STATE DISPLAYS OF CONFEDERATE SYMBOLS: LEGAL CHALLENGES AND THE POLITICAL QUESTION DOCTRINE

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Official state displays of Confederate symbols, especially in state flags, have been challenged in court in recent years. In challenging such displays, plaintiffs often have relied upon various constitutional and statutory provisions, including, in order of preference, the Fourteenth, Thirteenth, and First Amendments, as well as various civil rights statutes and the Voting Rights Act of 1965. In most instances, however, courts have held that cases involving state displays of Confederate symbols are political questions that should be addressed in a legislative, not judicial, forum. Accordingly, absent the development of a new legal strategy, plaintiffs' time, money and energy probably would be better spent lobbying state legislatures for redress in lieu of continuing to rely upon a judicial forum.

The decision by several southern state legislatures to adopt and publicly display Confederate symbols in official documents and communications, and especially in state flags, has been attacked increasingly in recent years. Not surprisingly, many of these attacks have taken the form of lawsuits challenging the constitutionality of a state's use of Confederate symbols as vestiges of racial discrimination and as a continuing means of "chilling" minority political participation.[1] Perhaps the most moving personal attack was voiced by James Forman, Jr. in the *Yale Law Journal*:

> It is the spring of 1984 in Atlanta, and the groundskeeper at Franklin Delano Roosevelt High School is starting his morning routine....As I wait, my eyes return to the groundskeeper, who is carefully unfurling and raising a series of flags. First is the American flag, last is the Atlanta Public Schools flag, and sandwiched between the two is the Georgia State flag. I am drawn to this flag, particularly its wholesale incorporation of Dixie.
>
> Like most of the students and teachers, the groundskeeper is black. I think of the incongruity of having black children, in a largely black

> city, watch a black man raise the symbol of the Confederacy for us all to honor. I tell myself to laugh, hoping that this will keep me from crying. But I cannot laugh, and I dare not cry, so I close my eyes and try to forget. If I could just forget. My eyes close tightly, my fists clench, and I slowly force from my mind images of the flag, of the Ku Klux Klan, of Bull Conner and George Wallace—of black people in chains, hanging from trees, kept illiterate, denied the opportunity to vote (1991, 526).

Forman's eloquent words make a persuasive case for removing Confederate symbols from state flags and other official communications as a matter of public policy. In most cases, however, courts have held that such changes in public policy are "political matter[s]" and, therefore, the "remedy for such grievance[s] lies within the democratic processes of the State" (*N.A.A.C.P. v. Hunt* 1990, 1556). In other words, judicial relief is available for grievances that can be fashioned into judicial causes of action; legislative relief for political questions, however, must be effected through a legislative forum. Accordingly, to place the courts' reasoning into a legal context, this essay will examine plaintiffs' strategies in challenging states' official use of Confederate symbols, especially in state flags, and reasons that the judiciary generally defers to the legislature in this area.

COLEMAN v. MILLER

On January 3, 1996, Judge Orinda D. Evans of the United States District Court, Northern District of Georgia, granted the defendants' motion for summary judgment in *Coleman v. Miller* (1996).[2] *Coleman* was a civil rights action filed pursuant to 42 U.S.C.A. Sections 1983, 2000(a), and 1971(b). The dispositive issue was the constitutionality of the Georgia State Flag, which contains, in part, a symbol of the Confederate Battle Flag. The state flag was established by the Georgia General Assembly in 1956 and codified at O.C.G.A. Section 50-3-1. The plaintiff sought an injunction "ordering the immediate removal of the Georgia flag from all state office buildings on the basis that both the legislation establishing the flag and the flag's design are discriminatory and racist in nature" (*Coleman v. Miller* 1996, 1). Judge Evans's order concluded that the historical reasons for the incorporation of the Confederate symbol into the Georgia flag were ambiguous; moreover, the plaintiff failed to show an objective disparate effect. Judge Evans observed:

> The only statement about the flag that all may agree upon, therefore, is that the flag fails as a unifying symbol for citizens of Georgia. This fact does not subject the flag to judicial scrutiny absent specific and concrete examples that the flag has caused a disparate effect on

> African-Americans. Because Plaintiff has presented no such evidence and rests solely on his own assertions that he has suffered a disparate impact, the court need not consider whether racial animus was a "motivating factor" in the flag's passage (*Coleman v. Miller* 1996, 12-13).

As of this writing, *Coleman* is the most recent decision in a line of precedents holding that the judicial arena is an inappropriate forum for resolving disputes concerning official public displays of Confederate symbols by states, especially symbols incorporated into state flags (see *Holmes v. Wallace* 1976; *N.A.A.C.P. v. Hunt* 1990). Since plaintiffs in these cases generally cannot demonstrate a disparate effect and, concomitantly, cannot satisfactorily prove specific, measurable damages directly related to the official public display of a Confederate symbol (a key element in sustaining a *prima facie* tort case), most courts have concluded that cases involving Confederate symbols contain political questions that are more amenable to legislative redress. In *Coleman*, for example, Judge Evans wrote:

> While it is regrettable that the state has adopted as its flag a symbol which creates controversy and discontent in the minds of many, resolution of this matter ultimately must rest in the hands of the General Assembly of Georgia rather than in this court (1996, 18).

Indeed, the courts generally limit their jurisdiction in these cases by asserting that they are "not empowered to make decisions based on social sensitivity" (*N.A.A.C.P. v. Hunt* 1990, 1565). Accordingly, under the principle of *stare decisis*, Judge Evans was justified in granting the defendants' motion for summary judgment in *Coleman*, regardless of her personal feelings on the desirability of employing a Confederate symbol in the Georgia State Flag (Rankin 1996a).

THE FOURTEENTH AMENDMENT

The Equal Protection Clause

Assuming, *arguendo*, that a case involving Confederate symbols is not dismissed owing to the political question doctrine, an equal protection argument initially seems to be the most promising means of sustaining a legal challenge. The Equal Protection Clause of the Fourteenth Amendment provides in relevant part that no state may "deny to any person within its jurisdiction the equal protection of the laws" (U.S. Constitution, amend. 14, sec. 1). The United States Supreme Court has held that a case alleging an equal protection violation must demonstrate a discriminatory intent in the law.[3] Even a facially neutral statute may be held unconstitutional if it

is found to be racially motivated and it results in a disparate effect on a minority group (see *Hunter v. Underwood* 1985; *N.A.A.C.P. v. Hunt* 1990).

To prevail in an equal protection suit, therefore, the plaintiff must demonstrate by a preponderance of the evidence that racial discrimination was a substantial or motivating factor in the adoption of the law or policy. Owing to the problem of examining the "motivation behind official action," plaintiffs often have a difficult time meeting this burden of proof (*Hunter v. Underwood* 1985, 228). Courts are required to look for clues on intent by examining the context in which a law or policy was implemented. Yet even the context of the adoption of Confederate symbols in southern state flags is not entirely unambiguous. In light of this ambiguity, courts generally have refused to second guess the original intent of the legislature.

Some commentators have contended that the meaning of Confederate symbols is not ambiguous. For example, writing in the *Yale Law Journal*, James Forman, Jr. observed that the adoption of a Confederate symbol in southern state flags clearly was based on a discriminatory intent:

> Under this discriminatory intent standard, there can be little doubt that racial discrimination was a motivating factor in Southern States' decisions to hoist Confederate flags. Examining the "sequence of events" in Alabama, for example, shows that the Confederate flag was raised as a symbol of white defiance to court-ordered integration (1991, 507).

Not everyone has viewed the history of decisions to incorporate Confederate symbols into southern state flags as unquestionably discriminatory. One commentator has written:

> The Confederate flag symbolizes many different messages. People who wave it might be expressing racial bigotry, but even offensive speech is entitled to protection. For many of the students and alumni who wave the Confederate flag, the message is not intended to be offensive at all (Rychlak 1992, 1422).

In *Coleman v. Miller*, Judge Evans concluded:

> There is simply no evidence in the record indicating that the flag **itself** results in discrimination against African-Americans. As Plaintiff has acknowledged, there is no consensus today, almost forty years after the flag's adoption by the General Assembly, on its meaning. There are citizens of all races who view the flag as a symbolic acknowledgment of pride in Southern heritage and ideals of independence. Likewise, there are citizens of all races who perceive the flag as embodying the principles of discrimination, segregation, white supremacy, and rebellion. Still other citizens

> either have no knowledge of the flag's historical enactment or have no interest in it (1996, 12).

Whatever meanings Confederate symbols may have for different audiences, a showing of discriminatory intent as a motivating factor in an official public display is only one part of an equal protection challenge. A plaintiff also must show that the state use and public display of a Confederate symbol results in a concrete, present-day discriminatory effect on African-Americans.[4] This is an almost impossible hurdle to clear since the plaintiff is required to demonstrate a causal connection between an official state display of a Confederate symbol and a legally-recognized harm or disparate effect; in other words, the plaintiff must show that he or she suffered specific, measurable damage that would not have occurred had the symbol not been displayed. If the plaintiff fails to establish the causal connection and the existence of demonstrable harm, the case fails the equal protection test.

To overcome the burden of demonstrating a causal nexus between an official public display of a Confederate symbol and specific, measurable harm, plaintiffs often cite the landmark United States Supreme Court desegregation decision *Brown v. Board of Education* (1954), which indicates that harm to African-Americans can include "feelings of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone" (*Brown v. Board of Education* 1954, 494). Accordingly, "feelings of inferiority" cannot and need not always include specifically identifiable or objective damages. Yet the circumstances of the *Brown* case are factually distinguishable from cases involving Confederate symbols. In *Brown*, the state statute in question was not facially neutral; indeed, the law could be linked directly to the establishment of demonstrably inferior "separate but equal" schools. The causal nexus between inferior schools and damage to the plaintiffs was clear and direct owing to the importance of public education in the quality of American life. Such a nexus is absent in Confederate symbol cases, however; the connection between an official display of a Confederate flag, for instance, and the resultant "damage" is not always clear and direct.

The Due Process Clause

The relevant section of the Fourteenth Amendment provides that "[n]o State shall...deprive any person of life, liberty, or property, without due process of law..." (U.S. Constitution, amend. 14, sec. 1). One novel argument under the due process clause is that African-Americans' relationships with Caucasians are harmed by official public displays of the Con-

federate symbol in a state flag or other official state communication since the use of a Confederate symbol, a "wholesale incorporation of Dixie" (Forman 1991, 526), makes African-Americans less likely to associate with Caucasians. Recognizing that "freedom of association receives protection as a fundamental element of personal liberty" courts have nonetheless been reluctant to hold that state use of a particular symbol directly harms relationships among and between groups of people (see *Roberts v. Jaycees* 1984). Since "freedom of association" generally contemplates the existence of an intimate relationship between individuals, a due process claim generally is insufficient to sustain a legal challenge to Confederate symbols incorporated into state flags. In *Coleman v. Miller*, Judge Evans wrote:

> Plaintiff's claim that the flag has interfered with his association with Caucasians, a large, undifferentiated group, does not fit the "intimate relationship" criteria for protection. More importantly, Plaintiff has provided no evidence demonstrating that his relationships with Caucasians have been hampered because of the flag's existence (1996, 16).

THE THIRTEENTH AMENDMENT

The Thirteenth Amendment of the United States Constitution provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction" (U.S. Constitution, amend, 13, sec. 1). The courts have interpreted congressional authority under the Thirteenth Amendment to include power to eradicate the incidents and badges of slavery through appropriate legislation (see, for example, *Jones v. Alfred H. Mayer Company* 1968). Since Congress has not enacted legislation forbidding state use of Confederate symbols, however, the Thirteenth Amendment is not an effective vehicle for challenging Confederate symbols exhibited on state flags. The Eleventh Circuit noted in *N.A.A.C.P. v. Hunt*:

> The NAACP's sole argument in support of its claim that the state has violated the Thirteenth Amendment is that the Confederate flag, because of its inspirational power in the Confederate army during the Civil War and its adoption by the Ku Klux Klan, is a "badge and vestige of slavery." Standing alone, the Thirteenth Amendment does not forbid the badges and incidents of slavery. Congress has not utilized its Thirteenth Amendment enforcement authority to pass legislation forbidding the flying of the Confederate flag as a badge or incident of slavery (1990, 1564).

THE FIRST AMENDMENT

Free Speech: The "Chilling" Effect of Confederate Symbols

Another constitutional attack on the use of Confederate symbols relies on the First Amendment. Plaintiffs generally argue that an official government display of the Confederate flag "chills" plaintiffs' desire to exercise free speech and, therefore, the flag effectively limits minority participation in the political process. The First Amendment argument was advanced by the plaintiff in *Coleman v. Miller*:

> Plaintiff next argues that the state flag violates his First Amendment rights because it compels him to be a courier of an ideological message to which he objects. As a citizen of Georgia, he is "forced to associate with the most prominent symbol of the State, the flag...." Plaintiff also argues, however, that the existence of the flag violates his First Amendment rights because it "overshadows" his own right to speak and interferes with his right to associate with others freely (1996, 13).

Stated in another way, the First Amendment argument involves the "chilling" effect of presumably racist symbols:

> ...[T]he Confederate flag violates the First Amendment by chilling the desire and ability of black citizens to exercise fully their First Amendment rights. Central to this argument is the understanding that the racist speech at issue here takes a particularly objectionable form: it is racist **government** speech. That the government is the speaker both increases the extent of the harm the speech produces and allows for a remedy plainly consistent with the First Amendment (Forman 1991, 516).

The difficulty for plaintiffs in relying on the First Amendment, however, is that the amendment cuts both ways: on one hand, the public display of a Confederate symbol may chill an individual's free speech rights owing to the implicit "hate" message it conveys; on the other hand, "hate" speech alone, absent extenuating circumstances or accompanying conduct, is protected by the First Amendment (Matsuda 1989; Smolla 1990; Balkin 1990; Strossen 1990). Generally, the courts have held that "hate" messages may compete within the "marketplace of ideas" (*Red Lion Broadcasting Company v. Federal Communications Commission* 1969, 390). Accordingly, the courts will uphold a public display of a Confederate symbol as long as other symbols and messages can compete without being "drowned out" of the marketplace of ideas.

Moreover, while the argument that the First Amendment prohibits states from forcing citizens to participate in the dissemination of ideas they find objectionable is well-grounded in caselaw (*Wooley v. Maynard* 1977), the First Amendment cases that articulate this prohibition are factually distinguishable from cases involving Confederate symbols (see, for example, *Miami Herald Pub. v. Tornillo* 1974; *West Virginia State Board of Education v. Barnette* 1943). Since citizens are not required to display state flags, plaintiffs cannot contend that they have been compelled by the state to display offensive symbols or messages. Thus, although a person may be personally uncomfortable entering a building that displays a Confederate flag, the courts generally do not recognize discomfort or "social sensitivity" as grounds for sustaining a First Amendment claim (*N.A.A.C.P. v. Hunt* 1990, 1565).

Government Speech

Free speech cases generally focus on constitutional problems associated with government abrogation of free speech. Seldom have cases considered the consequences of government's participation in the marketplace of ideas (Shiffrin 1980). As a result, the First Amendment generally has been held to protect individual freedom of speech from government-sponsored intrusion, but it does not address the consequences of government speech (see, for example, *Columbia Broadcasting System, Inc. v. Democratic National Committee* 1973). In the absence of a definitive interpretation of the First Amendment's relationship to government speech, courts generally have held that government speech is permissible unless: (1) government speech abridges "equality of status in the field of ideas" by granting the use of public forums to some groups but not to others (*Police Department of Chicago v. Mosley* 1972; *Cinevision Corporation v. City of Burbank* 1984); (2) government speech drowns out other sources of speech by monopolizing the "marketplace of ideas" (*Red Lion Broadcasting Company v. Federal Communications Commission* 1969); or (3) government speech compels "persons to support candidates, parties, ideologies or causes that they are against" (*Lathrop v. Donohue* 1961). Since government "speech" involved in displaying a Confederate flag does not include one of these three acts, it is permissible.

Setting aside the *res judicata* issue to consider the merits of the case in *N.A.A.C.P. v. Hunt*, the Eleventh Circuit concluded:

> The capitol dome is not public property which "by tradition or designation [is] a forum for public communication" (citations omitted). Thus, the state may reserve the dome for its own communica-

> tive purposes as long as that reservation is reasonable and is not an effort to suppress expression because the public officials oppose a speaker's view (citations omitted). There is no evidence that the dome is reserved to the state in order to suppress controversial speech. Neither does the flag represent government monopolization of the marketplace of ideas (*N.A.A.C.P. v. Hunt* 1990, 1566).

Although courts generally follow the interpretation expressed in the *Hunt* case, one commentator has suggested that government speech should be abridged when a discriminatory intent is present:

> It is equally clear, however, that the core values of the First Amendment are particularly threatened by government speech that encourages discrimination against and subordination of disadvantaged social groups. Such speech serves no legitimate government function and, indeed, may inhibit a portion of the citizenry from fully participating in the process of governing. Accordingly, this Note suggests a theory of government speech that would prohibit such discriminatory speech by the government. The starting point for this theory is a developing First Amendment literature imbued with the understanding that protecting the speech rights of some can damage the speech rights of others (Forman 1991, 522).

The Establishment Clause

The First Amendment states in relevant part that "Congress shall make no law respecting an establishment of religion..." (U.S. Constitution, amend. 1). Some plaintiffs have argued that since the Confederate flag has been adopted by the Ku Klux Klan as a symbol and since the Klan originally began as a secret religious society, a state's adoption of the Klan's religious symbol violates the Establishment Clause of the First Amendment. This argument was advanced by the plaintiffs in *N.A.A.C.P. v. Hunt*. The Eleventh Circuit expressed skepticism about "the dubious question of whether the ideology of the Ku Klux Klan constitutes religion" (*N.A.A.C.P. v. Hunt* 1990, 1564, n.8).

In *Lemon v. Kurtzman* (1971), the United States Supreme Court articulated a three-pronged test for courts to determine whether state action is tantamount to "establishing" religion. State action is valid according to the *Lemon* test if: (1) it has a secular purpose; (2) its principal or primary effect neither advances not inhibits religion; and (3) it does not foster excessive government entanglement with religion (1971, 612). Since the Confederate flag is not primarily a religious symbol, it neither advances nor inhibits religion, and it does not foster excessive government entanglement with

religion, courts generally have not sustained claims against Confederate symbols based on the Establishment Clause.

In *N.A.A.C.P. v. Hunt*, the Eleventh Circuit concluded:

> The flag does not violate the *Lemon* test. It is clear that whether the flag was hoisted to decry integration or to recognize history, the purpose in its hoisting was secular. It is also clear that the primary effect of the flag is not to promote religion; rather, it is to remind citizens, albeit offensively to some, of the controversial era in American history. To violate the Establishment Clause, the religious benefit may not be merely remote or incidental (1990, 1564).

STATUTORY CLAIMS

In the absence of constitutional remedies, plaintiffs can attempt to remove Confederate symbols from state flags and other official communications through one of two statutory schemes: (1) civil rights statutes; and/or (2) the Voting Rights Act of 1965. As with constitutional cases, however, the courts generally do not sustain such claims.

Civil Rights Cases

Plaintiffs sometimes argue that their civil rights have been violated by an official display of the Confederate flag pursuant to various civil rights statutes: for example, 42 U.S.C.A. sec. 1983 (governing the denial of a right, privilege, or immunity secured by the United States Constitution); or 42 U.S.C.A. sec. 2000(a) (infringement on the right to full and equal enjoyment of public facilities). Owing to the difficulty in demonstrating a disparate effect on African-Americans and the failure to prove infringement of a statutorily-protected right, however, these claims stand little chance of success. If constitutional challenges are unsuccessful, the likelihood of a successful statutory challenge also seems remote absent a new legal strategy. In the *Hunt* case, for example, the court discussed the inherent difficulty in a plaintiff's Section 1983 cause of action involving the Confederate flag:

> In order to state a cause of action under Section 1983, the NAACP must prove: (1) that the Confederate flag is flown by individuals acting under the cloak of state authority (citations omitted); and (2) that the flying of the flag deprives them of some right, privilege, or immunity secured by the Constitution. See 42 U.S.C.A. Section 1983. There is no dispute regarding the "under color of state law" requirement. It seems clear that a flag flown on the state capitol dome is flown under state authority. The parties dispute, however,

> the question of whether the NAACP has been deprived of any rights (1990, 1562).

In *Coleman v. Miller*, Judge Evans did not directly address the question of whether the plaintiff had been denied "the full and equal enjoyment of public facilities in violation of 42 U.S.C.A. Section 2000(a)" since the plaintiff did not address the issue in responding to the defendants' motion for summary judgment. Nonetheless, Judge Evans concluded:

> ...[T]he initial burden of production on a Title II violation lies with Plaintiff (citations omitted). Because the Plaintiff has come forward with no facts meriting that the court revisit its earlier conclusion that there is no legal or factual support for Plaintiff's theory, Defendants are entitled to summary judgment on this issue (1996, 16).

In any case, it would be difficult to imagine in the wake of the *Hunt* case how a plaintiff could demonstrate objectively that the public display of a Confederate symbol or the flying of a Confederate flag infringed upon the plaintiff's full and equal enjoyment of public facilities for Section 2000(a) purposes. Moreover, quantifying damages would be next to impossible.

The Voting Rights Act of 1965

The Voting Rights Act of 1965 provides in relevant part that "[n]o person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten or coerce any other person for the purpose of interfering with the right of such other person to vote" (42 U.S.C.A. sec. 1971[b]). Plaintiffs sometimes challenge the state use of a Confederate symbol on grounds that the display of such a symbol in official state communications violates their right to vote under the Voting Rights Act. Again, as with constitutional challenges, the difficulty for plaintiffs is that it is virtually impossible to establish a causal connection between the official use of a symbol and an impermissible interference with a statutorily-protected and judicially-recognized right such as voting. Legal precedents under the Voting Rights Act all demonstrate a direct connection between the actions of the defendants and the abrogation of the plaintiffs' voting rights. A plaintiff is hard-pressed to demonstrate that an official public display of a Confederate symbol resulted in any damage other than a subjective "chilling" effect on African-Americans' desire to vote.[5]

THE POLITICAL QUESTION DOCTRINE

"Political questions" generally are defined as questions "of which courts will refuse to take cognizance, or to decide, on account of their purely

political character, or because their determination would involve an encroachment upon the executive or legislative powers" (Black 1979, 1043). The doctrine was first articulated by Chief Justice John Marshall in the landmark case of *Marbury v. Madison* (1803):

> The province of the Court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform their duties in which they have a discretion. Questions in the nature political, or which are, by the Constitution and laws, submitted to the executive can never be made in this Court (1803, 170).

Chief Justice Taney subsequently relied on the political question doctrine in *Luther v. Borden* (1849) in considering whether the court should hear a case pursuant to Article IV, section 4, of the United States Constitution, which provides in relevant part that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government" (U.S. Constitution, art. 4, sec. 4). Taney explained:

> Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantees to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government and could not be questioned in a judicial tribunal (1849, 42).

In ensuing years, the political question doctrine became controversial owing to inconsistent application by the courts, suggesting that the judiciary occasionally abdicated its responsibility in refusing to consider some justiciable cases and controversies, although the courts now will make the initial determination whether a political question, in fact, exists (see *Coleman v. Miller* 1939;[6] *Colegrove v. Green* 1946; *Baker v. Carr* 1962). In *Baker v. Carr*, the United States Supreme Court explained why the judiciary experiences difficulty in resolving political questions:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination

> of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question (1962, 217).

For proponents of an active judiciary, the political question doctrine contains an inherent tautology which provides courts with a convenient rationale for avoiding hard cases. Political scientist John P. Roche once sardonically wrote:

> Political questions are matters not soluble by the judicial process; matters not soluble by the judicial process are political questions. As an early dictionary explained, violins are small cellos, and cellos are large violins (1955, 768).

Observing America during the 1830s, Alexis de Tocqueville expressed an expansive, practical view of justiciability. "Scarcely any political question arises in the United States," he wrote, "that is not resolved, sooner or later, into a judicial question" (1945, 288). Tocqueville's comment was remarkably prescient, judging by the growth of justiciable cases and controversies during the latter half of the twentieth century.

Despite the relative rarity of wholly political questions in recent years, the doctrine is not dead. According to one commentator, the political question doctrine retains "general jurisprudential validity." In other words, it is a workable, meaningful judicial tool for deciding whether a matter is a justiciable case or controversy. Unfortunately, the doctrine has been applied in a confusing manner, sometimes combining parts of other legal doctrines:

> The "political question" doctrine, I conclude, is an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts. Its authentic contents have general jurisprudential validity, and nothing but confusion is gained by giving them special handling in selected cases. I see its proper content as consisting of the following propositions:
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> 1. The courts are bound to accept decisions by the political branches within their constitutional authority.
> 2. The courts will not find limitations or prohibitions on the powers of the political branches where the Constitution does not prescribe any.

3. Not all constitutional limitations or prohibitions imply rights and standing to object in favor of private parties.
4. The courts may refuse some (or all) remedies for want of equity.
5. In principle, finally, there might be constitutional provisions which can properly be interpreted as wholly or in part "self-monitoring" and not the subject of judicial review (Henkin 1976, 622).

In its current form, the political question doctrine is used sparingly by courts, and sometimes inconsistently—generally in cases where judicial intervention would encroach on the powers of other branches or where the disparate effect necessary for private litigants to sustain a *prima facie* case cannot be successfully demonstrated (Scharpf 1966). As Judge Evans concluded in *Coleman*, the Confederate symbols/flag issue "ultimately must rest in the hands of the General Assembly" (1996, 18); in other words, its political character makes it more amenable to redress in the more political branch of government.

CONCLUSION

Many constitutional and statutory strategies exist for filing lawsuits to remove Confederate symbols from state flags or to block official state displays of Confederate symbols. Yet those strategies fail to effect judicial remedies for what essentially amounts to a political, or legislative, problem. To date, plaintiffs have been unable to fashion their grievances into a successful cause of action primarily because they cannot establish a disparate effect on African-Americans nor can they demonstrate a causal connection between the use of a Confederate symbol and a judicially-recognized harm. The future holds little promise of a different outcome in court cases on this issue. Accordingly, plaintiffs' time, money and energy probably would be better spent lobbying state legislatures for redress in lieu of continuing to rely upon a judicial forum.

NOTES

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are not Forgotten": *Confederate Symbols in the Contemporary South,* forthcoming.

[1]The paramount factual consideration in these suits is that the state displays Confederate symbols in an official capacity. An interesting ancillary issue was raised in *Melton v. Young* (1971), a case where a Tennessee public high school student was suspended from school for wearing a shoulder patch consisting of a replica of the Confederate flag, which the court deemed a "provocative symbol." Decided just two years after the landmark United States Supreme Court decision in *Tinker v. Des Moines School District* (1969), *Melton* initially seemed to contravene the *Tinker* rule that the "symbolic speech" expressed by wearing armbands was constitutionally permissible. Owing to a Tennessee principal's statutory authority to maintain discipline in schools and in light of previous "racial disorders" concerning Confederate symbols at the school in question, however, the court concluded that the student's suspension was not an unconstitutional abrogation of free speech since evidence of prior disruptive **conduct**—not symbolic speech alone—had been introduced. Accordingly, the cases discussed in this article consider state displays of Confederate symbols absent accompanying conduct.

[2]The plaintiff, James Andrew Coleman, appealed Judge Evans's decision. On December 10, 1996, a three-judge panel of the Eleventh U.S. Circuit Court of Appeals heard oral arguments in the case. The court is expected to rule on the appeal sometime in 1997 (Rankin 1996b).

[3]See, for example, *Washington v. Davis* (1976), a Fifth Amendment "discriminatory intent" analysis that also applies to the Equal Protection Clause of the Fourteenth Amendment.

[4]For a detailed discussion of the two-pronged equal protection test, see also *Personnel Admin. of Mass. v. Feeney* (1979) and *McKlesky v. Kemp* (1987).

[5]For Voting Rights Act precedents, see generally *Harper v. Virginia Board of Elections* (1984) (poll tax); *Harman v. Forssenius* (1965) (voter qualifications in federal elections); and *Kramer v. Union Free School District No. 15* (1969) (qualifications for voting in school elections).

[6]The 1939 United States Supreme Court case styled *Coleman v. Miller* was a suit to enjoin the Kansas state legislature from ratifying the Child Labor Amendment of 1924 after a thirteen-year lapse. It is cited here for the proposition that some questions are by their nature not amenable to judicial review. The 1939 case should not be confused with Judge Evans's

Order Granting Motion for Summary Judgment in the 1996 federal district court case concerning Confederate symbols, coincidentally styled *Coleman v. Miller.*

LEGAL CASES AND CODES

Baker v. Carr. 1962. 369 U.S. 186.

Brown v. Board of Education. 1954. 347 U.S. 483.

Cinevision Corporation v. City of Burbank. 1984. 745 F. 2d 560 (9th Cir.) Cert. denied, 1985. 471 U.S. 1054.

Colegrove v. Green. 1946. 328 U.S. 549.

Coleman v. Miller. 1939. 307 U.S. 433.

Coleman v. Miller. 1996. Civil No. 1:94-cv-1673-ODE. Order Granting Motion for Summary Judgment.

Columbia Broadcasting System, Inc. v. Democratic National Committee. 1973. 412 U.S. 94.

Harman v. Forssenius. 1965. 380 U.S. 528.

Harper v. Virginia Board of Elections. 1964. 383 U.S. 663.

Holmes v. Wallace. 1976. 407 F. Supp. 493 (M.D. Ala.).

Hunter v. Underwood. 1985. 471 U.S. 222.

Jones v. Alfred H. Mayer Company. 1968. 392 U.S. 409.

Kramer v. Union Free School District No. 15. 1969. 395 U.S. 621.

Lathrop v. Donohue. 1961. 367 U.S. 820.

Lemon v. Kurtzman. 1971. 403 U.S. 602.

Luther v. Borden. 1849. 7 How. 1.

Marbury v. Madison. 1803. 5 U.S. (1 Cranch) 137.

McKlesky v. Kemp. 1987. 481 U.S. 279.

Melton v. Young. 1971. 328 F. Supp. 88 (E.D. Tenn.).

Miami Herald Pub. v. Tornillo. 1974. 481 U.S. 241.

N.A.A.C.P. v. Hunt. 1990. 891 F.2d 1555 (11th Cir.).

O.C.G.A. Section 50-3-1.

Personnel Admin. of Mass. v. Feeney. 1979. 442 U.S. 256.

Police Department of Chicago v. Mosley. 1972. 408 U.S. 92.

Red Lion Broadcasting Company v. Federal Communications Commission. 1969. 395 U.S. 367.

Roberts v. Jaycees. 1984. 468 U.S. 609.

Tinker v. Des Moines School District. 1969. 393 U.S. 503.

42 *U.S.C.A.* Section 1971(b).

42 *U.S.C.A.* Section 1983.

42 *U.S.C.A.* Section 2000(a).

Washington v. Davis. 1976. 426 U.S. 229.

West Virginia State Board of Education v. Barnette. 1943. 319 U.S. 624.

Wooley v. Maynard. 1977. 430 U.S. 705.

REFERENCES

Balkin, J. M. 1990. "Some Realism About Pluralism: Legal Realist Approaches to the First Amendment." *Duke Law Journal* 1990:375-430.

Black, Henry Campbell. 1979. *Black's Law Dictionary*. 5th ed. St. Paul: West Publishing Company.

Forman, James, Jr. 1991. "Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols." *Yale Law Journal* 101:505-26.

Henkin, Louis. 1976. "Is There a 'Political Question' Doctrine?" *Yale Law Journal* 85:597-625.

Matsuda, Mari J. 1989. "Public Response to Racist Speech: Considering the Victim's Story." *Michigan Law Review* 87:2320-79.

Rankin, Bill. 1996a. "Judge Rejects Suit Against State Flag." *Atlanta Journal and Constitution* January 4:C8.

Rankin, Bill. 1996b. "State Argues Flag with Rebel Symbol Isn't Biased." *Atlanta Journal and Constitution* December 11:C4.

Roche, John P. 1955. "Judicial Self-Restraint." *American Political Science Review* 49:762-72.

Rychlak, Ronald J. 1992. "Civil Rights, Confederate Flags, and Political Correctness: Free Speech and Race Relations on Campus." *Tulane Law Review* 66:1411-34.

Scharpf, Fritz W. 1966. "Judicial Review and the Political Question: A Functional Analysis." *Yale Law Journal* 75:517-97.

Shiffrin, Steven. 1980. "Government Speech." *U.C.L.A. Law Review* 27:565-655.

Smolla, Rodney A. 1990. "Rethinking First Amendment Assumptions About Racist and Sexist Speech." *Washington and Lee Law Review* 47:171-211.

Strossen, Nadine. 1990. "Regulating Racist Speech on Campus: A Modest Proposal." *Duke Law Journal* 1990:484-570.

Tocqueville, Alexis de. 1945. *Democracy in America.* Vol 1. New York: Vintage Books.