

# DID CONSTITUTIONS MATTER DURING THE AMERICAN CIVIL WAR?

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**Abstract:** The question of why the Confederate States of America lost the American Civil War has been extensively discussed, with scholars such as Frank Owsley and David Donald arguing that constitutional text and philosophy – and a preference for local over central government action – constrained the CSA’s options and therefore prospects for victory. While Owsley and Donald’s portrayal of a government hindered by constitutional fidelity has been countered by Richard Beringer, Herman Hattaway and William Still, who have pointed out that the Confederate government grew in size and scope during the war in spite of apparent legal restrictions, there has been limited examination of the factual basis underlying the thesis that constitutions functioned as a restraint. This paper addresses the US Constitution and the Confederate Constitutions (provisional and final) with special attention to how certain provisions and interpretive actions may have constrained the central government in the realm of economic policy. I find that both documents were not clearly relevant due to being inconsistently obeyed. The Confederacy disregarded provisions relating to fiscal, monetary and trade policy, even though it is likely that adhering to its Constitution in these areas could have strengthened its position and allowed it to supply its armies more adequately. It is likely that non-constitutional discretionary factors primarily account for the Confederacy’s defeat.

## I INTRODUCTION

*Now, our Constitution is new; it has gone through no perils to test and try its strength and capacity for the work it was intended to perform. Should it happen that the powers granted to it by the Government are insufficient to meet a dangerous crisis, what ought the Government to do? Exercise the requisite power and save or try to save the nation, or hold its hand and let the Constitution and the nation perish? Wait until the intricate machinery of the fifth article can be put in operation, whilst the voices of the people, demanding instant action, are thundering through the land, or assume and wield at once all their power, reserved or other, to maintain its authority and defend its flag?*

Sidney Fisher<sup>1</sup>

During 1862, in the midst of the American Civil War, Philadelphia lawyer Sidney Fisher declared that ‘[t]his war is a test of the [United States] Constitution’, while Boston minister Reverend Joseph Thompson echoed that ‘we stand today beside one of those catapult plunges in human history, [at a] test hour for all that we have hitherto regarded as fixed and valuable in popular constitutional history, and especially the test-hour of a national government [built] upon the basis of republican freedom’.<sup>2</sup> The test that Fisher and Thompson wrote about was whether the Constitution of the United States could permit the conditions for victory against the Confederate States of America (CSA), the enemy composed of southern secessionists who had broken away from the United States Union that Abraham Lincoln was elected president of.

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<sup>1</sup> Sidney Fisher, *The Trial of the Constitution* (1862) 77.

<sup>2</sup> Quoted in Harold Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (1973) 102.

At least since 1925, when Frank Owsley's *State Rights in the Confederacy* was published, scholars have also wondered whether the Confederate Constitutions – both the provisional in effect from February 1861 to February 1862 and the final document in force thereafter – were up to the task of permitting the Confederate government sufficient flexibility to implement its war policies with single-minded focus on repelling Lincoln's armies. For Owsley, constitutional text and more importantly the constitutional philosophy espoused by Confederates operated as a constraint upon the federal government (which he seemed to assume would make better decisions, since it would keep in mind the bigger picture) and hindered its ability to marshal the men and resources needed to win. In the economic realm, Owsley focused his ire on the interventionist tactics employed by some state governments to resist seizure of property by President Jefferson Davis for military purposes. Likewise, David Donald in 1960 suggested that too much respect for constitutional liberty, including presumably economic liberty, constrained the CSA and harmed its prospects for victory.<sup>3</sup>

In 1986 Richard Beringer, Herman Hattaway, Archer Jones and William Still countered that the notion the CSA was undermined by its constitution fails as a historical reality, since favorable interpretations by Confederate courts achieved a level of national coordination that was comparable to the North's approach, so it is misleading to suggest that individuals or states had significant autonomy.<sup>4</sup> Richard Bense's 1987 study confirms the Confederate Congress and President Davis succeeded in establishing a formidable apparatus dedicated to war: '[t]he Union state apparatus appears relatively anemic when compared to the Confederacy. Northern experiments with conscription and internal economic controls never approached the all-encompassing Confederate operation in the South'.<sup>5</sup> Strong southern nationalism aided the centralisation process; Davis was supported by public sentiment which was in favor of expanding federal power if it could provide financial assistance to alleviate the hardships of the war economy. So if the South was such a highly centralised state as Bense says, it hardly seems fair to blame constitutional constraints for its poor end result in the war.

Nevertheless, smatterings of support for the idea that constitutions mattered remain. As Wilfred Yearns observes, "While few historians still accept Owsley's idea that the Confederacy 'Died of State Rights', there is still a gnawing possibility that had the states cooperated better with Richmond the war somehow might have ended differently".<sup>6</sup> In what follows, I assess the constitutional context of trade, fiscal and monetary policy with the objective of evaluating the constraints operating on the Union and Confederate governments in these areas during the war.

Economic and financial policy is an important part of winning wars. Robert Ekelund and Mark Thornton contend that '[g]rand battles, glory, heroism and military tactics make for great and inspiring stories, but the keys to modern war are more basic issues such as the

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<sup>3</sup> David Donald, 'Died of Democracy' in David Donald (ed), *Why the North Won the Civil War* (1960).

<sup>4</sup> Richard Beringer, Herman Hattaway, Archer Jones and William Still, *Why the South Lost the Civil War* (1986).

<sup>5</sup> Richard Bense, 'Southern Leviathan: The Development of Central State Authority in the Confederate States of America' (1987) 2 *Studies in American Political Development* 135.

<sup>6</sup> Wilfred Yearns (ed) *The Confederate Governors* (2010) 9.

allocation of capital and labor, international trade, the functioning of markets and the ability of an economy to provide logistical support'.<sup>7</sup> A wealthier nation necessarily has an advantage in warfare, since richer countries have more capital that can be depleted in pursuit of buying guns, food, clothing, medicine and other necessities of warfare.<sup>8</sup> Governments have a range of financing mechanisms available. Taxation of incomes or property is the least distorting since it relies on skimming real wealth from the economy and does not add to debt. Borrowing from lenders defers the costs of war into the future, but this can damage a nation's credit rating and moreover causes servicing obligations due to interest. These two are usually tried first, and if revenue is found wanting then governments disregard monetary means and resort to seizure of property or persons (through slavery or a military draft). Finally, the government's printing press can be used to simply print enough currency to cover expenses. However, this causes massive price increases and may be the worst of all in terms of economic harmfulness.

The question sought to be answered is how constitutional constraints impacted revenue, and ultimately, prospects for military success. Constraints are defined here not just as constitutional text, but also as interpretive opinion contributing to an ideological climate limiting what a central government can do. This is because constitutional conventions are often determined by a mixture of the philosophies held by the public and governments. When individuals justify policy stances by citing legal reasons, their views become part of the constitutional institutions of concern to this paper. However, when decisions are made that are acknowledged by most contemporaries at the time to be free of constitutional constraint and instead in the realm of discretion, that decision can be viewed as non-constitutional in nature.<sup>9</sup>

## II TEXTUAL CONSTRAINTS

The main textual constraint which operated on the US and Confederate governments was that flowing from broad textual presumptions in favour of state rights and inherent natural rights contained in the Ninth and Tenth amendments of the US Constitution and scattered throughout the document in the Confederate Constitutions. When one speaks of state rights constraining the federal government, one is speaking of the provisions presented in Table 1, which are drawn from Article I of the Provisional Confederate Constitution, Article VI of the CSA Constitution<sup>10</sup> or its equivalent the Bill of Rights in the Union.

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<sup>7</sup> Mark Thornton and Robert Ekelund, *Tariffs, Blockades and Inflation: The Economics of the Civil War* (Scholarly Resources, 2004) xxviii.

<sup>8</sup> Ludwig von Mises, *Human Action: A Treatise on Economics* (Ludwig von Mises Institute, 1998) 824: 'There is no record of a socialist nation which defeated a capitalist nation. In spite of their much glorified war socialism, the Germans were defeated in both World Wars'. The Chinese also believed productive resources were crucial to winning wars – see Matthew McCaffrey, 'The Economics of Peace and War in the Chinese Military Classics' (2015) 10 *The Economics of Peace & Security Journal*.

<sup>9</sup> An example of a non-constitutional discretionary factor is the decision by the Confederacy to by and large abstain from utilising guerrilla warfare and to meet the Union on its own terms through conventional armies. Because there is no mention of guerrilla tactics in either constitution it cannot be said the issue was constitutional in nature. The war power granted to both sides allowed military commanders discretion (without regard to law) whether to adopt or reject guerrilla tactics so long as appropriation of funds for their decision was made in the constitutionally authorised fashion via Congress. Almost everyone at the time would have agreed that the outcome in this area (that is, whether guerrilla warfare was utilised or not) was influenced by factors other than the Constitution.

<sup>10</sup> Hereafter referred to interchangeably as the 'final Confederate Constitution' or the 'CSA Constitution'.

<b>US Constitution (1788)</b>	<b>Confederate Constitution (1862)</b>
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.	The enumeration, in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people of the several States.
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.	The powers not delegated to the Confederate States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people thereof.

**Table 1:** Text supporting state rights philosophy

Under the CSA Constitution, the federal government had to contend with additional textual constraints as compared to its Union counterpart. Specifically, the state governments in the Confederacy had two explicit remedies to keep the federal government in check: a state could impeach a federal official operating solely within its limits and three states could call a convention to amend the constitution. By contrast, impeaching federal officials or amending the Constitution was much more difficult in the Union.<sup>11</sup>

In addition, there are other provisions that potentially operated as constraints on the federal government. The Confederate Constitution restricted the powers of Congress as compared to its US counterpart. It eliminated legislative riders, eliminated the ‘general welfare’ clause that had left open a backdoor to expansion of federal power in the US, encouraged free trade by confining tariffs to revenue rather than protectionism, incorporated restrictions on spending for internal improvements, required a two-thirds vote to lay a tax or duty on any Confederate state and limited Congress’ ability to undermine property in slaves. These provisions can be categorized as civil liberties (including economic liberties) rather than state rights. These also form a part of my analysis and some are reproduced at Table 2.

‘The Congress shall have power...’	<b>US Constitution (1788)</b>	<b>CSA Constitution (1862)</b>
<b>Taxation</b>	To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;	To lay and collect taxes, duties, imposts, and excises for revenue, necessary to pay the debts, provide for the common defense, and carry on the Government of the Confederate States; but no bounties shall be granted from the Treasury; nor shall any duties or taxes on importations from foreign nations be laid to promote or foster any branch of industry;

<sup>11</sup> Coulter points out that President Jefferson Davis of the Confederacy, “declared that [the Confederate Constitution] ‘admits of no coerced association’ and that this rule of voluntary union had great merit by making the central government doubly regardful of the rights of the states”. E. Merton Coulter, *The Confederate States of America 1861-1865* (first published 1950; 1994 ed) 29. This can be contrasted with the Union, where majority opinion supported coerced association, as reflected in Lincoln’s war against southern secession.

		and all duties, imposts, and excises shall be uniform throughout the Confederate States.
<b>Borrowing</b>	To borrow Money on the credit of the United States	To borrow money on the credit of the Confederate States.
<b>Regulating Commerce</b>	To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;	To regulate commerce with foreign nations, and among the several States, and with the Indian tribes; but neither this, nor any other clause contained in the Constitution, shall ever be construed to delegate the power to Congress to appropriate money for any internal improvement intended to facilitate commerce; except for the purpose of furnishing lights, beacons, and buoys, and other aids to navigation upon the coasts, and the improvement of harbors and the removing of obstructions in river navigation; in all which cases such duties shall be laid on the navigation facilitated thereby as may be necessary to pay the costs and expenses thereof.

**Table 2:** Economic provisions - US vs. Confederacy

A CSA president was granted slightly more influence in budgetary affairs as compared to a Union president. Only when the CSA president initiated an appropriation bill could the Congress pass it with a majority vote, but when Congress on its own initiative wished to pass a fiscal measure it was required to garner a two-thirds majority. By contrast, the US Congress enjoyed equal initiative with its president because it could pass budgetary measures with a simple majority in all circumstances. In addition, a Confederate president possessed a line-item veto power whereas the US president had to veto entire bills.

The CSA president was more constrained however, in that while he had authority to remove from office department heads and members of the diplomatic service, he could only remove other civil officers when their services were unnecessary, for dishonesty, incapacity, misconduct or neglect of duty and had to table reasons with the Senate. This can be contrasted with the ability of a US president to remove any official in executive departments at will, subject only to ordinary legislation. And while a US president at the time could be re-elected indefinitely, a Confederate president was limited to a single six-year term. The British notion of making cabinet responsible to parliament was partially implemented in article I, section 6 of the CSA Constitution which provides that ‘Congress may, by law, grant to the principal officer in each of the executive departments a seat upon the floor of either House, with the privilege

of discussing any measures appertaining to his department'. These can all be characterized as administrative constraints on the CSA government but were rarely obviously influential.

### III REVENUE FROM INTERNATIONAL TRADE

The importance of trade to the Confederacy's military fortunes seems clear. Antebellum southerners produced tobacco, rice and cotton either for sale abroad or to the North to earn revenue.<sup>12</sup> Indeed more than 40 percent of the South's Gross National Product was tied up in the production of staples.<sup>13</sup> Southerners used the money they acquired from sale of agricultural products to outsiders to buy finished goods such as textiles or luxury items and capital goods like machinery imported from overseas. Thus, trade was a way to create wealth which then ultimately became a source of revenue for government.

However, this system of mutually beneficial trade was dependent on the existence of low tariffs, minimal quotas and freedom to export. Experience with tariff reductions in 1846 and 1857 in the United States had demonstrated that lowering tariffs often increases revenue available to a government.<sup>14</sup> The punitive tariffs of the 1820s and 1830s were detrimental to southern consumers and businesses because they increased the cost of imported goods and resulted in a less developed economy by 1861 when the war began. Hence, any constitutional constraint that hindered the ability of a wartime government – and especially a Confederate wartime government given the agricultural economy of the South – to reduce trade barriers could therefore be considered a factor contributing to military defeat.

On the other hand, the North's economy was less dependent on low tariffs since its economic makeup was not predominantly agricultural and instead based upon manufacturing industry that relied less on cheap imports (in 1861, the Union had three times the South's railroad capacity and nine times its industrial production).<sup>15</sup> However it too would have benefited from free trade, as evidenced by the arguments of northern farmers and merchants who joined with southern planters in the 1820s and 1830s to oppose high tariffs.<sup>16</sup>

At least in terms of text, the founding documents of the US and the Confederate States of America (CSA) allowed for low tariffs and quotas. The US Constitution mandates that duties be uniform throughout America, thereby centralising power over trade in the federal government. It lists three purposes for which revenue from duties may be utilised: first, to pay off public debt; second, to provide for military defence; and third for the 'general welfare' of the United States. The US Constitution does not however, prescribe a specific course of action on trade, instead leaving it to political discretion whether tariffs and quotas should be imposed

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<sup>12</sup> As Donald Livingston observes, '[a]s of 1860, approximately 76 percent of American exports were agricultural staples. Nearly all came from the South, and were exchanged for British and European manufactures'. Livingston, 'A Moral Accounting of the Union and Confederacy' (2002) 16 *Journal of Libertarian Studies* 73.

<sup>13</sup> Douglas Ball, *Financial Failure and Confederate Defeat* (University of Illinois Press, 1991) 22.

<sup>14</sup> Ekelund and Thornton, *Tariffs, Blockades and Inflation*, above n 7, 13.

<sup>15</sup> James McPherson, 'American Victory, American Defeat' in Gabor Boritt (ed), *Why the Confederacy Lost* 20.

<sup>16</sup> Clyde Wilson, 'Calhoun's Economic Platform' in Robert Paquette and Louis Ferleger (eds), *Slavery, Secession, and Southern History* (2000) 87-88.

and at what level of stringency. This means a major aspect of US trade policy was immune to constitutional constraints; most of the remaining Congressmen who had not defected to the South acknowledged at least implicitly that it was up to their discretion what trade policy to pursue, thus taking Northern revenue outcomes from trade outside this paper's scope.<sup>17</sup>

Like the US Constitution, the Provisional Confederate Constitution in effect from February 1861 to February 1862 also permitted – and was acknowledged as allowing – complete congressional discretion on trade matters so will not be considered here.<sup>18</sup> Conversely, the final Confederate Constitution in effect from February 1862 explicitly directs the government to support *low* trade barriers by restraining Congress from imposing tariffs for a protectionist purpose.<sup>19</sup> CSA tariffs – as instructed by article I, section 8 – had to be used for raising revenue rather than ulterior purposes such as protecting infant industries from foreign competition. The leaders of the Confederacy apparently realised that a sensible way to raise revenue is to lower tariffs.<sup>20</sup> By writing their anti-protectionist stance into the Constitution, they recognised that to raise revenue tariffs would need to be at moderate levels since beyond a certain maximising point tariffs reduce total wealth and cause more harm than good (a concept that economic theory now calls the 'Laffer curve'<sup>21</sup>).<sup>22</sup>

As in the North, power over international trade was given exclusively to the central government of the Confederacy. The Confederate government interpreted its powers in a manner that resulted in tariffs averaging a seemingly revenue friendly 13.3 percent.<sup>23</sup> *Prima facie*, the average tariff rate appears to be evidence that prevailing constitutional influences constrained the CSA to implementing low tariffs. Yet by the end of the war, the Confederacy had collected a meagre \$3.5 million in tariff revenue, which suggests as one possibility that

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<sup>17</sup> I have not found any historical evidence that suggests any US member of Congress during the Civil War believed that the US Constitution mandated a specific degree of trade barriers in relation to foreign countries.

<sup>18</sup> I have not found any historical evidence suggesting the Provisional Confederate Constitution was interpreted by any sitting member of Congress at the time to mandate either low or high tariffs. Rather, the decision was acknowledged to be outside the constitutional domain and subject only to the judgement of policymakers.

<sup>19</sup> Randall Holcombe, 'The Confederate Constitution' (1992) 10 *The Free Market*.

<sup>20</sup> Southerners drew on experience since 1824, the year when the first major tariff was put in place. In 1828 and 1832 tariffs were increased. In 1833, nullification and resistance from southern plantation interests gradually reduced tariffs till 1842 when tariffs were again increased. These increases were partially reversed in 1846. Finally, between 1857 and 1860 tariffs were again lowered. The general consensus is that there was a period of prosperity from 1846 to the panic of 1857, a stretch when tariffs were lower than the average between 1824 and 1832 (Ekelund and Thornton, *Tariffs, Blockades and Inflation*, above n 6, 22).

<sup>21</sup> The Laffer curve is a theoretical construct that postulates there is an optimal level of taxation in between the zero-revenue extremes of 0 percent and 100 percent that maximises government revenue, and that it is the role of government policy to adhere as closely to the optimal level as possible. Often the optimal level is lower than modern levels of taxation, which are said to discourage business from taking steps to expand profits (and therefore pay more taxes). Thus, an implication is that increasing rates beyond a certain point will be counterproductive.

<sup>22</sup> Robert McGuire and T. Norman van Cott, 'The Confederate Constitution, Tariffs and the Laffer Relationship' (2002) 40 *Economic Inquiry* 428. McGuire and Cott observe that the Confederate Constitution in its wording confined tariff rates to the 'lower end of the Laffer curve'. They continue: 'the Confederate Constitution tells Confederate legislators to view promoting or fostering costs as the downside of raising tariff revenue. The resulting message is straightforward: tariffs above the revenue maximizing rate were unconstitutional'.

<sup>23</sup> *Ibid* 437.

effective trade barriers were probably not low enough and that further reduction was needed to reach the constitutionally permissible level.<sup>24</sup>

Two non-constitutional factors seem significant in explaining the revenue outcome. First, the CSA faced a major non-constitutional obstacle to raising revenue from duties on trade in the form of a Northern blockade of its ports. This dampened the flow of taxable goods. Second, as mentioned, the CSA failed to make effective trade barriers pertaining to imports and exports low enough to stimulate the optimal revenue level. The failure to reduce barriers further was a discretionary decision unrelated to constitutional constraints textual or social. Debate at the time does not reveal participants suggesting that the Confederate Constitutions forbid low trade barriers; rather, the opposite is true, since the convention that inserted the pro-free trade provision into the CSA Constitution was supportive of low tariffs.<sup>25</sup>

Discretionary decisions the central government took were at odds with its claimed objective of increasing revenue. First, the CSA impressed ships at below-market prices which, due to the consequent uncertainty over security of property rights, had the consequence of discouraging private production of ships and made the blockade harder to break. The federal government took over ships and attempted to run them, even though its constitution prohibited seizure of property without adequate compensation. Second, the Confederacy discouraged privateers from transporting goods across enemy lines by imposing onerous rules.<sup>26</sup> One such rule was the effective tax on blockade runner profits. This took the form of a dictate that 50 percent of space on ships had to be reserved for the Confederate government. This was a measure that made blockade running unprofitable and reduced the incentive to import needed goods into the war-torn South. Had the issue been litigated, there would have been a chance of overturning this rule since it was arguably outside the scope of CSA power given its protectionist effect. In February 1864, the Confederate Congress passed *An Act to Prohibit the Importation of Luxuries or of Articles Not Necessary or of Common Use* which listed prohibited categories of imports and imposed price controls.<sup>27</sup> This federal legislation further hindered the flow of goods into the Confederacy by reducing the profit motive for blockade runners.<sup>28</sup> It banned spirits in spite of alcohol being essential for medical needs and a source of sustenance for soldiers. By adopting such measures, the CSA was reducing its prospects of victory by hampering imports of iron to repair railroads essential for transporting military supplies. Another example is when the CSA banned private citizens from trading with the North, even though doing so could have created mutually beneficial relationships between the Confederate border states of Tennessee and Virginia and the Union and hence improved prospects for

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<sup>24</sup> Mark Thornton and Robert Ekelund, "The 'Confederate' Blockade of the South" (2001) 4 *Quarterly Journal of Austrian Economics* 34.

<sup>25</sup> Ekelund and Thornton, *Tariffs, Blockades and Inflation*, above n 7, 23; Jeffrey Rogers, *A Southern Writer and the Civil War: The Confederate Imagination of William Gilmore Simms* (2015) 67.

<sup>26</sup> Robert Ekelund and Mark Thornton, "The Confederate Blockade of the South" (2001) 4 *The Quarterly Journal of Austrian Economics* 25.

<sup>27</sup> *An Act to Prohibit the Importation of Luxuries or of Articles Not Necessary or of Common Use* (Confederate Imprints, 1861-1865; Research Publications, 1974) 10-11.

<sup>28</sup> Ekelund and Thornton, *Tariffs, Blockades and Inflation*, above n 7, 51.

peace.<sup>29</sup> Perhaps an open policy in favour of trading with the enemy may have allowed the CSA to partially overcome the limitations of its cotton economy by receiving foodstuffs such as beef, pork, corn, flour, fruits, butter, and cheese.

The division of authority between local and national was a relevant constitutional influence, however the states did not suppress federal government revenue since for the most part had state views prevailed there would have been a beneficial expansion in trade.<sup>30</sup> For instance, Governor Joseph Brown had chartered the *Little Ada* to carry Georgia cotton to European markets, but became embroiled in conflict when President Davis tried to enforce the counterproductive law that reserved cargo space for the central government. Davis refused the ship clearance to run the blockade and during the ensuing squabble the ship was reported to the enemy, who in a surprise raid captured it in port. Ironically the Union was denied their prize by Davis, who had as part of his dispute with Brown ordered that the *Little Ada* not be allowed to leave and so had stationed artillery batteries nearby. This episode was caused by Davis overstepping textual constraints in the CSA Constitution. Brown took the practical approach which could have aided war financing by boosting trade.<sup>31</sup>

At times, however, state dissent did constrain the federal government in a way that reduced revenue from trade. Contrary to the Provisional Constitution's text which prohibits states from imposing export duties without Congressional approval, the state governments imposed an embargo on cotton exports to Europe. By limiting exports as an official policy, the states hoped to put pressure on Britain and France – who were believed to be reliant on supplies from the South – to intervene on the Confederacy's behalf in the same way France had assisted the colonial American revolutionaries. Ultimately this was an unsuccessful strategy, not only because foreign intervention did not materialise, but also because it needlessly deprived southerners of export revenue at a time when their economic situation was dire.<sup>32</sup> President Jefferson Davis failed to overrule local embargoes due to a respect for state rights even though he had the textual authority to take charge of international trade under the Constitution.<sup>33</sup>

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<sup>29</sup> A total ban on trade with the North is equivalent to a 100 percent tariff, and therefore prohibited by the CSA Constitution which tried to stamp out protectionism.

<sup>30</sup> As noted by John Schwab, the state governments, and especially North Carolina, were particularly interested in cotton speculation abroad. Schwab, *The Confederate States of America, 1861-1865: A Financial and Industrial History of the South During the Civil War* (1901) 234.

<sup>31</sup> A contrary view can be found in Craig Symonds, *The Civil War at Sea* (Oxford University Press, 2011). Symonds suggests that despite passage of regulations seemingly inhibiting blockade running imposed by the Confederate government, exports and imports continued at increased rates. If Symonds is correct, this would imply that the central government intervention had a positive, rather than a negative, impact. For a persuasive rejoinder see Ekelund and Thornton, 'The Confederate Blockade of the South', above n 24.

<sup>32</sup> Exports fell by 85 to 90 percent in the first year of the war due to the embargo. Cotton exports reaching Europe in the first year of the war dropped to about one percent of its peacetime level, and output fell from 4.5 million bales to 1 million bales. Mark Thornton, 'The Union Blockade and Southern Strategy' (Speech delivered at the Auburn University Academy for Lifelong Learners, Auburn, 2 February 2005); Jeffrey Hummel, *Emancipating Slaves, Enslaving Free Men* (2013) 167.

<sup>33</sup> Granted, it was difficult for the federal government to resist the states since no Supreme Court binding on the states was ever established. However, even in their public pronouncements officials such as Judah P. Benjamin, Confederate secretary of state, irrationally hoped that an embargo on 'King Cotton' would force help from textile-producing countries. Instead, England just switched to alternative sources of cotton in Egypt and India.

In summary, while the Confederate Congress superficially supported a low-tariff approach consistent with the CSA constitution, quota policies had the result of pushing up trade barriers to a high level. In this, the federal government had only its discretionary choices to blame and it does not seem logical to say that constitutional philosophy was a constraining factor, since most acknowledged at the time that the Constitution required – at the minimum, in spirit – low trade barriers but politicians simply chose to ignore it.<sup>34</sup>

Had the CSA encouraged international trade, its tariffs may have raised reliable revenue since there would have been a barrage of goods to tax. The Union blockade was porous, with Stanley Lebergott estimating the probability of capture for blockade runners smuggling into the South at 16.4 percent<sup>35</sup> and others agreeing that the risk to life faced by blockade runners were less than those encountered by Confederate soldiers in the field.<sup>36</sup> Hence it should have been possible to bring in essential goods and earn income from exports despite the blockade. It was more important for the Confederacy to trade than it was for the North which had a natural resource advantage and coped with the ill-effects of protectionism.<sup>37</sup>

#### IV FISCAL POLICY

Fiscal policy pertains to spending and taxation measures undertaken by a government. Since resources are scarce, economists advise that during a conflict governments should, firstly, discourage private citizens from consuming goods required by the military, and second, shift from civilian to military expenditure. As Murray Rothbard observes, '[m]obilization means that large quantities of resources must be shifted from the peace-time production of consumers' goods to the production of military goods. Factors of production, machine-tool factories, capital equipment, land, and labour force must be shifted from consumers' to war industries'.<sup>38</sup>

In terms of text, neither the US Constitution or the Confederate Constitutions constrained the warring parties to the economists' ideal. The US Constitution's provisions detailed the authority of Congress over taxation, borrowing money and regulating commerce; however, it contained few constraints, leaving it to the discretion of the legislature when and how much to borrow and proscribing no prohibition against subsidies or public works. The Provisional CSA Constitution was like the US Constitution, in that it left tremendous discretion

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<sup>34</sup> My conclusion contradicts that of Douglas Ball in *Financial Failure and Confederate Defeat* (University of Illinois Press, 1991). Ball believes that it was adherence to a state rights philosophy by the CSA Treasury Secretary that caused the shortfall in tariff revenue.

<sup>35</sup> Stanley Lebergott, 'Through the blockade: the profitability and extent of cotton smuggling, 1861-1865' (1981) 41 *The Journal of Economic History* 874. The probability I cite is the combined rate for steamers in 1862 and 1863, and does not cover all the years of the war nor does it cover sailing ships (sailing ships had a higher rate of capture so including them would push up the capture rate). Lebergott derives a capture rate of 16.1 percent for steamers between 1862-1865. This suggests 16.4 is an indicative figure and useful for our purposes.

<sup>36</sup> Mark Neely, 'The Perils of Running the Blockade: The Influence of International Law in an Era of Total War' (1986) 32 *Civil War History* 101-18.

<sup>37</sup> The North raised \$305 million from tariffs. This may have something to do with the non-constitutional factor that despite its high tariffs, its ports were unaffected by Confederate attempts to destroy US merchant ships.

<sup>38</sup> Murray Rothbard, *The Economics of War* (1950) Mises Institute <<https://mises.org/library/economics-war-0>> He notes that to discourage consumers buying up the food, clothing and medicines needed by soldiers, it is necessary to reduce private demand for these products by increasing the price (through taxes).

to the Congress on fiscal matters. The final Confederate Constitution was a mixed bag, in that while it granted discretion to borrow largely to Congress – thus partly taking the issue outside the constitutional realm of analysis – it did prohibit subsidies to industry and public works projects (the latter if adhered to would have restrained wasteful civilian expenditure by the federal government). An exception permitted infrastructure such as ‘lights, beacons, and buoys, and other aids to navigation upon the coasts, and the improvement of harbors and the removing of obstructions in river navigation’ however these were to be financed by taxing the shipping companies trafficking the waterways, rather than by burdening the Treasury.

### *A Tax finance*

A major area of textual constraint common to the US Constitution and the Confederate Constitutions was that of direct taxation, which was required to be apportioned based on population. This requirement was inserted in response to fears that an unlimited taxing power given to the national government could be used to abuse regions. The apportionment clause makes it harder to levy taxes unfairly because it implies, for example, that if an amount of \$20 million is to be raised by the federal government then the share each state contributes toward meeting that target is distributed to avoid overly burdening any one state. Ergo a state with one-third of the national population would contribute one third of the \$20 million.<sup>39</sup>

An initial area of interpretive constraint concerned the definition of ‘direct’ tax. Traditionally defined as a tax on land or slaves, in the North some congressmen nonetheless wondered aloud whether an income tax was a direct tax or an indirect tax. If it was the former, then the constraint of apportionment based on population would apply, with said population having to be measured by a recent census. Prior to the war, the American government was mostly funded from excise and customs duties and no precedent had ever been set authorising an income tax at the national level. Nevertheless, claiming necessity for revenue, the US Congress enacted an income tax in August 1861 and adjusted rates in following years. During the war, Congress and President Abraham Lincoln held that because an income tax did not touch property directly, it was an indirect tax and not constrained to requisitions proportionate to the population of each state. Constitutional challenges to the tax did not reach the Supreme Court until after 1865, and even if they had been allowed to earlier, would likely not have succeeded given that Lincoln appointed five Supreme Court justices favouring his theory of interpretation to the bench. Thus, in the North, the president and legislature’s opinion was adopted and the only potential constraint in the field of taxation overcome.<sup>40</sup>

The North, though enjoying superior administrative institutions, did experience problems in state-federal relations when it came to collecting tax. For instance, when the *Revenue Act of 1861* containing the income tax was enacted (among several other types of tax

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<sup>39</sup> Erik Jensen, “The Apportionment of ‘Direct Taxes’: Are Consumption Taxes Constitutional?” (2006) 398 *Faculty Publications* <[http://scholarlycommons.law.case.edu/faculty\\_publications/398](http://scholarlycommons.law.case.edu/faculty_publications/398)>

<sup>40</sup> In 1880, the Supreme Court upheld the Civil War income tax law. However, its interpretation was questioned by a later Supreme Court in 1895 when it ruled that income taxes are direct taxes. Legal uncertainty led to passage of the Sixteenth Amendment to the US Constitution, which allowed for unapportioned income tax.

embedded in the law) it was left to the governors to collect but nothing much was done by the state governments. These initial teething problems were quickly overcome however with the formation of the Bureau of Internal Revenue and enforcement mechanisms, so there does not seem to have been much overall constraint in the form of state rights resistance.<sup>41</sup>

In the South, for the first year the Confederacy operated under its Provisional Constitution which did not have an apportionment clause and granted a slightly broader authority than the US Constitution by permitting taxes to be laid on exports and not just imports (the latter freedom was in the final Constitution too).<sup>42</sup> This meant that in theory, excepting issues of state rights or other interpretive constraints, the Confederate government had more freedom to tax than the Union. Taking advantage of the flexibility of its provisional document, on February 28, 1861 the CSA Congress levied duty of an eighth of a cent per pound of cotton exported. In August 1861, Congress implemented a War Tax of one half of a percent on real and personal property (including slaves). Yet neither was particularly successful, since in 1862 less than five percent of revenues was realised from this tax. Attempts at collection continued over the years, and ‘not until 1864 did the War Tax account for even 10% of total revenues’.<sup>43</sup>

In its first year, the Confederate government derived 75 percent of its total revenue from treasury notes, less than 25 percent from bonds and under two percent from taxes.<sup>44</sup> This poor tax outcome can likely be attributed largely to non-constitutional factors of personality and poor leadership. Bad decisions were made by members of Congress who, wrongly believing the war would be short, underestimated the importance of taxation in the early stage of the conflict despite having power to pursue most types of tax. They taxed the wrong things, and left the right things untaxed. They delayed in setting up an administrative system.

Constraints imposed upon the federal government by the states were influential, however, when it came to collecting the War Tax. Governor Moore of Alabama on October 28, 1861 protested that ‘[t]he collection of this tax, by the state would be an onerous and unpleasant duty as it imposes upon the state the necessity of enforcing the laws of the Confederate government against her own citizens’.<sup>45</sup> Such reluctance to burden the public was reflected in the reality that most state governments, to meet their quota payments, resorted to taking out loans rather than directly taxing residents.<sup>46</sup> Due to the substitution of loans for taxes, the stock

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<sup>41</sup> Sheldon Pollack, ‘The First National Income Tax, 1861-1872’ (2014) 67 *Tax Lawyer* 10-11.

<sup>42</sup> Although some state constitutions did specify limits on taxation. See, e.g., Alabama Constitution of January 7, 1861.

<sup>43</sup> Richard Burdekin and Farrokh Langdana, ‘War Finance in the Southern Confederacy, 1861-1865’ (1993) 30 *Explorations in Economic History* 357.

<sup>44</sup> *The Civil War Tax History Project* <<http://www.taxhistory.org/www/website.nsf/web/THM1861?OpenDocument>> at 28 December 2016.

<sup>45</sup> Quoted in Marc Weidenmier, *Money and Finance in the Confederate States of America* (22 September 2002) EH.Net Encyclopedia <<https://eh.net/encyclopedia/money-and-finance-in-the-confederate-states-of-america>>

<sup>46</sup> With the exception of South Carolina, which collected duties from its citizens. Eric Nielsen, ‘Monetary Policy in the Confederacy’ (2005) *Region Focus* 41.

of money circulating in the economy increased and a rise in prices was stimulated, consequently undermining the intent and effectiveness of the federal tax program.<sup>47</sup>

From February 1862, the permanent CSA Constitution came into effect and created a textual and practical barrier to levying direct taxes via its apportionment clause. The inability of Confederate armies to reliably hold territory precluded a reckoning of population through a fresh census, and hence due to the terms of the clause Congress felt unable to target for revenue the two-thirds of wealth that was tied up in land and slaves. Military setbacks such as the capture of New Orleans in May 1862 also sparked demoralisation, which transformed into an additional constitutional constraint in the form of growing state level resistance.

Nevertheless, while the public's loyalty was not as sturdy as at the outset of the war, there was still scope in 1862 to implement a comprehensive *indirect* tax regime if the federal government had the foresight and determination to do so. Eventually, the CSA did try to utilise indirect taxes by side-stepping taxes on land and slaves to avoid its apportionment clause. On April 24, 1863 excise taxes on forest products, liquor, hotels and occupational and license fees were established, and a 10 percent tax on most profits, an income tax and a 'tax-in-kind' of one-tenth of farm produce was implemented.<sup>48</sup> The income tax was an onerous imposition which Edwin Seligman has pointed out was at higher rates than that of the Union, yet it failed to yield the desired revenue.<sup>49</sup> While the tax-in-kind was moderately successful, residents of locales overrun by the enemy were by virtue of collection difficulties exempt.

Why did the income tax fail to produce significant revenue? The outcome cannot be blamed on the constraint of state rights, since responsibility for collection (unlike the situation with the War Tax) was entrusted exclusively to federal officials. One reason may be that the rates were set too high, since widespread tax evasion occurred. By the logic of the Laffer curve analysis mentioned above, such evasion implies the balance between acceptable and unacceptable coercion had been breached and society was organically rejecting the imposition. Lowering the rate could have encouraged personal saving, capital formation and, over the long-term, revenue for government coffers. Regardless, tax rates were a non-constitutional discretionary factor because no rate was proscribed by the Constitution.

When faced with lacklustre revenue from indirect taxes, at the urging of President Davis, Confederate leaders in February 1864 repudiated the apportionment clause out of desperation at the state of their finances, including disregarding their own constitutional requirement for taking a population census. A five percent levy on land and slaves was consequently imposed.

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<sup>47</sup> Eugene Lerner, 'The Monetary and Fiscal Programs of the Confederate Government, 1861-65' (1954) 62 *Journal of Political Economy* 509.

<sup>48</sup> William Barney (ed), *The Oxford Encyclopedia of the Civil War* (Oxford University Press, 2011) 99.

<sup>49</sup> Edwin Seligman, *The Income Tax: A Study of the History, Theory and Practice of Income Taxation* (Augustus M. Kelley Publishers, 1970) 486. Seligman's observation does not consider the US emergency income tax bill passed in July 1864 which imposed an additional tax of 5 percent on all incomes more than \$600, on top of the rates set by previous income tax bills.

When the Confederate experience with constitutional constraints is viewed in its totality the record appears a mixed one. On the one hand, by 1864 the CSA had institutions that rivalled the Union in centralisation. Its states did not shirk in terms of paying tax, with an average rate of contribution between 62 percent and 87 percent throughout the war, even in later years when the Union controlled swathes of territory.<sup>50</sup> Also, much of the poor tax finance outcome can be attributed to discretionary decisions that delayed setting up an administrative system rather than to constitutional institutions. On the other, it is difficult to deny that constitutional constraints played a role in inhibiting development of a broader tax base. Plantation owners were influential as a lobby group, and elicited criticism of being granted special privileges that reduced their tax liability.<sup>51</sup> The CSA Constitution legally protected slavery, leaving open the possibility that taxing slaves could be seen as undermining property rights which was a factor that contributed to the influence of slave-owning plantation owners in national policy.

On balance, when compared to the North, the South was constrained in its ability to tax to a greater degree to the detriment of its fighting ability.<sup>52</sup> While the North made good use of direct and indirect taxes, the Confederacy was held back by its inability to circumvent its apportionment clause sooner. By contrast, the Union experienced few problems with its identical apportionment clause since a census had been taken in 1860 and it acted accordingly.

### B. Debt finance

The US Constitution and the Confederate Constitutions authorised each document's respective central government to borrow money, and contained nearly identical provisions in this regard. The text of the borrowing clause generally leaves to the political branches the task of resolving its scope and offers no guidance as to whether, for example, a balanced budget should be the objective of fiscal policy. It simply states that the Congress shall have the power 'to borrow money on the credit of the United States [or the Confederate States]'.<sup>53</sup>

The general availability of credit was constrained, however, by the gold or silver standard which was enshrined in the constitutions of the United States and the Confederacy by provisions pertaining to coining money and the outlawing of anything but gold and silver coin as tender in payment of debts. In 1850, it was recognised in *United States v Marigold* that Congress under the US Constitution had been granted the 'trust and duty of creating and maintaining a uniform and pure metallic standard of value throughout the Union'.<sup>53</sup> Further,

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<sup>50</sup> Rose Razaghian, 'Financing the Civil War: The Confederacy's Financial Strategy' (Working Paper, Yale University, December 2004) 18.

<sup>51</sup> In April 1863 for example, a law passed by the CSA Congress had exempted slaves from taxation. This created discontent since plantation owners in effect were not paying their 'fair share'. Ethan Rafuse, *Robert E. Lee and the Fall of the Confederacy, 1863-1865* (2009) 129.

<sup>52</sup> By one measure, the North raised 21 percent of its revenue from taxes whereas the South raised not more than 10 percent of its total revenue from taxes (including tariffs). Paul Nelson, 'Cost of the Civil War' in Spencer Tucker (ed), *American Civil War: The Definitive Encyclopedia and Document Collection* (2013) 442. Others have found a smaller difference, with about 16 percent from tax in the North versus 10 percent in the South.

<sup>53</sup> *United States v Marigold* 50 US 560 (1850).

the Confederacy was bound by an additional textual constraint in its constitution's article I, section 8, clause 4, which was a provision guaranteeing repayment of debts.<sup>54</sup>

The United States raised 64.5 percent of its revenue from borrowing over the course of the Civil War. By comparison, 21.3 percent of the Confederacy's total revenue was from debt.<sup>55</sup> In its first year, the CSA Treasury received \$15 million from loans and bonds in February and \$22.6 million from bonds in August.<sup>56</sup> But from August 1861, a \$100 million issue of Treasury notes convertible to twenty-year bonds sold slowly. Prima facie, these facts suggest a material difference between the parties that invites inquiry as to whether text or interpretive constraints played a role in the Confederacy's proportionately less revenue from borrowing.

Some have argued the failure of the CSA to centralise sufficiently due to constitutional constraints may have reduced its borrowing capacity. In comparison, the Union's expansive interpretation of its power resulted in the *National Banking Acts* of 1863 and 1864 which created federally chartered banks, taxed state banknotes to drive state banks out of existence and established a uniform national currency backed by government securities. Northern banks were required to deposit one-third of their capital for war bonds with the Comptroller of the Currency, and in exchange were given banknotes representing the market value of the bonds. In short, the system induced private banks to buy US bonds, making financing of the Civil War through borrowing easier for the Union government.

It is true that unlike in the Union, the Confederate Congress did not establish a system wherein banking was systematically taken out of the hands of state governments. Yet this must be qualified by the observation that the federal government occasionally imposed its will on local populations to encourage them to lend assets to it. For example, the Confederate government induced banks in 1861 to lend specie to the Treasury. The central government later pressured the state banks to suspend specie payments because this allowed easier deficit financing, since suspension meant banks could lend more freely. On February 17, 1864, with its *Currency Reform Act*, the government attempted to force conversion of its interest-bearing Treasury notes into four percent bonds. Again, in November 1864, it targeted interest-bearing notes and coerced, with the threat of taxes, noteholders to exchange these notes for bonds.<sup>57</sup>

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<sup>54</sup> This was a clause guaranteeing the CSA could not forgive certain debts. Article I, section 8, clause 4 of the CSA Constitution grants Congress the power '[t]o establish uniform laws of naturalization, and uniform laws on the subject of bankruptcies, throughout the Confederate States; *but no law of Congress shall discharge any debt contracted before the passage of the same* (emphasis added)'.

<sup>55</sup> John Godfrey, *Monetary Expansion in the Confederacy* (1978) 14. Some others estimate a higher percentage of somewhere between 32 and 40 percent of Confederate revenue from loans. See Marc Weidenmier, *Money and Finance in the Confederate States of America* (22 September 2002) EH.Net Encyclopedia <<https://eh.net/encyclopedia/money-and-finance-in-the-confederate-states-of-america>>; Paul Nelson, 'Cost of the Civil War' in Spencer Tucker (ed), *American Civil War: The Definitive Encyclopedia and Document Collection* (2013) 442.

<sup>56</sup> Jefferson Davis, *The Rise and the Fall of the Confederate Government* (Thomas Yoseloff, 1881) vol 1, 485.

<sup>57</sup> Richard Burdekin and Marc Weidenmier, 'Interest Bearing Currency and Legal Restrictions Theory: Lessons from the Southern Confederacy' (2002) 22 *Cato Journal* 203.

It should also be noted that the states played a supporting role in deficit financing. All states except for North Carolina and Georgia assisted in obtaining credit for the federal government by joining together to guarantee Confederate bonds to increase their value and attract foreign investors. Alabama's legislature on December 1, 1862 approved a resolution opining that 'it is the duty of each State of the Confederacy, for the purpose of sustaining the credit of the Confederate government, to guarantee the debt of that Government in proportion to its representation in the Congress'.<sup>58</sup> South Carolina's legislature passed a resolution in similar terms, and authorised the state's governor to endorse a share of \$200,000,000 of Confederate bonds. Mississippi followed suit on January 3, 1863 when it authorised its governor to endorse its share of \$200,000,000. These efforts indicate that on the matter of loans state rights philosophy does not seem to have been a major hindrance.

Many governments enact internal taxation programs simultaneously when attempting to procure loans to instil confidence in investors that revenue is available for repayment. However, as discussed above, tax revenue was comparatively low in the CSA partly due to constitutional limitations. Without significant revenue from taxation, there was doubt among financial markets of the capacity of the CSA to pay its debts, and so money loans dried up (hence the impetus for the Confederacy's 1861 experiment with the produce loan scheme, which allowed food to be exchanged in return for bonds). Investors also look for victories on the battlefield to find assurance of repayment. Yet there were constitutional constraints preventing interference with slave property that hindered the CSA's ability to raise black troops from the millions of slaves in its jurisdiction, and this manpower shortage diminished the federal government's ability to match the numerical strength of Union armies.<sup>59</sup> In this sense, when it came to attracting lenders, the Constitution did partially operate as a constraint.

On the other hand, the shortage of tariff revenue available to repay debts and secure lenders, as shown above, was primarily the result of non-constitutional discretion. In addition, high inflation, which was anathema to lenders because a devaluation of Confederate currency discouraged creditors from wanting to lend if they were to be repaid in worthless Confederate dollars (although some government bond contracts promised repayment in gold after the conclusion of the war), as I show in the next section, was also primarily the result of discretionary decisions not the Constitution. Treasury Secretary Christopher Memminger understood the negative effects of a debased currency, however he failed to convince Congress to control inflation and inspire faith in holding Confederate currency.<sup>60</sup>

Revenue from loans was consequently the result of multiple influences. On balance, I would suggest that the non-constitutional products – namely, tariff revenue and inflation rates – were more influential, however this is my own subjective weighting and reasonable persons

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<sup>58</sup> Richard Todd, *Confederate Finance* (University of Georgia Press, 2009) 69.

<sup>59</sup> Specifically, the CSA Constitution stated that '[n]o...law denying or impairing the right of property in negro slaves shall be passed'.

<sup>60</sup> See, e.g. Memminger's speech to the South Carolina House of Representatives on 9 December, 1848 outlining the effects of currency debasement and arguing that governments should not be involved in the business of banking. *Speech of Mr. C. G. Memminger, on the question of rechartering the bank of the state of South Carolina: delivered in the House of Representatives, December 9, 1848* (1849).

can disagree. What cannot be disputed however, is that the possibility for securing loans had much to do with perceptions of underlying ability to repay, and here the Union had an advantage due to its credible internal tax revenue, assured tariff duties and lower inflation rate. The relatively favourable economic situation in the North allowed Philadelphia banker Jay Cooke (acting under direction of Treasury Secretary Salmon Chase) to successfully propagate bonds to not only the rich but hundreds of thousands of middle-class individuals.

In one sense, the issue of constitutional versus non-constitutional influence is moot, since even if it had somehow succeeded in borrowing more, the CSA would still have struggled with debt servicing obligations due to a poor revenue base, which would have eventually resulted in a financial crisis either when the system collapsed under its own weight or when lenders discovered the essentially bankrupt Treasury. So, it is unclear whether more loans could have made a tangible impact allowing the CSA to finance its victory. As an illustration consider that in 1861, war expenditure was 95 percent of the Confederacy's budget but by October 1864 actual spending on fighting the war fell to 40 percent of the budget since the rest (about 56 percent overall) constituted payments towards debt servicing. '[W]hen it succumbed [the CSA] was owing current floating debts estimated between \$400,000,000 and \$600,000,000 – owing soldiers their pay for many months and obligated to almost everybody for materials, rentals or services and for interest on the public debt', writes Ellis Coulter.<sup>61</sup>

### *C. Expenditures*

A complete picture of fiscal policy necessitates an analysis of government expenditures and how effectively these were directed toward the prime objective of military defence. There was nothing in the US Constitution or Provisional CSA Constitution's text precluding wasteful spending, thus leaving constraints to be resolved in the realm of political discretion. But in the Confederacy from 1862, private companies were mostly responsible for building their own infrastructure. As mentioned, spending on public works was ruled out by the final CSA Constitution except for on ports, harbours, lighthouses and for dredging rivers. Taxes to raise revenue for the aforementioned had to be laid only on ocean or river going ships rather than on the general population (so too with the post office, which after March 1863 was to be funded from profits obtained by user fees).<sup>62</sup> Subsidies from the Treasury to specific companies were prohibited. However, an exception in article I, section 8, clause 17 allowed for construction of 'forts, magazines, arsenals, dockyards, and other needful buildings' for military defence.

In the North, the Republican Party won the 1860 election on a platform of subsidies for manufacturing and shipping industries. From 1861, President Lincoln's mercantilist beliefs shaped the agenda in the House of Representatives and Senate; their efforts led to the adoption of an interpretation permitting spending on internal improvements.<sup>63</sup> Influenced by the

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<sup>61</sup> Coulter, *The Confederate States of America, 1861-1865* (first published 1950; 1978 ed) 172.

<sup>62</sup> Additionally, like the US, a provision in the CSA Constitution prevents discrimination in regulation or taxing of ports, so all states were to be treated equally by the federal government. See article I, section 9, clause 7: 'No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another'.

<sup>63</sup> Thomas DiLorenzo, *The Real Lincoln* (Crown Forum, 2003) 56.

‘American System’ proposed by Congressman Henry Clay, whereby hundreds of businesses collaborate with government and are paid by taxpayers for their efforts, the Lincoln administration in 1862 signed a bill for a transcontinental railroad from Omaha, Nebraska to Sacramento, California diverting millions of dollars even though that money could have instead been spent on bouncing back from the poor performance of Union armies during the first year of the war.<sup>64</sup> Instead of selling federal land to finance government, Congress did the opposite with the *Homestead Act of 1862* which gave away land at little or no cost, and the *Morrill Act of 1862* which granted 17.4 million acres to build colleges to teach agriculture and science. With respect to the latter, the US Constitution nowhere authorised expenditure on education by the federal government, but proponents argued it was implied from the authority over commerce under article I, section 8, clause 3. Also in 1862, a Department of Agriculture was created to dispense farm welfare. Such domestic largesse indicates allocation of resources away from war aims and minimal constitutional constraints on spending.

In the Confederacy, President Davis took advantage of the Provisional Constitution’s absence of textual constraints and its unicameral legislature to advocate spending on constructing railroads. He gained congressional approval on February 10, 1862, with almost two-thirds of the legislature supporting aid for a connection between Virginia and North Carolina. When the permanent constitution came into effect on February 22, 1862, the Confederate Congress continued to pass legislation authorising various public works projects and subsidies to business (what one historian has labelled war ‘socialism’<sup>65</sup>).<sup>66</sup> On October 2, 1862, Congress authorised a sum of \$1,122,480 in bonds to be spent on construction of a railroad between Blue Mountain, Alabama and Rome, Georgia. In this way, the exception for military defence in article I, section 8, clause 17 for construction of buildings was stretched to support laying rail track too. Millions in subsidies were paid to iron foundries, textiles, and other industries that had little precedent in the antebellum agricultural South, further indicating that the CSA Constitution’s textual constraints had little practical effect.

Had the Confederate government adhered to the spending constraints in its constitution, it would have left to the states (or at least, those without spending constraints in their constitutions) or the private sector the responsibility for infrastructure. This may have necessitated a frugal military strategy, for example, cooperating with the states fully and drawing the enemy into the deep south and away from northern supply lines. It is not certain that such an alternative approach would have been worse than the inefficient central government allocation of resources that was pursued.<sup>67</sup> As things stood, the government adopted an unconstrained big spending approach like the Union, albeit with the disadvantage of not having assured streams of revenue or as productive an economy. In other words, while it is true that given wartime pressures something had to be done to quickly close the gap in

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<sup>64</sup> Ibid 83. California had little whatsoever to do with the fronts on which the war was fought.

<sup>65</sup> Louise Hill, *State Socialism in the Confederate States of America* (Historical Publishing, 1936).

<sup>66</sup> Richard Bense, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (1990) 148. Davis sidestepped the constitutional prohibition by claiming that the railroad fell within an exception for military purposes.

<sup>67</sup> Ekelund and Thornton, *Tariffs, Blockades and Inflation*, above n 7, 75-6.

industrialisation vis-à-vis the North, it is not certain that additional budgetary expense while not having as secure a tax base to pay for such expense was the rational way forward.

## V MONETARY FINANCE

Monetary policy in the 19<sup>th</sup> century involved targeting the supply of money in the context of paper certificates entitling the bearer to redeem in a precious metal.<sup>68</sup> By contrast, monetary *finance* entailed suspending the metallic standard and emitting bills of credit (such as Treasury notes) which were then used by government to pay for goods and services without the need to tax in a visible manner. However, there is a limit to how much a government can create money out of thin air in this way, because when too much money exists relative to the supply of goods, the result is price inflation. The resulting price rises constitute a ‘inflation tax’ and can be harmful to civilian and military life due to the economic dislocation caused.

The main clause pertaining to monetary finance in the US and Confederate Constitutions declares that Congress shall have power to ‘coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures’. This suggests that Congress had a right to coin money but could print money only if backed by a gold or silver standard; indeed, the word ‘coin’ implies a metallic standard.<sup>69</sup> Moreover, Congress is not granted authority to make its currency legal tender. The Provisional Confederate Constitution contains identical provisions and additionally prohibits states from emitting bills of credit.

There are two competing interpretations of Congress’ power, one which supports the federal government issuing paper money unbacked by specie and another which opposes paper money.<sup>70</sup> The latter finds support in the historical record from the American framers who understood the harmful effects of inflation under the Articles of Confederation. Importantly, while the Articles had allowed the Continental Congress to ‘emit bills’, the framers subsequently removed this wording from the enumerated powers of the Congress, calling into question the legality of emitting bills of credit and making them legal tender.<sup>71</sup> Arguably, the text was designed to be a constraint on creation of funds through monetary finance.

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<sup>68</sup> Hummel, *Emancipating Slaves, Enslaving Free Men*, above n 21, 224.

<sup>69</sup> ‘Constitutional historians and scholars generally agree’, writes Andrew Dahdal, ‘that the framers of the US Constitution... intended to deny the federal government the power to issue paper money’. Andrew Dahdal, ‘The Constitutionality of Fiat Paper Money in Australia: Fidelity of Convenience?’ (2013) 2 *Journal of Peace, Prosperity and Freedom* 51. See also *Hepburn v. Griswold* 75 US 603 (1870) which held that paper money is unconstitutional.

<sup>70</sup> Edwin Vieira, ‘The Monetary Powers and Disabilities of the United States Constitution’ (Research Paper for the Gold Commission, US Congress, 8 February 1982) 50.

<sup>71</sup> Edwin Vieira, ‘The Monetary Powers and Disabilities of the United States Constitution’, above n 56, 29: “By not including the language ‘emit bills’ that the Articles of Confederation contained, Article I, § 8, cl. 2 disables Congress from issuing paper currency of any sort”. Justice of the Supreme Court Joseph Story said as much in *Commentaries on the Constitution of the United States*, where he noted that the purpose of the US Constitution was to stop ‘the floods of depreciated paper-money, with which most of the States... were inundated’. Joseph Story, *Commentaries on the Constitution of the United States* (5<sup>th</sup> ed, 1891) vol 3, 212.

In the first year of the Civil War, the hard-money legacy of President Andrew Jackson constrained the US government's utilization of the printing press, since the Treasury was restrained by the gold standard. Thus, it was necessary to subvert the existing legal order to raise revenue through monetary means. To do so the Union pursued a policy of creating demand notes and United States Notes (collectively known as Greenbacks). In 1861, Secretary Chase issued \$33 million in demand notes while attempting to adhere to existing law by promising redemption in specie. However, as it dawned on banks that the conflict would be a long one and that there would be economic uncertainty in future, they suspended redemption for specie in December. In 1862, with the cost of war multiplying and loans being expensive due to high interest rates, Lincoln sought an alternative means of finance and so the idea to issue unbacked United States Notes was conceived. On February 25, Congress passed the *Legal Tender Act* and authorised \$150 million in notes. These were made legal tender in all transactions except for paying customs duties, and were not immediately redeemable in specie.<sup>72</sup> In March 1862, demand notes were also made legal tender. There was controversy over these policies and California and Oregon, in compliance with their state constitutions, refused to suspend gold based transactions.<sup>73</sup> However overall there was little effective constitutional constraint on US monetary finance, with a total of \$480 million in legal tender notes being issued.

Likewise, the CSA faced few constraints since – due to low tax revenue – heavy reliance was placed on currency issues.<sup>74</sup> The foundation of Confederate finance was its \$1.5 billion in fiat money. Marc Wiedenmier finds that ‘the Confederate money supply increased 11.5 times between January 1861 and October 1864 while commodity prices increased 28 times in the same period’.<sup>75</sup> Confederate leaders made arguments based on necessity. Secretary Memminger claimed in a letter to New Orleans bankers in September 1861 that ‘the necessity is most urgent that our Treasury notes be made available...the President, with the concurrence of his entire cabinet have directed me to ask your immediate adoption of the only measure which can secure the credit of the Government, namely, the temporary suspension of specie payments by the banks and the reception of treasury notes as currency’.<sup>76</sup> Belatedly, when faced with the negative consequences of his policy, Memminger proposed taking one-third of the currency out of circulation by repudiating it. Congress resisted, but finally in February 1864 it passed an act that produced a minor temporary drop in inflation.<sup>77</sup>

Unlike the Union however, there was no officially sanctioned legal tender in the Confederacy. Discussion at the time shows that the Confederate Congress purposefully adopted a constitutional interpretation that was pro-choice, partly because President Davis and

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<sup>72</sup> Greenbacks were fundable into bonds at six percent interest, payable in 20 years and redeemable in five. Interest on the bonds was payable in gold, which helped enhance the value of the bond.

<sup>73</sup> Murray Rothbard, *A History of Money and Banking in the United States* (2002) 127-29.

<sup>74</sup> Coulter, *The Confederate States of America, 1861-1865*, above n 61, 158.

<sup>75</sup> Marc Weidenmier, *Money and Finance in the Confederate States of America* (22 September 2002) EH.Net Encyclopedia <<https://eh.net/encyclopedia/money-and-finance-in-the-confederate-states-of-america>>

<sup>76</sup> Memminger in Raphael Thian, *Reports of the Secretary of the Treasury of the Confederate States of America, 1861-1865* (Privately published, 1878) 45-6.

<sup>77</sup> *Currency Reform Act of 1864*. The act took effect April 1, 1864 east of the Mississippi River, but did not take effect until July 1, 1864 in the west.

Secretary of the Treasury Christopher Memminger believed legal tender status for Confederate currency would be unconstitutional.<sup>78</sup> In the CSA, state banknotes, US currency and Confederate notes initially circulated throughout the economy simultaneously until the federal government eventually banned use of Union currency.

State rights philosophy was of very little hindrance whatsoever. In fact, paper money issues occurred despite textual impediments in the Confederate Constitutions and state constitutions.<sup>79</sup> The Louisiana constitution, for instance, prohibited bank specie payment moratoriums and the attorney-general was supposed to bring proceedings against any suspended bank. But this was ignored when suspension occurred in late 1861. Some states ignored the CSA Constitution's requirement to only make gold and silver a legal tender in payment of debts as well as the document's effective centralisation of monetary policy in an attempt to support the federal program.<sup>80</sup> They passed laws making Confederate currency legal tender (with the intention of forcing into circulation the depreciated money and encouraging investment with it) and several states interfered in the domain of monetary policy by issuing their own paper money which competed with the federal government's.<sup>81</sup> Their endorsement of fiat currency undermined the sound practices that had been pursued in America under the Jacksonian era of free banking and the gold standard, and contributed to the rampant inflation that most agree contributed to the downfall of the Confederacy.<sup>82</sup> Both the federal government and states contributed almost equally in this regard (although states issued fewer notes).<sup>83</sup>

The heavy reliance on note issue makes clear that constitutional constraints were largely ineffective in restraining either the Union or the Confederacy, with the one exception being that the Confederate government never made its notes legal tender. According to Hummel, this inability to make its notes legal tender was not detrimental to the CSA's prospects:

Some attribute the Confederacy's monetary problems to a failure to make its currency legal tender in private transactions. In fact, as the monetary history of the American colonies makes clear, all that is necessary to get government paper to circulate is making it payable for taxes, along with some restraint on the amount issued and good prospects that the government will survive.<sup>84</sup>

In other words, the CSA simply had to keep inflation under control and win military battles to bolster confidence in its monetary finance. The Union contained the cost of living at 180 percent above what it was in 1860, whereas the combination of rising money supply and

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<sup>78</sup> E. Merton Coulter, *The Confederate States of America, 1861-1865* (1978) 156.

<sup>79</sup> Ball, *Financial Failure and Confederate Defeat*, above n 34, 167: 'The Provisional Constitution expressly forbade state governments to emit bills of credit. Yet by January 1862, every state in the Confederacy, excepting only Kentucky, Tennessee and South Carolina, had issued or authorised notes'.

<sup>80</sup> The states are prohibited from coining money without the consent of Congress, which represents an effective centralisation of monetary policy. See article I, section 10.

<sup>81</sup> Ball, *Financial Failure and Confederate Defeat*, above n 34, 175.

<sup>82</sup> For examples of scholars who agree inflation was detrimental to the Confederacy see John Schwab, *A Financial and Industrial History of the South During the Civil War* (1901) 95; Jeff Hummel, *Emancipating Slaves, Enslaving Free Men* (2013).

<sup>83</sup> Coulter, *The Confederate States of America, 1861-1865*, above n 61, 170.

<sup>84</sup> Hummel, *Emancipating Slaves, Enslaving Free Men*, above n 32, 41.

diminishing quantity of goods (as Weidenmier observes, ‘the South experienced a forty percent fall in real output during the war’<sup>85</sup>) led to near hyperinflation conditions in the CSA, with prices having increased 9000 percent on their prewar level by 1865.<sup>86</sup> Both countries experienced declining real wages and economy-wide distortions which hampered the ability of businesses to make reliable calculations and plan.<sup>87</sup>

Monetary finance is conjectured to have been unavoidable by some historians, who fail to see alternatives. Yet, there are scenarios wherein the Union and Confederacy could have respected their textual framework and successfully financed without excessive inflation.<sup>88</sup> William Sumner writes that ‘[t]he real financial question of the day was whether [the US] should carry on the war on specie currency, low prices, and small imports, or on paper issues, high prices, and heavy imports’.<sup>89</sup> Sumner points out that between November 1860 and December 1861, there was a window of opportunity for non-inflationary finance since most people were reducing debt and expenses to hedge against the uncertainties of war. As a result, prices fell, imports slowed, exports boomed and specie flowed in. Specie inflow would have allowed for issuing paper backed by gold, but instead Lincoln and Secretary Chase chose to pursue a policy based on fiat money. Similarly, the CSA could have prioritised taxation, borrowing and sale of assets to raise revenue rather than printing money.<sup>90</sup> As Ekelund and Thornton note, although such non-inflationary methods may have reduced resources available and forced adoption of a decentralised and defensive military strategy aimed at conserving capital, they are sustainable in the long-run since it avoids the ravages of inflation.<sup>91</sup>

## VI COMPULSORY ACQUISITION

There was no explicit wording in the US or Confederate Constitutions that permitted the central government to seize private property as a means of gathering resources. However, forfeiture of property without compensation was permitted as a punishment for treason so long as appropriate court procedures were undertaken to determine the loyalty of an individual or group (legislation declaring an individual or group guilty of treason without trial was prohibited). Applying confiscation to non-treasonous citizens was precluded by the US Constitution’s Bill of Rights (which was duplicated in the CSA) unless a warrant was obtained before taking

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<sup>85</sup> Marc Weidenmier, *Money and Finance in the Confederate States of America* (22 September 2002) EH.Net Encyclopedia <<https://eh.net/encyclopedia/money-and-finance-in-the-confederate-states-of-america>>

<sup>86</sup> Paul Nelson, ‘Cost of the Civil War’ in Spencer Tucker (ed), *American Civil War: The Definitive Encyclopedia and Document Collection* (2013) 442.

<sup>87</sup> Ekelund and Thornton, *Tariffs, Blockades and Inflation*, above n 7, 69-75.

<sup>88</sup> It is interesting to note that in *Hepburn v. Griswold* 75 US 603 (1870), the majority found that printing greenbacks is unnecessary for fighting a war.

<sup>89</sup> William Sumner, *A History of American Currency* (Henry Holt, 1874) 189-192.

<sup>90</sup> Instead, the Confederate government imposed a variety of policies—including the draft, impressment, and tax-in-kind—that drove up the cost of goods and created scarcity.

<sup>91</sup> Ekelund and Thornton, *Tariffs, Blockades and Inflation*, above n 2, 76: ‘Noninflationary finance, in reducing the amount of resources available to the Confederate government, would have forced its officials to rely on a more decentralised and defensive military strategy. It might also have made them more cooperative with their state governments, the business community, the slave population and foreign nations and force them to make the tough decisions they were unwilling to face under inflationary finance until the final days of the war’.

property and unless ‘just compensation’ was provided to owners whose property was taken for public use. Thus, per the text, a narrow confiscation power existed.

During the war, compulsory acquisition came to be of two types: impressment and sequestration. Impressment entailed forcible taking of property for public purposes from those otherwise loyal to the ruling government; these affected persons were supposed to be compensated at market rates since they were innocent of treason but in practice this did not always occur. Conversely, sequestration was a confiscation measure taken against disloyal persons who were not compensated because they were presumed to be active combatants outside the scope of the constitutional protection requiring ‘just compensation’. Sequestered property was seized and then sold, with the proceeds going to the Treasury.

A Union confiscation law targeting disloyal persons was passed in August of 1861. This legislation authorised sequestration of all rebel property (including slaves) directly used to aid the war effort. An act in July 1862 broadened the scope of confiscation by applying penalties against all persons who directly or indirectly supported the southern states, whether by taking up arms, providing aid or moral comfort. Enforcement occurred through federal district or circuit courts, was limited to areas where the process of courts could reach and offered no financial compensation. Therefore, most successful prosecutions occurred in the North since the fighting made it impractical to hold hearings against persons residing in the South. This lack of enforcement must be qualified by the reality that Union military men early in the war when there was no legislation and after the passage of legislation occasionally enforced martial law to consume or sell property.<sup>92</sup> Still, the auctioning of property, whether through legal or extra-legal means, did not yield much for the Treasury until after the war.<sup>93</sup> ‘When all has been said,’ explains James Randall, ‘it is clear that there was not a sufficiently diligent and systematic enforcement of the acts to produce any marked effect other than a feeling of irritation and injury on the part of a few despoiled owners’.<sup>94</sup> Daniel Hamilton confirms that ‘[r]elatively little property was in fact confiscated, and the Second Confiscation Act was more or less ignored by Lincoln and the executive branch during the war’.<sup>95</sup>

The Union expropriated property of residents primarily where a link to aiding or abetting the rebellion could be shown.<sup>96</sup> Part of the reason for restraint among Northern legislators was their choice of constitutional interpretation. Lincoln and the Republican Party refused to admit that the Confederacy was a separate nation, preferring instead to adopt the view that the CSA was still part of the United States. Their interpretive choice implied that

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<sup>92</sup> Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877*, above n 53, 156. Until 1863, when an act relating to captured and abandoned property was passed, the military routinely exercised extra-legal influence. Even after 1863’s legislation, the military continued in its old habits. A prime example is the Union army confiscating Robert E. Lees home, Arlington House, which they used as headquarters.

<sup>93</sup> James Randall finds that by May 1868, about \$25 million had been raised under the *Captured Property Act*. This act was used to reach property that the Confiscation Acts could not reach. James Randall ‘Captured and Abandoned Property During the Civil War’ (1913) 19 *American Historical Review* 69.

<sup>94</sup> J.G. Randall, *Constitutional Problems under Lincoln* (Peter Smith, 1963) 291.

<sup>95</sup> Daniel Hamilton, *The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy during the Civil War* (University of Chicago Press, 2007) 3.

<sup>96</sup> *Ibid* 1-3.

loyal citizens, whether residing in the Confederacy or in the United States, were eligible to claim protection from the Bill of Rights and its requirement that there be ‘just compensation’.<sup>97</sup> Hence there was internal controversy as to whether the government should ignore Fifth amendment rights and it did not engage in any significant impressment from loyalists, preferring instead to rely on contracts offering commercial rates for use of their property.<sup>98</sup>

In the Confederacy, impressment was pursued at first informally by the army, and then formally from 1863 when Congress backed the policy through legislation and appointed a quartermaster of each district to oversee progress. The Confederate government impressed from loyal residents their food, fuel, slaves, and machinery, among other things.<sup>99</sup> Power gravitated to the central government, which either immediately compensated property owners at below market prices, issued a promise to pay after the war or, in violation of its 1863 law, simply took the property without paying. While the Confederacy never established a Supreme Court as a binding court of appeal, most state courts nonetheless upheld the impressment law. Only the Georgia Supreme Court ruled major sections of the 1863 act unconstitutional.<sup>100</sup> The relative judicial consensus undermines the notion that decentralist philosophy constrained supplies available to the military. Although prominent governors opposed impressment, they lost the legal battle and the Confederacy routinely took confiscation further than the Union by taking property without compensation from citizens without a connection to the enemy.

While not officially part of the impressment policy, confiscation was also effectively applied to loyal Confederates through the tax-in-kind law passed in April 1863, which allowed the federal government to take 10 percent of agricultural produce and livestock from farmers, with the cash value of the crop being allowed in lieu if it was not possible to deliver the actual goods. To ensure compliance, a penalty was imposed on those who failed to pay. This tax-in-kind was a reversion to a barter economy and fell heavily on the civilian population, who would have benefited instead from a tax that asked for payment in low-value Confederate currency. Despite administrative problems which caused food to be spoiled while waiting at depots, the tax-in-kind is estimated to have raised \$140 million in goods and cash.<sup>101</sup>

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<sup>97</sup> Abraham Lincoln voiced objection to the 1862 confiscation bill on the grounds of it being a bill of attainder working corruption of blood (removing the right of heirs to inherit land after the rebel’s death), although he ultimately signed the bill once Congress assured that it was not to apply beyond the life of the person affected. J.G. Randall, *Constitutional Problems under Lincoln* (Peter Smith, 1963) 280.

<sup>98</sup> The Fifth Amendment of the US Constitution, which is duplicated in the Confederate Constitutions, provides: ‘No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation’.

<sup>99</sup> 1<sup>st</sup> Congress 3<sup>rd</sup> Session, Act of March 26 1863 in *Statutes at Large of the Confederate States of America* (R.M. Smith, 1862) 102-04.

<sup>100</sup> Marshall DeRosa, *The Confederate Constitution of 1861: An Inquiry into American Constitutionalism* (1991) 117.

<sup>101</sup> John Schwab, *The Confederate States of America, 1861-1865* (Charles Scribner’s Sons, 1901) 297.

In addition to impressment, the Confederacy used sequestration to take from belligerent residents their property – both tangible and intangible – located within its jurisdiction. From the beginning the CSA looked upon the Union sympathisers residing within its borders as alien enemies who were ineligible for ‘just compensation’. Therefore, the Confederate government proceeded swiftly and more severely in the matter of sequestration.<sup>102</sup> A May 1861 statute confiscated debts owed by Northerners to Southerners, while the August 1861 law sequestered the property of aliens directed toward hostile use. Although designed to hurt enemy aliens, sequestration had harsh effects on Confederate family members, business partners or debtors who had children or who had done business with Northerners. The antebellum association between geographical regions meant it was difficult to disentangle the two.

There is reason to believe that the Union was more constrained in its confiscation measures. When it came to allocating scarce resources to military uses, a system of contracts with the private sector was utilised more often in the North than government possession.<sup>103</sup> In the Union, the rule of law restrained impressment.<sup>104</sup> ‘The situation could hardly have been more different in the South,’ writes Bensel. ‘In the Confederacy, the central state regulated almost all forms of production and manpower, often assuming direct control of private factories, impressing their production, and even constructing state-owned plants where private capacity was insufficient for the needs of the war effort’.<sup>105</sup> The South’s denial of property rights was comprehensive and yielded dividends that in the short-term helped in stretching the duration of its resistance. For instance, sequestration brought in millions for the CSA.<sup>106</sup> The Union raised less from seizures due to prevailing views restraining congressional and presidential power under the US Constitution and its Bill of Rights.

After four years of taking from its subjects without adequate compensation in probable violation of the constitutional requirement for ‘just compensation’, it was the CSA’s policy that caused the most problems. Aside from the fall in morale because of perceived unfair treatment by CSA agents, there was an increase in uncertainty that contributed to a 50 percent reduction in consumption.<sup>107</sup> This environment precipitated reduced economic activity and in the medium to long-term would have resulted in smaller revenues from taxation. When property can be taken from residents without due process or fair compensation, it creates uncertainty

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<sup>102</sup> Daniel Hamilton, *The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy during the Civil War*, above 81, 83.

<sup>103</sup> Bensel finds: ‘Apart from the suppression of dissent in the North and plans to reconstruct the Southern political economy’, explains Bensel, ‘the Union relied on an unregulated capitalist market to supply resources and manpower’. He continues: ‘While some of the financial measures that facilitated this reliance on market procurement had broader, largely unanticipated statist consequences...most Union policies fell comparatively lightly and transiently on civilian society and the economy’. Richard Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (Cambridge University Press, 1990) 233.

<sup>104</sup> Although enemy aliens frequently had their property sequestered.

<sup>105</sup> Bensel, *Yankee Leviathan*, above n 87, 233.

<sup>106</sup> Nowlin Randolph, ‘Judge William Pinckney Hill Aids the Confederate War Effort’ (1964) 68 *The Southwestern Historical Quarterly* 17-18.

<sup>107</sup> Eric Nielsen, ‘Monetary Policy in the Confederacy’, above n 35, 41. Paul Escott has shown that government appropriation can diminish morale among affected persons, a sizable percentage of whom feel resentment over forfeiture. Paul Escott, *After Secession: Jefferson Davis and the Failure of Confederate Nationalism* (Louisiana State University Press, 1992; originally 1978) 66.

that discourages future investment and production. Individuals cannot easily plan since they have no reliable method of knowing whether they will be the government's next target.<sup>108</sup>

## V CONCLUSION

Near the end of the Civil War, President Davis wrote in a letter that:

the difficulties with which this Government has to contend in opposing, with its limited resources, the devastating tide of invasion which the power of our enemy is pouring upon us would be great enough under any circumstances, and with the most united and harmonious action of our whole people. But these difficulties have been materially increased by the persistent interference of some of the State authorities – Legislative, Executive, and Judicial – hindering the action of this Government, obstructing the execution of its laws, denouncing its necessary policy, impairing its hold upon the confidence of the people, and dealing with it rather as if it were the public enemy than the Government which they themselves had established for the common defense and which was their only hope for safety from the untold horrors of Yankee despotism.<sup>109</sup>

Whether this was a genuine complaint, or a self-interested excuse offered by a leader who, along with those in Congress, failed in defending their people, has been partially addressed by this paper in relation to economic policy. In this paper, the provisions of the US Constitution and Confederate Constitutions were analysed to determine influence on the revenue available to the central government. I have emphasised not just the text but also interpretive opinion, primarily reflected in the proxy of outward policies pursued by the state and federal governments. This is because legal provisions are given meaning by human beings and so clauses cannot be viewed in isolation of the people who interpret them.

The experience of the Union and the Confederacy suggests that the legal framework was not much of a constraint on the central government in terms of raising revenue since most issues were resolved in the non-constitutional domain. Most major legal issues did not reach the Supreme Court of the United States until after the war, and the few litigated cases were decided in favour of the federal government.<sup>110</sup> Similarly in the Confederacy, the state courts mostly ruled in favour of the central government on the one issue that was litigated, namely, impressment. When it came to revenue from international trade, the Confederacy actively exercised non-constitutional discretion to ignore the text of its constitution by imposing quotas and taxes that undermined free trade. On fiscal policy, the Confederacy spent freely on public works projects in violation of the textual ban on such spending. On monetary policy, the antebellum consensus against fiat currency was overturned and both parties printed currency freely. On impressment, neither nation fully adhered to the constitutional mandate of 'just compensation' however the Confederacy was egregious in its seizure of property. There was

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<sup>108</sup> For illustration of this principle see Robert Higgs, 'Regime Uncertainty: Why the Great Depression Lasted so Long and Why Prosperity Resumed After the War' (1997) 1 *The Independent Review* 563-64.

<sup>109</sup> Jefferson Davis, 15 December 1864 (in a letter to Samuel J. Person).

<sup>110</sup> *The Prize Cases* (1863) 67 US 635, which held the Northern blockade of the South was lawful, was the only major Supreme Court decision affecting the economic realm during the war. Several important cases dealing with income tax, for instance, were only heard by the Court after the war's end.

increased centralisation in both jurisdictions when compared to the pre-war period. What Fisher wrote in 1862 essentially sums up what occurred: ‘the war has shed new light on the principles and meaning of our Constitution, and revealed in it imperfections, perhaps also powers, scarcely perceived by its makers, and hidden from the superficial and unsuspecting glances of the people, during our long period of prosperity and peace’.<sup>111</sup>

My finding is consistent with earlier research that suggests war is a state of panic where nationalistic fervor tends to trump legal formalities, and that constitutions rarely restrain government in emergency situations.<sup>112</sup> There is necessarily a degree of subjectivity when assessing the weight of constraints versus non-constitutional factors such as poor leadership. Nonetheless, despite the complexities of wartime constitutions, I have tried to demonstrate when constitutions were followed and when they were not, and that poor discretionary judgements caused harmful delays, loss of revenue and broader detrimental economic impacts.

However, there were some real constraints. In the Union, these materialised in confiscation policy where controversy over diminishment of property rights played a constricting role and created a circumscribed impressment regime, while in the CSA the apportionment clause caused direct tax to falter until 1864 when it chose to ignore the clause. Thus, the Union raised less from confiscation and the CSA brought in less in taxes. In the South, only 10.5 percent of the revenue collected over the course of the war was from taxes, the printing press covered 61.7 percent and miscellaneous sources (donations, sequestration etc) raised 6.5 percent. The North raised 16.5 percent of its total revenue from taxes, currency issue covered 16.5 percent and other sources accounted for 2.5 percent.<sup>113</sup>

In many instances, adherence to the Constitution’s text could have created more resources to direct toward the military. If the Confederacy had pursued a free-trade policy that exported cotton and avoided banning classes of goods it could have improved its financial position by the revenue gained from trade. Likewise, if it had restrained spending it could have saved money for military supplies and paying soldiers, and if it had stuck with a metallic standard it could have avoided the price increases that made it difficult for civilians to afford essential goods. Finally, to avoid uncertainty to business investment caused by impressment, the CSA could have pursued mutually beneficial contracts with private industry. These observations must be qualified, however, by the reality that war was a desperate situation and that some of these measures would have taken time to yield the desired revenue.

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<sup>111</sup> Sidney Fisher, *The Trial of the Constitution* (1862) vi

<sup>112</sup> Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (1987).

<sup>113</sup> John Godfrey, *Monetary Expansion in the Confederacy* (Arno Press, 1978) 14. Totals do not add to 100 because the remainder of revenue was raised from borrowing.