point of the non-delegation doctrine as the Supreme Court's striking down of the National Industrial Recovery Act in 1935, and he considers the Supreme Court to have been in retreat since then. Ginsburg's summary statement is as follows:

"So for 60 years the non-delegation doctrine has existed only as part of the Constitution-in-exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins, the Necessary and Proper, Contracts, Takings, and Commerce Clauses. The memory of these ancient exiles, banished for standing in opposition to unlimited government, is kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty—even if perhaps not in their own lifetimes."

The Court's 'Wrong Turn'

The current guru of the movement is University of Chicago law professor Richard Epstein, notorious for arguing that many of the laws underpinning the modern "welfare state" are unconstitutional. Rosen describes Epstein as peddling a legal theory far more radical than that of Justice Antonin Scalia; on the Supreme Court, Clarence Thomas is its closest adherent.

Biden had questioned Thomas about his interest in Epstein during Thomas's contentious 1991 confirmation hearings. In 1995, Thomas wrote an opinion which echoed the "Exile" movement's and Epstein's bizarre theories (and which caught our attention at the time).[1] The case was *U.S. v. Lopez,* which invalidated a 1990 law making it a Federal crime for anyone to possess a firearm within 1,000 feet of a school. The Court said that Congress, in enacting the statute, had exceeded its authority under the interstate commerce clause of the Constitution. Thomas went further than the others, suggesting that current law regarding the Commerce Clause is "an innovation of the 20th Century," that everything was fine up through 1935, for which proposition Thomas cited Supreme Court rulings invalidating New Deal regulations of commerce, on the grounds that such regulations invaded the province of the states. The "wrong turn," Thomas declared, "was the Court's dramatic departure in the 1930s from a century and a half of precedent."

In Epstein's view, any government that interferes with unrestrained economic liberties is repressive, and that includes the United States government. "When Epstein gazes across America, he sees a nation in the chains of minimum-wage laws and zoning regulations," Rosen wrote. "His theory calls for the country to be deregulated in a manner not seen since before Franklin D. Roosevelt's New Deal."

Epstein's favorite hobby-horse, about which he has written extensively, is the "Takings Clause" of the Constitution—referring to the provision of the Fifth Amendment which states that "nor shall private property be taken for public use, without just compensation." Epstein argues that the Takings Clause bars *any* redistribution of wealth, and that it calls into question zoning laws, workmen's compensation laws, transfer payments, and progressive taxation; this is what he calls "the recipe for striking down the New Deal."

Rosen's article cited a former Bush Administration official as saying that many people in the White House believe in the principles of the "Constitution-in-Exile" movement, without necessarily using the name. The one White House official mentioned, is David Addington, Vice President Dick Cheney's legal counsel, who is reported to have pressed the Justice Department to object to laws and regulations which the Constitution-in-Exile movement finds objectionable.

1. See "The Rehnquist Court Joins the Conservative Revolution," *EIR,* May 12, 1995.

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,

"People like Addington hate the Federal government, hate Congress," said the former official. "They're in a deregulatory mood," and they believe that the second term of the Bush-Cheney Administration "is the time to really do this stuff."

Which Constitution?

This gang talks about "restoring" the exiled Constitution, but the Constitution that they want to restore, bears no resemblance to the Constitution of the United States, as it was enacted in 1787-89, and as was implemented in the first decades of the 19th Century, and again under Abraham Lincoln.

Rather, the Constitution for which they seem to yearn, is actually the 1861 Constitution of the Confederate States of America, which stripped out all the provisions relating to the obligation of the central government to promote the general welfare, or to regulate economic activity for the common good.

This came up at an April 25, 2005 forum at the Cato Institute in Washington, during a panel discussion called "In Defense of an Independent Judiciary." The panel was organized and chaired by Roger Pilon, Cato's constitutional expert.

The focus of discussion was judicial review (whereby the courts review the constitutionality of legislation and Executive actions); at the outset, Pilon said that the panel would not be on the filibuster or the "nuclear option." But he then proceeded to discuss, in rather unfavorable terms, recent actions by Tom DeLay, and other inflammatory statements about religion and the filibuster—all the while making it clear that he does support the "nuclear option" itself.

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*