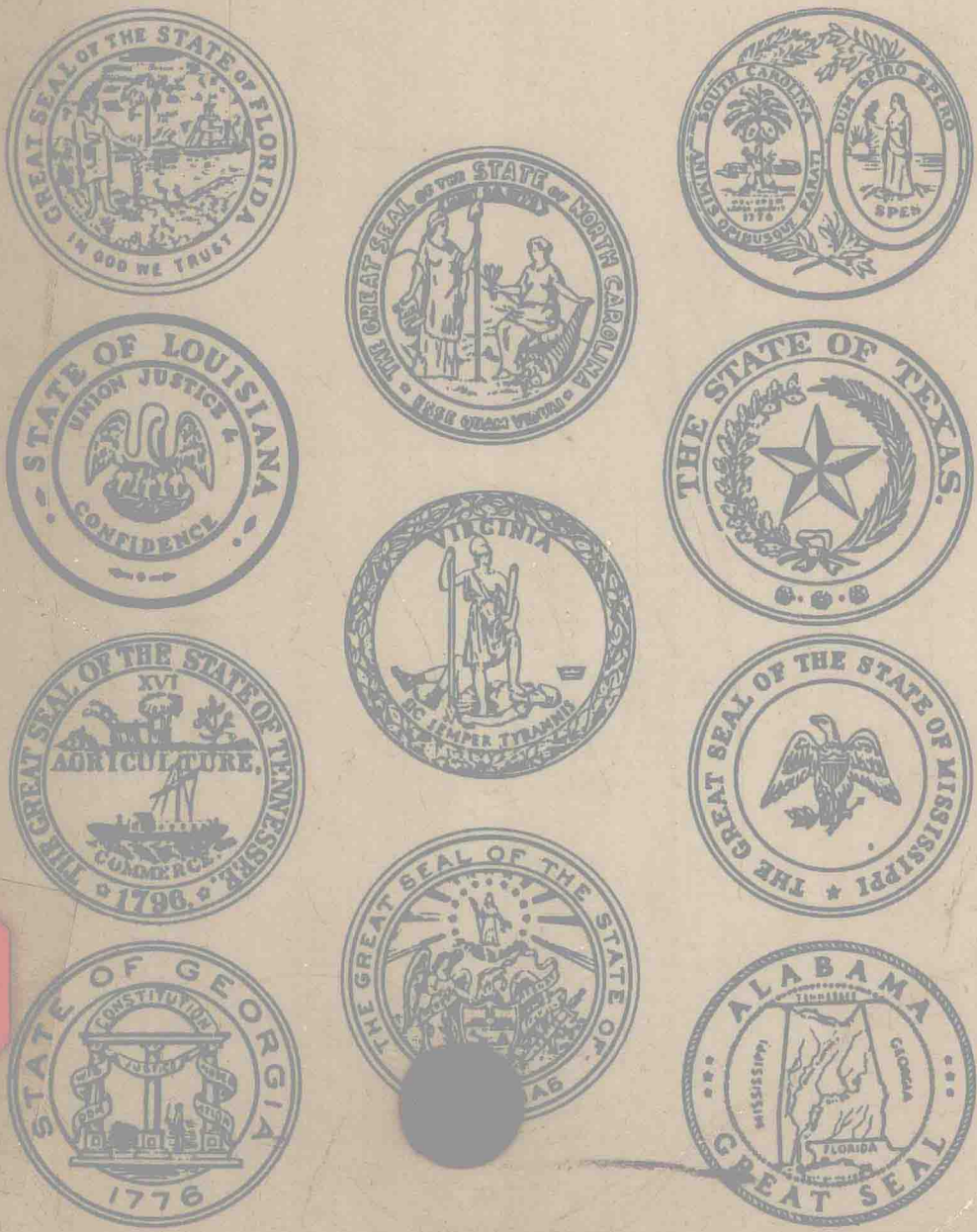
An Uncertain Tradition

Constitutionalism and the History of the South

Edited by Kermit L. Hall and James W. Ely, Jr.



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To the memory of Stephen Botein,

who was to have participated in the symposium from which the essays in this volume are taken.

All earnings derived from the sale of this book will be contributed to a special research fund at the American Antiquarian Society in memory of this gifted historian, erudite scholar, and compassionate human being.

Acknowledgments

This book began as a symposium, "The South and the American Constitutional Tradition," held at the University of Florida in early March 1987. All of the papers presented at that conference are contained in this volume, and they are much the better for the insightful, humorous, and sometimes pungent commentaries given by Don E. Fehrenbacher, Jack P. Greene, Paul L. Murphy, J. Woodford Howard, Jr., and Bertram Wyatt-Brown. These distinguished scholars are due special thanks for their contributions to the symposium and their shaping influence on these essays.

Scholarly enterprises such as this one require considerable institutional support. As the organizers of the symposium, we extend thanks to Dean Charles Sidman, College of Liberal Arts and Sciences, University of Florida; Dean Frank T. Read, University of Florida College of Law; Associate Dean Jeffrey Lewis, also of the University of Florida College of Law; Dean John J. Costonis, Vanderbilt University School of Law; Ann Henderson, Director, Florida Endowment for the Humanities; The University of Florida Humanities Council; the Eighth Circuit Bar Association of Florida; and the Florida Bar. Elizabeth B. Monroe oversaw much of the conference planning; David Bodenhamer, of the University of Southern Mississippi, provided valuable guidance; William T. Coram ably handled local arrangements; and Rachel Engelhardt managed to keep the books balanced.

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Kermit L. Hall
Gainesville, Florida

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December 1987

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Part One

Introduction

The South and the American Constitution

Kermit L. Hall and James W. Ely, Jr.

The bicentennial of the federal Constitution has come and gone, and its occasion provided an opportunity to take historical stock of our constitutional traditions. The essays in this volume inquire into those traditions and the special poignancy they have had for the inhabitants of the eleven states of the former Confederacy. Slavery, secession, Confederate nationhood (which included its own national constitution), Reconstruction, and legally mandated racial segregation shaped not just the section's attitudes toward the federal Constitution but the course of the nation's constitutional history. To inquire about the place of the South in the American constitutional tradition, therefore, is to probe more generally for the sinews of authority in the federal system.

Since the late nineteenth century, the search for the roots of southern distinctiveness has been part of a larger effort to explain the impact of section on the American nation. The importance of section as an organizing principle of historical analysis has ebbed and flowed during these decades. The sectional school of Frederick Jackson Turner, with its underlying assumptions about the powerful relationship between geography and history, was modified and recast in later years by C. Vann Woodward and David M. Potter, in history, and Julius Turner and V. O. Key, Jr., in political science.[1] Woodward and Potter, while interested in the sectional phenomenon, also questioned Turner's assertions about the geographical bases of sectionalism and criticized Turner and his disciples for projecting their own biases in suggesting that the South was somehow sectional and the North national.[2] As important, they and

other scholars insisted that Turner's approach ignored other important analytical variables, such as class, ethnicity, and culture. "What was fundamentally wrong with" sectionalism, Richard Hofstadter has written, "was not that it lacked validity, but that it lacked the importance with which [Turner and others] so solemnly tried to invest it."[3]

Today, there is a renewed interest in sectionalism, and scholars have advanced a multivariate approach to determine its existence and to measure its influence.[4] Not only do they stress ethnicity and culture, but some of them have also argued that section must be defined on the basis of ecologically adapted modes of production.[5] This approach emphasizes the ways in which the people of a section—the South, for example—wrested their food, their energy, their income, and their personal liberty from the environment. Such an approach complements and builds upon the insights provided by an appreciation of geography, ethnicity, and culture. If the modes of production were the same as those elsewhere, then the South would not have been a section, and questions about whether it had a distinctive legal culture would be meaningless. On the other hand, if the modes had been too radically different, the South would not have been a section at all, but a foreign civilization. Somewhere between those poles of conformity and differentiation lies the concept of section.

One mode of production shaped the South's history. That was the plantation system of agriculture in which African slave labor cultivated tobacco and cotton. After the Civil War ended, slavery, agriculture, and the black work force continued to shape the South's fortunes, although tenant farming and sharecropping created new arrangements that perpetuated traditional ways of doing business. Only since World War II has the South begun to break significantly from this historical path, with massive out-migration of blacks (a development begun in the early twentieth century), urbanization, and industrialization. The Sunbelt South is less agrarian and more commercial, and as a result, it has become at once more like and more competitive with other sections for business and federal support dollars.[6]

Legal historians have contributed to the resurgence of interest in sectional analysis. They accept the responsibility of making explicit those assumptions about sectional differences in the legal culture that earlier scholars had casually treated as implicit. Equally significant, they recognize the important analytical advantage that a comparative sectional perspective provides on the rise of national legal culture. As James

Willard Hurst, the dean of American legal historians, observed in 1982, "It is only within recent years that students of legal history have begun to explore ways in which legal doctrine and uses of law may have shaped or responded to sectional experiences and patterns different from or in tension with interests taking place on a national scale."[7] Almost all of this new attention, however, has gone to private law and legal institutions, much to the neglect of constitutional law.[8] We know precious little about the operation of fundamental frames of government within each of the southern states, of the existence of distinctive constitutional traditions within the South, and of the relationship of the section to the nation's ruling document.[9] In short, the role of the Constitution and of constitutionalism in southern history remains, despite all of the ink spilled over the problem of southern distinctiveness, elusive.

Recent scholarship on the history of private law and legal institutions has laid bare the section's "ambivalent legacy," one in which the South's legal culture was at once distinctive from and yet similar to that of the rest of the nation.[10] Might the same thing be said of the history of public law in the South? The essays in this volume explore one part of this question—the relationship of the South to the federal Constitution. As was true of *Ambivalent Legacy,* a collection of essays on private-law development in the South edited by David J. Bodenhamer and James W. Ely, Jr., the essays in the present volume are an exploration designed to encourage additional work and, we think, to add another dimension to the general debate about the place of section and law in American history.

The organic laws of each of the southern states were also important. Daniel Elazar cogently argues that the section's state constitution makers had a strongly contractual bent.[11] Although all constitutions are by their nature contracts between the governed and the governors, state constitutions in most of the South, more fully than in other sections, circumscribed the authority of government through a rigorous separation of powers and sharp limits on its authority to tax and to extend its credit for public and private development.[12] This contractual tradition persists even today. On average, the South's state constitutions are nearly one-quarter longer than the ruling documents of states outside the section. The Alabama Constitution, with approximately 174,000 words, is the nation's longest, a distinction held by Louisiana until 1974, when its quarter-of-a-million-word constitution was reduced to about 34,000 words. The Georgia Constitution, with its many local amendments, was

more a code than a fundamental charter of government until a new organic law in 1982 ended the practice of allowing local amendments.[13]

This contractual tradition also informed the relationship of the South to the federal Constitution. No other section in the nation's history, for example, embraced so fully the compact theory of the Union, which held that the states, and not the people as a whole, had formed the Union and that these same states could dissolve it. Secession and the Confederacy were the ultimate expressions of this strongly contractual constitutional tradition. In the era of Reconstruction, the Republican Congress turned this tradition against the once rebellious states by requiring them to recognize explicitly the inherent superiority of the Constitution. The North Carolina Constitution of 1868, for example, provided that "there is no right to secede. This State shall ever remain a member of the American Union," and "every citizen of this State owes paramount allegiance to the Constitution and Government of the United States."[14]

This volume treats only one aspect of the contractual tradition—the South's relationship to the federal Constitution. Matters of state constitutional development, as important and little understood as they are, have been left for another day. Each author has conceptualized section in ways that stress the sociolegal and ideological forces associated with the South's unique modes of production rather than merely cataloging the distinctive features of its culture of public law. The essays, when taken as a whole, point toward a legacy of ambivalence—a tradition of uncertainty—in which southern political and legal spokesmen frequently sought to be in the federal constitutional order without being of it.

Powerfully contradictory behavior has fostered this sense of uncertainty. To begin with, there is no doubt that a kind of provincial belligerency has characterized southern white attitudes toward the federal Constitution. When Governor George C. Wallace in 1963 attempted to block black students from entering the University of Alabama by standing in the doorway of the school's administration building, he symbolized the defiance of white southerners not only to blacks but to attempts by the federal government to aid them. A hundred years earlier, a Georgia newspaper editor summarized the sentiments that lay behind such actions: "Free society! We sicken at the name. What is [the North] but a conglomeration of greasy mechanics, filthy operatives, small-fisted farmers, and moon-struck theorists. . . . hardly fit for association with a gentleman's body servant."[15]

Such vituperative rhetoric often masked other equally significant attitudes. Take, for example, the question of who best represents the southern constitutional tradition. In the pre–Civil War South do we turn to George Washington, James Madison, and John Marshall? Or did Spencer Roane, John C. Calhoun, and Jefferson Davis symbolize the spirit of that earlier era? The discourse of history distinguishes between the two groups, regarding the former as constitutional nationalists and the latter as constitutional polemicists of states' rights. James Madison, a Virginian, gave birth to the Constitution; Jefferson Davis, a Mississippian, attempted to destroy the Union through secession and civil war. The problem is just as difficult, if not more so, for our own time, when biracial politics have become a fact of southern life. George C. Wallace in the 1960s epitomized the attitudes of many white southerners by proclaiming: "Segregation now—Segregation tomorrow—Segregation forever."[16] Martin Luther King, Jr., however, while locked in a Birmingham, Alabama, jail for acts of civil disobedience designed to break the constitutional support of racial segregation, urged southerners of both races to embrace a more cosmopolitan and egalitarian meaning of the Constitution. "What affects one directly affects all indirectly," King wrote. "Never again can we afford to live with the narrow, provincial 'outside agitator' idea. Anyone who lives in the United States can never be considered an outsider anywhere in this country."[17]

These contradictory patterns of behavior merge into common themes founded on the section's modes of production. Racism, states' rights, and individual liberty of course were not unique to the section, but as the essays in this volume suggest, an appreciation of the southern response to them illuminates the place of the South in the American constitutional tradition. Together they provided the South with a legacy of great tragedy and, as several of the authors suggest, also of great opportunity.

Racism has been endemic in America. Slavery existed throughout the colonies, not just in the South. The most enlightened public leaders of the day were certain that blacks were inferior to whites, even subhuman. Southerners, however, came to hold slaves in such numbers that the section's wealth, social fabric, and national political power depended upon the peculiar institution. Slavery became integral to the economic well-being of southerners even as its significance waned in the burgeoning commercial economy of the North. Southerners realized that racial slavery fostered a social calculus of great complexity and of

potentially fatal consequences for both master and slave. "Deep-rooted prejudices entertained by the white; ten thousand recollections, by the blacks, of the injuries they have sustained," wrote Thomas Jefferson, "[and] the real distinctions which nature has made will divide us into parties, and produce convulsions, which will probably never end but in the extermination of one or the other race."[18] Fear of the free black population and of a servile slave rebellion, when coupled with the economic imperative of slavery, drove southerners to seek protection of their system of racial control under the Constitution.

Southern delegates to the Philadelphia convention in 1787 took the initiative to protect their peculiar human property. Slavery, from their point of view, was peculiar not because it was "odd" but because it was largely confined to their section. They demanded and won from their northern counterparts important concessions. The framers did not directly endorse human bondage; the words "slave" and "slavery" nowhere appear in the Constitution. Slavery nonetheless insinuated itself indirectly through eight separate provisions, and James Madison concluded at the end of the proceedings that these compromises were so important that agreement on the Constitution would never have been reached without them.[19]

In retrospect, the South achieved a Pyrrhic victory. By gaining federal recognition for slavery, the section assumed a burden of racial control that structured its social, political, and constitutional behavior for the next century and a half. The South, among all the sections of the new nation, thoroughly embraced slavery and the equally distinctive proslavery constitutional theory that supported it.

Until recently, the constitutional law of race relations in the South, in the words of Daniel Boorstin, was "indwelling."[20] The southern consensus on race was so pervasive and constraining that the law merely ratified rather than channeled attitudes about first slaves and later free blacks. In the pre–Civil War years the requirement to defend slavery forced southerners to fashion constitutional arguments intended to preserve the peculiar institution from critics within and without the section. The proslavery defense was so extreme that southern civil liberties suffered and a sense of injustice infected the nation's entire constitutional system. Southerners censored the mails for antislavery literature; they gagged congressmen from debating the merits of antislavery petitions; and in a desperate effort to hasten the return of escaped slaves, they secured passage of the Fugitive Slave Act of 1850, which paid federal

commissioners more to return a slave to his or her master than to free the slave. The southern view of race relations attained its apotheosis in *Dred Scott v. Sandford* (1857) when the Supreme Court declared that persons of African descent had "no rights" that white persons were bound to respect.[21]

Indwelling attitudes toward race continued to shape southern understanding of the Constitution even after the Civil War and Reconstruction. Southerners once again successfully appealed to the Supreme Court, this time to fashion a workable accommodation with the great Civil War amendments—the Thirteenth, Fourteenth, and Fifteenth. With the acquiescence of the justices, southerners foisted second-class citizenship on newly freed blacks through such devices as the all-white party primary, literacy tests, and de jure segregation. The most important and pervasive of the new constitutional expressions of racism was the doctrine of separate but equal, which the justices sustained in *Plessy v. Ferguson* (1896).[22] Although pre–Civil War northerners invented the practice of racial segregation by law, and even though westerners adopted it in dealing with the Chinese on the Pacific slope, southerners made separate but equal the most distinctive feature of post–Civil War race relations.[23]

In the twentieth century, the constitutional law that supported traditional patterns of southern race relations underwent radical change, the effects of which echoed throughout the nation. The Legal Defense Fund of the National Association for the Advancement of Colored People (NAACP) skillfully orchestrated a litigation strategy that turned the Constitution into a tool to service the needs of black people.[24] Although racism remained pervasive, its legal stature gradually eroded, leaving behind positive protections for blacks in the due-process and equal-protection clauses of the Fourteenth Amendment. The NAACP harnessed federal power, once used to undermine the concept of black freedom, to sustain that freedom. The case of *Brown v. Board of Education* (1954) became a constitutional landmark as important for the South as *Dred Scott v. Sandford* and *Plessy v. Ferguson* and as far-reaching as both of those decisions for defining race relations in public facilities throughout the entire nation.[25]

Change has come in other ways. New social arrangements have replaced traditional ones; old ideas have given way to new practices. States' rights and, ironically, in view of the history of slavery, a concern for individual liberty have composed the other major themes in the

South's history under the federal Constitution. The doctrine of states' rights provided the constitutional scaffolding that legitimated slavery, segregation, and the rights of the white majority. The persistent localism in southern constitutional thought derives from a belief that local democracy offers the best opportunity to secure a responsible political order more sensitive to individual ambition and worth than a federal government, distant and out of sight, could be. Yet time and again, the vision of such local autonomy has meant, given the South's persistent racism and agrarianism, oligarchic control by a ruling white elite rather than genuine democracy.

Nonetheless, southern constitutional theorists of the late eighteenth and early nineteenth centuries had more on their minds than race in boosting states' rights. Spokesmen such as John Taylor of Caroline, Thomas Jefferson, and John C. Calhoun understood that the agricultural modes of production that accompanied the South's rural character and dispersed population meant that local control over political decision making would foster their particular vision of republican government. Even today, for example, county government retains a vitality in the South found almost nowhere else in the nation.

Southern proponents of states' rights also advanced the doctrine as a means of securing individual liberty (albeit white liberty) against an encroaching national government. The earliest invocation of states' rights involved freedom of political expression, not protection of slavery, although the influence of the peculiar institution was never far from the surface of antebellum southern consciousness. Congress in 1798 passed the Alien and Sedition Acts, which Federalists employed to harass their political opponents, the Jeffersonian Republicans. Through these measures the Adams administration secured ten convictions of Republican newspaper editors and printers. Shortly thereafter, Thomas Jefferson and James Madison penned the Kentucky (1798, 1799) and Virginia (1798) Resolutions, which invoked a compact theory of the Constitution that maintained that each state had an equal right to protect individual citizens from the hostile actions of the central government by declaring federal laws unconstitutional.

This refrain echoed through the early Republic, finding expression in the Nullification Crisis of 1832 and the great debate over the return of fugitive slaves, and culminating in secession. By that time, however, as Arthur Bestor has shown, the doctrine of states' rights as a means of