Which Constitution Are They Defending?

When the "Constitution in Exile" grouping complains that the U.S. Supreme Court, from its 1937 ratification of FDR's New Deal measures forward, is trashing the "real" Constitution, whose paramount purpose was to protect property rights, they inadvertently raise the question: Which Constitution are they talking about? The only Constitution which did what they claim, is the 1861 Constitution of the Confederate States of America (C.S.A.).

Let's take a look at how the two Constitutions compare:

At first glance, the Constitution of the Confederate States of America is not all that different from the Constitution of the United States. For reasons of expediency, the framers of the C.S.A. Constitution took the text of the U.S. Constitution as the template from which they cut out their own version. Thus, the differences are illuminating—not only as to the nature of the Confederacy, but also as to the nature of the republic they were fighting against. The reality is, that the C.S.A. framers took the U.S. Constitution. and gutted it of its best and noblest features.

One need go no further than the Preamble to know exactly what the issues were between the U.S.A. and the C.S.A. Simply compare the two:

U.S.A.: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense,

promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

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

Here is the essence of the battles which wracked American politics and law in the early 19th Century. Was the union a compact among sovereign states, or was it formed by the people, acting in their sovereign capacity? Was the purpose to form "a more perfect Union," and to "promote the general Welfare" for posterity, or was the purpose simply to enter a social contract to form a Federal government?

These issues were definitively, but not irreversibly, resolved in the Supreme Court under John Marshall (Chief Justice from 1801 to 1835), and his closest ally, Joseph Story. Over intense opposition, Marshall and Story enshrined the Hamiltonian system into U.S. constitutional law—national banking, promotion of internal improvements ("infrastructure"), and promotion of manufactures through protective tariffs.

The Core of the American System

Thus, the C.S.A. Constitution threw out everything identified with the "American System." The C.S.A. Constitution:

- prohibited any measures (bounties, duties or taxes on importations) which would be used "to promote or foster any branch of industry";
- prohibited appropriation of funds "for any internal improvement intended to facilitate commerce," (except for lights, beacons, and buoys on waterways);
- removed the power of taxation to provide for the general welfare;
- gave the Congress the power to establish a post office and postal *routes* rather than post *roads* and required that the post office's expenses be paid out of its own revenues.

There were other changes, some primarily administrative with respect to the appropriation process, and others of more substance, such as explicit acknowledgement of slavery (which was never expressly mentioned in the U.S. Constitution).

In form, the judiciary system stayed the same. But, states could impeach Federal judges or other officers who operated solely within that state. Provision was made for a Supreme Court, but it was never established. So despite the formal inclusion of a "supremacy" clause, the states retained judicial supremacy.

Thus, it is easy to see why the C.S.A. Constitution of 1861 is much more compatible with the views of the Constitution-in-Exile movement, than the U.S. Constitution of 1787. With its weak Federal government, and the prohibition of "American System" economics—government promotion of the general welfare through the fostering of infrastructure, industry, and agriculture—the New Deal would have been forbidden. Fortunately, the C.S.A. Constitution *has* been in exile, for 140 years, and thus shall it remain.—*Edward Spannaus*