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The South Won't Rise Again but It's Time to Study the Defunct Confederacy's Constitution

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I. INTRODUCTION

It is a simple fact that for a short, but significant, period in American history two governments existed with highly similar, but also markedly divergent, seminal constitutions. One government was *de jure*,[1] in light of force of arms and constitutional law, and the other *de facto*,[2] because of having failed at revolution. The Confederate States of America, repudiated first by military and naval debacle and then by constitutional law,[3] existed from 1861 to 1865.[4]

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* Professor of Law, Pace University School of Law. Portions of this article concerning the history of the Constitution of the Confederate States of America were first delivered as speeches before several historical societies. I very much appreciate the continuing and influential encouragement of my friend and colleague, Associate Dean and Professor of Law Michael B. Mushlin. Professor Mushlin is a true son of the South, who still bemoans the accidental torching of his Meridian, Mississippi home town during General Sherman's benevolent operations there.

1. The Union can be categorized as a *de jure* government, one "[e]xisting by right or according to law." BLACK'S LAW DICTIONARY 437 (7th ed. 1999).

2. As a *de facto* government, the Confederacy was "[i]llegitimate but in effect." BLACK'S LAW DICTIONARY 427 (7th ed. 1999).

3. *See* Texas v. White, 74 U.S. (7 Wall.) 700 (1868).

4. *See generally*, E. MERTON COULTER, THE CONFEDERATE STATES OF AMERICA 1861-1865: A HISTORY OF THE SOUTH (Wendell Holmes Stephenson & E. Merton Coulter eds., 1950); HARRY HANSON, THE CIVIL WAR (1961).

It may well be true that in the post-Vietnam War period, interest in the Civil War increased. Whatever the tawdry gift shops of Gettysburg or the well-tended battlefields in a number of states may contribute to revenue from tourism, the reality is that relatively few persons concern themselves with the constitutional and political history of the Civil War. To the extent that some have that interest, their attention (and money) is largely drawn towards the turmoil of the Lincoln presidency. Much focus is on the unresolved, and possibly unresolvable, questions as to the President's true commitment to abolishing slavery, his allegedly lackadaisical concern about protecting civil liberties, and the freedom of the press.[5]

The complex ideological and legalistic justification for Southern secession has largely been lost. Southern secession was a result of a process that created disunion and fomented a rebellion, leading to the costliest war in United States history. However, those individuals interested in the Civil War have largely devoted their time, energy and money to studying campaigns and battles, winners and losers, weapons that worked and those that did not.[6] Even those of us who teach Constitutional Law have permitted the contrasting and provocative dialectical theories of generally unknown Southern lawyers and political idealists to remain hidden from the view of students.

The premise of this essay is not to espouse that the Southern ideological and constitutional theorists were correct. I propose, however, that an understanding of the historical basis of constitutional law, and a recognition of evolving doctrinal issues of Federalism, will enhance law school curriculum. Presentation of these topics dictates the introduction of the Confederate

5. See David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1444 (1998), for an exposition of President Lincoln's conduct with regard to the suppression of civil liberties during the Civil War. There are probably more books and articles about Abraham Lincoln than about any other president. His conduct during office, especially his conception of his powers under the Constitution, is beyond the scope of this article. The controversy as to whether his actions were within the confines of his constitutional authority, or whether he subverted the Constitution to save the Union, is enduring, divisive, and not infrequently related to contemporary issues and ongoing agendas.

6. See TONY HORWITZ, CONFEDERATES IN THE ATTIC: DISPATCHES FROM THE UNFINISHED CIVIL WAR (1998), for an interesting and accurate account of not only the historical events of the Civil War, but also of the current social repercussions of America's greatest conflict.

Constitution into the curriculum of required courses and electives. This effort, I propose, would be a prudent step, to be amply repaid in terms of higher understanding and scholarly benefit.

I confess at the outset my lifelong love of history for its own sake. This, however, is not the motivation for this short article. I hope to encourage colleagues to step back and consider recasting their Constitutional Law courses to increase student awareness of the influence of history. Much can be gained by focusing specifically on the failed experiment of eleven Southern states.[7] The heritage of slavery and the bitterness of four years of combat continue to linger with us. Confederate political and military iconography are not simply objects for sale at Civil War artifact shows. They continue to cause political division as citizens object to flags of "The Lost Cause" being displayed on public buildings.[8] Their private display, while surely protected by the First Amendment, stimulate passion and, occasionally, serious violence.[9] The strength of such symbolism springs from unsettled issues, the most prominent revolving around race and the heritage of slavery. As I will attempt to illustrate further, the customary examination of race in Constitutional Law courses minimizes or disregards the continuing impact of America's Civil War experience.

Understanding Confederate constitutional doctrine may also be helpful in examining contemporary Supreme Court deci-

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7. Putting aside the military history of the Civil War and the actions of commanders and common soldiers, a remarkably stable civil government existed in the seceded states for much of the Civil War. A government largely mirroring the Northern government functioned, but with variations in substance and procedure. Of course, most Southern politicians were experienced in serving in the national government, often with high rank. Their fundamental differences were not with the political structure of the U.S. government.

8. *See, e.g.*, Scott McCabe, *Lake City Logo is NAACP's Next Battle in Rebel Flag War*, PALM BEACH POST, Feb. 16, 2001, *available in* 2001 WL 14129338 ("Fresh from rebel flag victories in Georgia and South Carolina, the NAACP is traveling south into Florida to attack its next target - the Lake City Logo."). *See also* Eugene Kane, *Symbol of Confederacy is No Banner of Honor*, MILWAUKEE J. SENTINEL, Feb. 4, 2001, *available in* 2001 WL 9337173.

9. *See, e.g.*, Robert L. Kaiser, *Confederate Flag Can Still Draw Blood in a Small Town, The Stars and Bars of the Confederacy Proved in a Deadly Fashion the Weight it Carries for Some in the South*, CHI. TRIB., March 19, 2000, *available in* 2000 WL 3647258.

sions. For example, *McCulloch v. Maryland*[10] is still the formalistic pronunciamento that the federal union was created by the people and not the states. Justice Thomas's dissent in *U.S. Term Limits, Inc. v. Thornton,*[11] a five-to-four decision, may well adumbrate an emerging majority that accepts what was a major pillar of Confederate constitutional theory.[12]

II. THE CONFEDERACY AS CONSTITUTIONAL COUNTER-REVOLUTION

If one word can encompass the panoply of emotions that captivated many Southerners, driving them to seek disunion, "estrangement" is probably the best. More than "alienation," which certainly was also detectable in copious amounts, "estrangement" in political life, as in intimate personal relationships, reflects loss of what was once held dear, cherished, and respected.

As a result of this estrangement, the sentiment "A Government of Our Own" was frequently heard in the late 1850's.[13] It was an expression that became increasingly strident and common as the crisis of secession approached. Choosing that expression as the title of his book, historian William C. Davis, a specialist in Civil War biography and military analysis, noted the deepening sense of betrayal sensed by many Southerners began, not with the emergence of Abraham Lincoln, but almost immediately after the ratification of the federal Constitution.[14] While secession looks like revolution, and in the legal sense has been so regarded, for many Southerners the key word and concept was restoration.

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10. 17 U.S. (4 Wheat.) 316 (1819).

11. 514 U.S. 779 (1995).

12. In essence the most fundamental Confederate constitutional plank was that the Union was formed by the states, not by the people. This is, of course, the exact opposite of the Supreme Court's *McCulloch* holding, perhaps one of the few bedrock Constitutional principles that lawyers never forget from their law school days.

13. *See* WILLIAM C. DAVIS, A GOVERNMENT OF OUR OWN (1994).

14. *See id.* Davis's book is one of the few non-specialist works to explore Confederate political theory and the men (women were no more enfranchised or empowered in forming the Confederate union than they had been with its predecessor) who did not seek war, but a government faithful to original Federalist concepts.

Today's typical introductory Constitutional Law course runs from *Marbury v. Madison*[15] to *United States v. Morrison*.[16] The Constitutional Convention of 1787 has been acknowledged as a work of compromise.[17] To a significant degree it was an effort to accommodate slaveholding states and their fear of encirclement and disempowerment.[18] Although this is acknowledged, it is rarely explored in any depth. For example, *The Federalist Papers* clearly foresaw the doctrine of judicial review, with regard to both enactments of Congress and decisions of the state courts.[19] The unease fostered by the Marshall Court's articulation and application of that doctrine is, however, buried beneath analysis of the concept itself.[20]

The need for a union that would be able to thwart oppression or territorial aggrandizement by European powers, insured that the mounting concern with the power of the Supreme Court would remain relatively muted in the early Republic period. Nonetheless, *Martin v. Hunter's Lessee*[21] must have disturbed many thinking Southerners, and more than a few in the North. It is studied mainly as the case that insured that judicial review of state court decisions would bring about national

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15. 5 U.S. (1 Cranch) 137 (1803).

16. 529 U.S. 598 (2000).

17. *See, e.g.*, Bryan K. Fair, *A Constitutional Law Casebook for the 21st Century: A Critical Essay on Cohen and Varat*, 21 SEATTLE U. L. REV. 859, 869 (1998); Sonny Swazo, *The Future of High-Level Nuclear Waste Disposal, State Sovereignty and the Tenth Amendment*: Nevada v. Watkins, 36 NAT. RESOURCES J. 127, 136 (1996); Paul V. Niemeyer, *The Gerrymander: A Journalistic Catch-Word or Constitutional Principle? The Case in Maryland*, 54 MD. L. REV. 242, 257 (1995); Suzanna Sherry, *Our Unconstitutional Senate*, 12 CONST. COMMENTARY 213, 214 (1995).

18. *See* THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1966) [hereinafter RECORDS]; *cf.* Paul Finkleman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261, 261 (2000) ("Slavery led to two major political compromises of the antebellum period, as well as the most politically divisive Supreme Court in our history.").

19. *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

20. The concern about judicial power, as reflected by the doctrine of judicial review, was by no stretch of the imagination restricted to the South. The South, however, was developing what became a well-honed and not entirely irrational sense of political isolation. The implications of judicial review were particularly disturbing to a region populated by many Jeffersonians, successors in interest to the Anti-Federalists.

21. 14 U.S. (1 Wheat.) 304 (1816).

uniformity.[22] It was that uniformity that was considered central to Federalist political ideology.[23] The upholding of Section XXV of the Judiciary Act of 1789[24] exposed raw fears about the loss of states' rights to an increasingly intrusive Supreme Court.

Disunion, like divorce, rarely springs from one act. Rather, a festering situation worsens until it becomes intolerable. At the time of *Martin,* the memory of Washington being nearly burned to the ground was fresh in the nation's mind. It was a sharp lesson in maintaining a union, honoring treaty obligations, and preventing further military misadventures for the young nation; the Battle of New Orleans notwithstanding. From today's classroom perspective, *Martin* completed the judicial interpretation of the Federalist blueprint for judicial review. However, to many in the South it augured a threat to slavery, the all-critical underpinning of any concept of states rights.[25]

While the Supreme Court essentially avoided applying judicial review in the decades following articulation of the doctrine, Southern fears of encirclement increased exponentially. A number of reasons accounted for the growing estrangement and distrust. They included the developing industrialization of the North as compared to the continuing agrarian-based South-

22. A clear reading of *Martin* reflects its obvious potential implication for the claim of states' rights in any area, including, most ominously for the South, slavery.

23. *See* THE FEDERALIST No. 78 (Alexander Hamilton), No. 51 (James Madison).

24. *See Martin*, 14 U.S. (1 Wheat.) at 351.

25. This article cannot explore in depth the continuing debate as to whether slavery was the underlying and controlling cause of secession. Some Southern apologists, as well as respected academic historians, continue to deny that it was. They claim, without any evidence, that slavery would have ended in time without war. To those observers, Southern constitutional theory was rooted solely in a belief that states' rights, guaranteed under the federal constitution, had been abrogated. Thus, slavery was secondary to a demand for a compact that reified the values of 1787. I have never received a satisfactory answer to a simple question that I have personally posited to historians and advocates of that view: Would secession ever have occurred BUT FOR the issue of slavery? To me the answer is self-evident, and it is "no." *See* MARSHALL L. DEROSA, THE CONFEDERATE CONSTITUTION OF 1861 (1991). Professor DeRosa, a political scientist, has provided, in a slim volume, the best analysis of the competing views as to the relative importance of slavery versus states' rights issues in the formation of the Confederacy's constitution.

ern economy, the influx of immigrants in the North, and westward expansion. There was also a concomitant rise of militant abolitionist movements targeting slavery in the South, after having successfully seen its demise throughout the Northern states. Last, but not least, there were revolts by slaves, both real and imagined. Such acts not only threatened the lives of Southerners, but also cast serious doubt on the theory of benignity by which many sought to defend slavery. These are not issues that are generally discussed when dealing with the history of race in the law school classroom, at least not in a required course.

Many will agree that the *Dred Scott* case is probably the most institutionally damaging in the history of the Supreme Court.[26] Stated simply, Northerners, particularly abolitionists, were incensed that Dred Scott was not recognized as a person for the purposes of pursuing his claim for manumission.[27] Additionally, Southerners recognized that they had, at best, a Pyrrhic victory in that an essentially favorable opinion merely animated and incensed their enemies, while giving scant assurance of protecting their interests.

The impetus for secession, and what was perceived by Northerners as the restoration of a dishonored constitution and federal system that insured primacy of the individual subscribing states, surged after the *Dred Scott* decision and its accompanying debates. The intensification of endemic sectional and slavery-based violence in Kansas ("Bloody Kansas") and parts of Missouri, with neither federal nor state authority able to contain its excesses, led a growing minority of Southerners to question whether the Union should, let alone could, be preserved.

In state assemblies, in meetings held formally and otherwise, the renewed possibility of secession segued into a developing belief as to its inevitability. Unlike the delegates to the Federal Convention of 1787,[28] who exceeded their warrant to amend the Articles of Confederation by ditching them entirely,

26. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). Anyone teaching Constitutional Law today need not fear that students will bring inaccurate or sketchy information about this case to the class discussion. On a yearly basis I can count on two hands the number of students with any recognition of *Dred Scott* prior to reading assigned material.

27. *See generally* DON E. FEHRENBACHER, THE DRED SCOTT CASE (1978).

28. *See* RECORDS, *supra* note 18.

the Southern political theorists had a handy model for a new federal union of seceded states. That model, of course, was the U.S. Constitution. This was a document about which they had few misgivings, but whose implementation and interpretation by the Supreme Court lay at the heart of state and regional estrangement with Washington.

As with the original American Revolution, those favoring secession could be classified into two general camps of "firebrands" and "moderates."[29] Not surprisingly, as with the earlier cataclysmic event, lawyers in the South tended to caution and to seek a new union that largely preserved the benefits of the one being left.[30] The Confederate Constitution that emerged virtually copies its ancestor, but with some important deviations.[31] The drafters of the Confederate Constitution may well have thought of themselves as largely improving, rather than replacing, the federal constitution. However, a close comparative reading illuminates not only the issues of the antebellum and Civil War era, but current constitutional arguments and theories.

The preamble articulates instantly the dominant Southern concept of state rights: the new union is formed not by the people, as Chief Justice Marshall articulated in *McCulloch*, but by "each State acting in its sovereign and independent character."[32] The preamble thus answers both *Martin v. Hunter's Lessee* and *McCulloch v. Maryland* obliquely but, nonetheless, emphatically. Illustrating the difference a word can make, the term "granted," with regard to the federal Union's legislative powers for the nascent republic, is changed in the document to "delegated."[33] This is not a casual substitution.

Dropping subtlety, but not the numerical equation, the Confederate document retains the three-fifths apportionment to deal with state representation in the Confederate Congress.[34]

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29. *See generally* DEROSA, *supra* note 25.

30. *See id;* DAVIS, *supra* note 13.

31. *See The Constitution of the Confederate States of America*, *infra* note 47. This is the copy I use in both required and advanced courses.

32. CONSTITUTION OF THE CONFEDERATE STATES OF AMERICA, PREAMBLE (1861) [hereinafter CONFEDERATE CONST.], *reprinted in* CHARLES ROBERT LEE, JR., THE CONFEDERATE CONSTITUTIONS app. C (Greenwood Press 1974) (1963).

33. CONFEDERATE CONST. art. I, § 1.

34. *See id.* art. I, § 2, cl. 3.

But the "other persons" language of the federal constitution, which everyone understood as meaning slaves, is replaced with the more honest word "slaves."[35] Protection of slavery was, of course, the critical *raison d'etre* of the entire Southern experiment. Interestingly, the language of the federal constitution's non-importation clause was largely followed, but with the added proviso that the importation of slaves from non-Confederate states or territories was forbidden.[36]

A number of structural innovations in the constitution for the new nation do not deal with slavery, but may be viewed as a rejection of fundamental Federalist principles which were believed to falsely accord due regard to state authority. For example, limiting the Confederacy's president and vice-president to one six-year term with the president being ineligible for re-election seems to evidence a fear of a powerful chief executive.[37] What the Confederate Constitution did grant to its Chief Executive was a power every modern president has desired: the line item veto.[38] The Confederate Constitution had other provisions

35. *Id.*

36. *See id.* art. I, § 9, cl. 1. However, it is questionable how strong the interest was in enforcing this non-importation prohibition.

37. *See id.* art. II, § 1, cl. 1. No constitution can safeguard a government against the passions and follies of human beings holding office. Throughout the four years of the Confederacy, President Jefferson Davis and Vice-President Alexander Stephens were at such irresolvable division that a group of followers encircled each politician. This ensured a minimum of cooperation and a maximum of bitter dispute, which permeated every level of Confederate political and military functioning. So antagonistic was Stephens to Davis that he spent most of the Confederacy's short life in his native Georgia, not exactly a vantage point conducive to cooperative work with his president, had he wanted to be helpful (which he did not).

38. *See id.* art. I, § VII, cl. 2. I have found it very useful to discuss in class this Confederate "improvement" on the U.S. Constitution, which has not been added despite decades of presidents arguing for its utility, indeed its necessity. Currently the line item veto is a power possessed and utilized by governors in forty-three states. *See* Steven Heufner, *The Supreme Court's Avoidance of the Nondelegation Doctrine in* Clinton v. City of New York*: More Than "A Dime's Worth of Difference,"* 49 CATH. U. L. REV. 337, 376 (2000). Many candidates for office, including Ronald Reagan, fought for a presidential line item veto. *See* Eric Stephen Schmitt, *There is no Joy in D.C., the Mighty Court Struck Out: An Analysis of* Clinton v. City of New York*, The Line Item Veto Act and the Court's Failure to Uphold Constitutionally Legitimate Means to a Viable End*, 44 ST. LOUIS U. L.J. 167, 170 (2000). In twenty-five years I have had two students who knew about the Confederate concept of the line item veto before studying the subject with me. Knowing of the antecedent experiment affects how a student views and analyzes the two hundred and ten year-plus federal model.

unrelated to slavery, which simply reflect a view of how the federal government functioned from ratification of the Constitution through the antebellum era.[39]

From the perspective of constitutional lawyers, scholars, and students, what the Confederate document mandated, but which ultimately was never carried into effect, is the establishment of a Confederate "Superior Court" (as opposed to "Supreme Court") and a system of inferior courts.[40] The Confederate Article III virtually mirrors the antecedent federal provision with the same number. The Confederate Congress never established such a court. The reasons for this nonfeasance are complex and multifaceted. Above all, however, was the consensual rejection of the authority of a national juridical tribunal with the power to bind, by its decisions, the states that voluntarily entered the new confederation. Thus, it was not the language of the Confederate Constitution's Article III, but the overwhelming fear of, and rejection of, a national unifying legal tribunal. This is explained by the four-year history of the Confederacy, with each state's highest court the final and absolute arbiter of Confederate national law.[41]

From the perspective of Southern partisans, then and now, the Confederacy was based upon a corrective and amendatory concept of the American experience. The original seminal com-

39. For example, the Confederate president enjoyed a clearly articulated and broad dismissal power with regard to executive branch officers below diplomatic and cabinet level. *See* CONFEDERATE CONST. art. II, § II, cl. 2. Interestingly, the Confederate Constitution, in following the model for creating a federal postal service, mandated that the post office be self-sustaining by March 1, 1863. *See id.* art. I, § 8, cl. 7. Amazingly, this was achieved during an expensive and debilitating war.

40. Both terms, "Superior" and "Supreme" were used in different drafts of the Confederate Constitution.

41. It would be a gross and untenable exaggeration to claim that the Confederacy was defeated by the lack of a system of federal laws interpreted by a high court vested with judicial review. But it cannot be gainsaid that the lack of such a system clearly and frequently hurt the Confederacy. By 1864, highly partisan state judges invalidated, or made impossible to implement, a host of laws. Confederate statutes directly relating to conscription and other critical war-related dilemmas enjoyed contradictory interpretations and non-enforcement in the shrinking Confederacy. As discussed *infra,* the heuristic example of the Confederate Government, largely paralleled in political institutions and organic law to the federal model, but without a unifying court system OR the doctrine of judicial review, brings students to a sharper perception of the role of judicial review and an appreciation of rational, if not controlling, objections to it.

pact was not critically flawed; it was abandoned in principle and in practice. Administrations, either hostile to the South or impotent to restrain its perfervid enemies, threatened not only slavery but also the underlying sovereignty of the states. While the emergence and election of Lincoln functioned as an unstoppable catalyst for secession, the underlying power of the Supreme Court and the ability of that tribunal to nullify federal and state law, made the path to secession irreversible.

III. THE CONFEDERATE CONSTITUTION AND TEACHING CONSTITUTIONAL LAW TODAY

I believe that teaching history is a critical part of teaching Constitutional Law. This is true whether the subject is judicial review, the Commerce Clause, or more recent issues such as the claimed right to assisted suicide, the right to privacy and autonomy, or the application of the First Amendment to situations unknown to the amendment's framers. I do not dismiss the relevance of economic theory in understanding constitutional doctrine, but for me that is largely the application of concepts derived from historical experience.

After twenty-five years of teaching, I certainly understand how limited time is for instructional purposes, as well as how much must be covered in three-credit, four-credit, or even two-credit courses. I suggest that incorporation of material dealing with the Confederate Constitution can be achieved with little effort, that it will be well received and that a far greater understanding of some current constitutional issues will result. This, of course, reflects a somewhat optimistic attempt to induce others to do what I have already done, and also for them to garner the same pedagogical rewards.

I start with the premise that virtually all casebooks provide inadequate historical material, although some are better than others.[42] However, the key failing of most is that they reflect

42. By way of unsolicited endorsement, for years I have used the casebook, CONSTITUTIONAL LAW (Geoffrey R. Stone et al. eds., 3rd ed. 1996), supplemented annually. Although this casebook delves into historical material more deeply than most of its competitors, it is still not adequate for my teaching goals with regard to historical material. For almost twenty years I have required that all students taking Constitutional Law I read ROBERT G. MCCLOSKY, THE AMERICAN SUPREME COURT (1994) by the end of the first week of classes. Given the generally poor level

the Federalist view as if it is almost unchallengeable. The casebook I use liberally reproduces useful excerpts from *The Federalist Papers* while largely ignoring compelling arguments put forth by the anti-Federalists.[43]

My approach has been to ask students if they can discern what I call "Constitutional Wisdom" in the comments of the casebook editors. By "Constitutional Wisdom" I mean the transmogrification of announced doctrine into supposedly impermeable statements of truth, almost "Constitutional Folklore," if you will. *McCulloch* is a good example. Chief Justice Marshall's hallowed utterance that "it is a constitution we are expounding"[44] is considered by many to be a juridical pronouncement of the greatest importance. Justice Frankfurter regards Marshall's statement as his "greatest judicial pronouncement" and "the pole-star for constitutional adjudications."[45] A plausible argument exists to sustain that view, but students regard this often quoted "Marshallism" differently when viewed in the light of anti-Federalist political and judicial theory. Perhaps some members of the present Supreme Court are arriving at a less than exalted view of the doctrine enshrined in *McCulloch* and wrapped in Marshall's protective, insulating words.[46]

Requiring the reading and interpretation of the Confederate Constitution puts little burden on students. Many copies are available on-line. I require a particular version, the one appended to this essay.[47] I also encourage students to look for

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of past exposure to history in school, the McCloskey book plays an invaluable part in achieving a level playing field for exploring the Marshall Court.

43. It would be too much to require students to purchase *The Anti-Federalist Papers*, published in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES (Ralph Ketcham ed., Mentor 1986). However, reproducing, as handouts, selected papers and introducing "Brutus" and "Centinel" as foils for "Publius" and friends, brings about an easily controlled (as to time) but expansive and valuable class discussion.

44. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

45. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 596 (1952).

46. *See, e.g.*, U.S. Term Limits, Inc. v. Thorton, 514 U.S. 779 (1995).

47. *See The Constitution of the Confederate States of America* (visited April 2, 2001) <http://www.civilwarhome.com/csconstitution.htm>. For assured accuracy, and readability, Yale Law School's on-line version also cannot be beat. *The Avalon Project at Yale Law School: Confederate States of America – Constitution for the Provisional Government* (visited April 2, 2001) <http://www.yale.edu/lawweb/avalon/csa/csapro.htm>.

other versions, and quite a few do. They discover that some online versions have inaccuracies and a few appear to be edited (doctored) to advance contemporary political agendas.

As indicated previously, the most important issues that can be explored using the Confederate States Constitution and relevant supplementary material are:

- oppositional views to Federalist political theory;
- the inevitability of judicial review and its impact;
- the contrasting view of the President as afforded by the secessionist document; and
- the reality of race and slavery as dominant formative influences on both the federal and Confederate constitutions, as well as the continuing pervasiveness of the race issue. Issues relating to First Amendment rights, non-justiciable political matters and the divisive debate about Confederate iconography take on a different light when studied in the context of the constitutional and political theories surrounding secession in 1861.

Last, I would like to discuss some observations about incorporating historical material into Constitutional Law courses, including advanced electives, through technology. In the area of Civil War history alone, the resources available through the Web are exhaustive, and occasionally exhausting. All of my courses are fully Web-integrated. I post URLs with the same requirement that they be accessed and read, as I would expect of class handouts.

With regard to Constitutional law, the Confederate Constitution and other supplementary materials are but a small portion of the sources that can, and should, be utilized to infuse a sense of historical relevance in contemporary issues. Casebooks allow the study of doctrine, almost exclusively at the Supreme Court level. Facts accepted by the Court are derived from an often sterile and not infrequently questionable record. Learning is more by rote acceptance of majority opinions, or enchantment by the words of dissenters and concurring justices, than it is by broad examination of the underlying issues.[48] Technology

48. For very many years I have been privileged to bring my friend, Irving Feiner, to meet with each Constitutional Law class. He is the Feiner of *Feiner v. New York*, 340 U.S. 315 (1951), a relic of Cold War fears and insufficient protection for First Amendment rights. Mr. Feiner is a feisty representative of the "Old Left," and continues as a community activist to this date. His appearances transform students who, even in the evening class that ends past nine o'clock, stay after class

affords faculty and students opportunities for meaningful exploration of materials that make understanding constitutional doctrine and the workings of the Supreme Court more realistic and more relevant to grasping the role of counsel in all litigation.

IV. CONCLUSION

The South will not rise again, at least not in secessionist revolt. But the anti-Federalist beliefs and values that largely inflamed the Old South, and which led it to protect slavery, its most dominant institution, through disunion remain. It is those beliefs and values that remain. We soon may have a majority of the Supreme Court who, although not sympathetic, of course, to either racial prejudice or disunion, may subtly, yet significantly, reinvigorate some of the Jeffersonian and antebellum theories doomed by combat and forgotten by most who teach. The Confederate Constitution belongs in the Constitutional Law curriculum.

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to ask questions and express amazement at, and fascination with, the world he describes. The fact that *his* view of *his* case deviates drastically from the facts as reflected in the Supreme Court's opinion, does not detract from the experience for the students. Rather the opposite occurs; the students see the Court more clearly as a necessary, but nonetheless real, hostage to a trial record. This lesson is better learned by a first-hand meeting with Mr. Feiner, than by any degree of casebook studying.