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An Uncertain Tradition: Constitutionalism and the History of the South by Kermit L. Hall;  
James W. Ely,

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## Book Reviews

*An Uncertain Tradition: Constitutionalism and the History of the South.* Edited by Kermit L. Hall and James W. Ely, Jr. (Athens: University of Georgia Press, 1989. Pp. ix, 403. Tables, notes, select bibliography, index. \$40.00 cloth, \$17.95 paper.)

Comparisons across time or space are merely incomplete casual explanations, small descriptive steps on the path to analysis, historians' conventional rhetorical substitutes for more comprehensive empirical generalizations. If the South has had a legal "legacy of ambivalence," if its "spokesmen frequently sought to be in the federal constitution order without being of it" (p. 6), as Kermit Hall and James Ely assert in their introduction to this collection of essays from a 1987 symposium, just what produced that ambivalence, assuming, as the editors do implicitly, that the South was more mentally divided than the North was? If courts in colonial Virginia were clerk-dominated, locally-oriented, and concerned overwhelmingly with procedures, not substance, as David Konig contends in the chronologically earliest essay in this volume, how, precisely, does that colony's experience compare to that of others, or of Virginia later, and what factors explain the variations? If eleven of the fifteen states that failed to ratify the Equal Rights Amendment were southern, as Mary Bonsteel Tachau points out in a stimulating, if necessarily skeletal essay on the largely unexplored topic of southern women's legal history, what accounts for the greater degree of opposition to women's rights in the South? How, if at all, do the causes of these contrasts relate to slavery, segregation, fundamentalist Protestantism, climate, modes of production, "culture," or whatever?

The authors of these thirteen essays, which vary perhaps even more than usual for a melange volume in quality, originality, and scope, do not expend much effort on pinpointing causes. Indeed, like most historians, they seemingly do not recognize the lack of logical closure in their accounts. Most extreme is Herman Belz's reactionary polemic, "The South and the American Constitution," which homogenizes the histories of both sections as well as experiences within the South, viewing patently contradictory philosophies as legitimate outgrowths of a "republican" tradition so amorphous that it can equally foster states' rights and centralism, slavery and antislavery, autocracy and freedom of expression, antipartyism and party consciousness, or segregation and equal rights. Distorting the work of other scholars, including myself, in order to read the civil rights movement and affirmative action out of the southern tradition and the proslavery and segregation movements into the national mainstream, Belz eschews explanations by denying that real differences between North and South, and within the South, existed.

Other contributors contradict Belz and each other without mentioning the fact or saying why they differ. For William Wiecek, unlike Belz, the necessity of defending slavery and racial discrimination produced a distinctive southern constitutionalism, and the revolutionary northern effort to reconstruct southern society after the Civil War (not slavery or the civil rights movement) gave rise to a southern tradition of extralegal violence. Although Wiecek believes the use of states' rights arguments by antebellum southerners "opportunistic" (p. 169), Paul Finkelman, in a subtle, sectionally comparative essay on the subject, specifically denies that it was (p. 125). And whereas Wiecek emphasizes the distinctively "southern" features of the Confederate constitution (pp. 172-73), Donald Nieman, in a closely focused and nuanced paper, stresses the continuity of that document with the national "republican" tradition and with the experiences of both sections in antebellum and even postbellum politics. How can historians hope to advance toward agreed-upon generalizations if the authors of papers delivered at a single conference, published in the same volume, refuse to confront each others' descriptions or explanations, and if they fail to move from metaphors, such as continuity, to explicit models of causation?

Other contributors' pioneering observations raise causal questions that they do not attempt to answer. Why did South Carolina, but not other American colonies, require of its attorneys attendance at the English Inns of Court, as Herbert A. Johnson asserts that it did (p. 92)? Why did the transition from colony to state make so little difference in South Carolina (p. 98)? Why did post-Reconstruction state constitutions, North as well as South, adopt the tenets of "laissez-faire constitutionalism," if Michael Les Benedict is correct in saying that they did? Was federal appeals court judge John J. Parker's moderate regionalist economic jurisprudence of the 1920s and '30s followed by enough other courts to form "a judge-made southern constitutional tradition" (p. 278), as Peter Graham Fish believes? If so, how and why did that tradition differ from those of other sections?

With the exception of the late antebellum period, the legal history of the South is not far advanced. The narrowly-focused descriptions, thinly-based overviews, and question-filled explorations that make up this volume are probably inevitable at this stage of research. But as studies of the subject proliferate, historians should become more self-conscious in framing explanations.

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