>473</sup> See, for example, Cong Globe, 38th Cong, 2d Sess 537 (Feb 1, 1865) (Sen Harris); id at 549 (Feb 2, 1865) (Sen Doolittle).

<sup>474</sup> Id at 549 (“There never was a time when you could do it, when you would be less liable to the charge of any sinister influence, because it cannot change the result.”).

<sup>475</sup> US Const Art II, § 1, cl 3.

<sup>476</sup> Id at 550 (Sen Trumbull); id at 549 (Sen Hale).

<sup>477</sup> Abraham Lincoln, Special Message (Feb 8, 1865), in Richardson, ed, 6 *Messages and Papers of the Presidents* 260, 260 (cited in note 10). Believing the matter one entirely for Congress to decide, Lincoln disclaimed any intention of expressing his own judgment on the merits of the resolution itself. Id.

<sup>478</sup> Cong Globe, 38th Cong, 2d Sess 668 (Feb 8, 1865).

<sup>479</sup> See generally Charles Fairman, *Supplement to 7 History of the Supreme Court of the United States: Five Justices and the Electoral Commission of 1877* (Macmillan 1988). One interesting structural reform was proposed by a House committee in 1864 but never adopted: Cabinet officers should be permitted to sit on the House floor and to speak on matters related to their duties, and they should be required to attend twice a week to answer questions. Citing the precedents of territorial delegates and claimants for seats in the House, supporters argued that the

## CONCLUSION

After the Civil War Congress the Constitution was never the same again. Not only did Congress adopt a medley of novel war measures—ranging from confiscation and conscription to legal tender—that challenged preexisting notions of federal authority, but the domestic legislation of the period—from homesteads and agricultural colleges to the creation of the Department of Agriculture and the reestablishment of national banks—also reflected a sea change in constitutional interpretation amounting to no less than wholesale abandonment of states'-rights principles that had generally prevailed before the war.

Some aspects of this revolution were accomplished without explicit recognition that change was taking place. Congressional authority was often assumed rather than explained. Especially in connection with the war measures, however, this was not always the case, and the debates enrich our understanding of the relevant constitutional provisions. This was equally true of some of the more controversial executive measures of the war period, such as emancipation and the suspension of habeas corpus, which the President himself did not always fully explain. And of course it was in Congress that the great debate over reconstruction largely took shape, beginning long before the war itself had come to a close.

Wars place unusual strains on constitutions, and the Civil War was no exception. Not everything President Lincoln did, for example, could easily be squared with constitutional restrictions, and the same may be said of some of the actions of Congress. An observation made by Professor Andrew McLaughlin seven decades ago may help to keep matters in perspective:

To reconcile all the orders of the President or the acts of Congress during the war with the constitutional limitations normally operative in time of peace is quite impossible. . . . The outstanding fact, however, is not the occasional or frequent breach of particular clauses in the Constitution, but the effort not to disregard

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House could permit whomever it chose to participate in debate, and they noted that a 1789 statute had required the Treasury Secretary to make reports either in person or in writing. Opponents feared for legislative independence and branded the proposal as contrary to the spirit of the constitutional provision forbidding executive officers to be members of Congress, and the bill was quietly put aside. See HR Rep No 43, 38th Cong, 1st Sess 1–8 (1864); Cong Globe, 38th Cong, 2d Sess 419–25, 437–48 (Jan 25, 1865); *id* at 1398 (Mar 3, 1865); Cong Globe App, 38th Cong, 2d Sess 103–08 (Feb 27, 1865) (Rep Pendleton); US Const Art I, § 6 (“[N]o Person holding any Office under the United States shall be a Member of either House during his Continuance in Office.”). The Confederate constitution expressly authorized the Congress to enact the first half of this proposal, but after a similar debate the Confederate Congress declined to implement the provision. See Currie, 90 Va L Rev at 1382–83 (cited in note 2).

them altogether. And even more noticeable is the continuous open discussion and debate.<sup>480</sup>

In short, the Constitution may have been bent in some important particulars, but it survived.

By March of 1865, when President Lincoln delivered his second Inaugural Address, victory was imminent. In his famous peroration he called attention to the work of reconstruction that remained to be done:

With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.<sup>481</sup>

A little over a month later Abraham Lincoln was dead. The job of binding up the nation's wounds was now in other and less capable hands.

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<sup>480</sup> Andrew C. McLaughlin, *A Constitutional History of the United States* 639 (Appleton 1935).

<sup>481</sup> Abraham Lincoln, Second Inaugural Address (Mar 4, 1865), in Richardson, ed, 6 *Messages and Papers of the Presidents* 276, 276–77 (cited in note 10).