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Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument

James A. Gardner*

I. The Character Thesis

Among the more common techniques of American constitutional argument is the resort to "character" as an aid to interpreting the United States Constitution. Character-based arguments seek to justify a particular interpretation of the Constitution on the ground that it is more consistent than competing interpretations with the character of Americans or with the values that Americans, in consequence of their character, hold dear. Philip Bobbitt, who calls such arguments "ethical," describes them as arguments "whose force relies on a characterization of American institutions and the role within them of the American people. It is the character, or ethos, of the American polity that is advanced in ethical argument as the source from which particular decisions derive." 1

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1. PHILIP BOBBITT, CONSTITUTIONAL FATE 94 (1982).
The plausibility of character-based argument derives principally from a familiar and widely accepted underlying conception of the Constitution. On this view, the Constitution is understood to be a self-conscious act of social definition by the American polity. Because the Constitution functions as a democratic expression of American aspirations for good and enduring self-government, it therefore by definition embodies the values that Americans understand themselves to hold. Moreover, as a document commanding governmental obedience to the popular will, the Constitution secures the integrity of American life by assuring that the organs of American government act consistently with fundamental American norms. A dual relationship consequently arises: the Constitution both expresses and shapes American character. Character-based arguments exploit this model to find meaning in the Constitution's otherwise vague injunctions. They do so by making assertions about the content of American character and from them deducing the meaning of the Constitution in concrete applications.

The presence of a character-based argument is often revealed by a proposition to the effect that "Americans are a people who"—who are of a certain kind, who behave in certain ways, or who hold certain beliefs or values. Sometimes these propositions are advanced explicitly, as in the Supreme Court's interpretation of the Eighth Amendment as "draw[ing] its meaning from the evolving standards of decency that mark the progress of a maturing society." At other times the reliance on character may be

2. See U.S. CONST. preamble (declaring that the Constitution was created by the people of the United States); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (theorizing that because the American people actively assented to the Constitution through the constitutional ratification conventions, the government created by the Constitution represents all of America).

3. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (noting that the Constitution creates a binding, judicially enforceable obligation of obedience on government officials).

4. As Robert Post has written, "Constitutional law is fundamental because it reflects and embodies the essential political ethos that makes governance possible within a particular culture." Robert C. Post, The Challenge of State Constitutions, in CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE 45, 45 (Bruce E. Cain & Roger G. Noll eds., 1995); see also BOBBITT, supra note 1, at 94-95 (arguing that ethical constitutional arguments use the character of the American people to provide solutions that are consistent with desired means to solve political problems); JAMES BOYD WHITE, JUSTICE AS TRANSLATION 217 (1990) (stating that law is made in the process of writing and that "we are made by the very language that we use"); JAMES BOYD WHITE, Reading Law and Reading Literature: Law as Language, in HERACLES' Bow 77, 80 (1985) (proposing that instead of a community giving meaning to a text, it is the text that creates the community); Robert M. Cover, The Supreme Court, 1982 Term—Foreward: Nomos and Narrative, 97 HARV. L. REV. 4, 4-40 (1983) (discussing the proposition that the creation of legal meaning takes place through a cultural medium); Richard Delgado, Storytelling for Oppositionists and Others: A Plea for the Narrative, 87 Mich. L. Rev. 2411, 2412 (1989) (describing how legal stories circulated among groups represent the cohesion, shared understandings, and meanings held by those groups). The role of the Constitution in American public life is thoroughly examined in MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF (1986).

more subtle, as in the Court's horrified rejection of legislation prohibiting the use of contraceptives by married couples. But all such arguments appeal in some way to the belief that the best constitutional interpretation is one that "comports with the sort of people we are and the means we have chosen to solve political and customary constitutional problems."7

Although not without its critics,8 the technique of appealing to American character seems to be a settled feature of American constitutional argument.9 Less settled, however, is the practice of applying character-based argument to the interpretation of state constitutions. In numerous scholarly articles and a few influential judicial opinions, advocates of what has come to be known as New Judicial Federalism have urged state courts to treat the character and values of the people of their states as sources of constitutional meaning.10 Just as the character of the American people infuses the national Constitution, so too, they claim, does the character of the people of a state infuse the state charter. Thus, we are told, a state constitution is a "mirror of fundamental values"11 of the people of the state, one that expresses "the basic values of the polity."12 A state's

Kennedy, and Souter in a portion of their opinion that was the opinion of the Court, argued that the Court must adhere to precedent and principle to be faithful to "the character of a Nation of people who aspire to live according to the rule of law." Id. at 868. Justice Scalia, joined by three other Justices, ridiculed this contention as a "Nietzschean vision" of unelected judges "leading a Volk" whose self-understanding is "mystically bound up" in their beliefs about the Supreme Court. Id. at 996 (Scalia, J., concurring in part and dissenting in part).

6. See Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (classifying the "sacred" marital relationship as protected by the zone of privacy and noting that "[t]he very idea of policing married couples' use of contraception] is repulsive to the notions of privacy surrounding the marriage relationship").

7. BOBBITT, supra note 1, at 95.

8. Naturally, anyone—like textualists or originalists—who thinks that constitutional meaning is to be found exclusively in the text or intentions of the framers, will dispute the legitimacy of this technique. Justice Scalia, for example, a noted originalist, has criticized it severely. See Casey, 505 U.S. at 980 & n.1 (Scalia, J., concurring in part and dissenting in part) (arguing that abortion is not a constitutionally protected liberty and criticizing Roe v. Wade because it "sought to establish—in the teeth of a clear, contrary tradition—a value found nowhere in the constitutional text" (citation omitted) (emphasis in original)).

9. BOBBITT, supra note 1, at 96-119 (discussing several Supreme Court cases that adopt ethical reasoning). Bobbitt views the use of an interpretational technique as self-legitimating. See id. at 5.


constitutional law becomes, on this view, "uniquely expressive of that state's own constitutional culture." In sum,

no function of a constitution, especially in the American states, is more important than its use in defining a people's aspirations and fundamental values. . . . A state constitution is a fit place for the people of a state to record their moral values, their definition of justice, their hopes for the common good. A state constitution defines a way of life.

The use of character-based argument in the interpretation of state constitutions would not be especially noteworthy were it not for an additional step taken by many advocates of New Judicial Federalism: they frequently claim that the characters and values of the people of the various states differ both from one another and from the character and values of Americans generally. For example, Judith Kaye, now Chief Judge of the New York Court of Appeals, has claimed that "[m]any states today espouse cultural values distinctively their own." New York's constitution, she contends, "reflects the geography, history, culture and uniqueness of our state." Wisconsin Supreme Court Justice Shirley Abrahamson agrees: a state's constitution must be interpreted in light of its "peculiarities," including "its land, its industry, its people, [and] its history." Robert Utter, former Justice of the Washington Supreme Court, has made the same point: his state's constitution, he argues, must be interpreted in view of "the vast differences in culture, politics, experience, education and economic status" between the state and national founding generations.

This contention has dramatic implications for the interpretation of state constitutions. It means that courts and lawyers cannot approach a state's constitution under the assumption that it embodies the same kinds of broad value judgments as would be made by Americans as a group—the kind with which we are all familiar from federal constitutional law. Instead, each state constitution must be approached individually and a careful assessment made of the basic character of the people of the state. Only once such an evaluation has been made is it possible to formulate conclusions about the

values held by the state’s people and about the ways in which those values might be embodied in their constitution.

This type of evaluation is a potentially far-reaching technique whose possibilities David Schuman has illustrated:

The founders of a populist frontier state with a tradition of ferocious individualism, like Washington or Oregon, probably intended to carve out a larger sphere of rights, a larger arena of activity into which the government could not intrude, at least with respect to such matters as bearing arms and avoiding scrutiny, than a more communitarian, homogeneous state like Massachusetts or one with sectarian roots like Maryland. Those latter states, on the other hand, might be assumed to have cared more deeply about matters of religion.\(^{19}\)

As this passage makes clear, character-based arguments tailored to the purportedly unique characters of individual states provide a potentially powerful means for differentiating state constitutions from their national counterpart and from each other.

This kind of character-based differentiation is more than a theoretical possibility; it has already found favor among some state supreme courts. Indeed, Schuman’s account is consistent with one given by the Oregon Supreme Court in the course of construing the Oregon Constitution. In an opinion holding that the state constitution’s protection of free speech extends, unlike the First Amendment, to obscene expression, the court observed: “Oregon’s pioneers brought with them a diversity of highly moral as well as irreverent views,” and “most members of the Constitutional Convention of 1857 were rugged and robust individuals dedicated to founding a free society unfettered by the governmental imposition of some people’s views of morality on the free expression of others.”\(^{20}\)

In another well-known example, the New York Court of Appeals ruled that the New York Constitution provides greater protections than does the United States Constitution in numerous areas of free speech, including reporters’ privileges against disclosure of sources,\(^{21}\) the application of nuisance law to adult bookstores,\(^{22}\) and the application of libel law to the


\(^{20}\) State v. Henry, 732 P.2d 9, 16 (Or. 1987).

\(^{21}\) See O’Neill v. Oakgrove Constr. Inc., 523 N.E.2d 277, 280 (N.Y. 1988) (concluding that the state constitution mandates a reporter’s qualified privilège while noting that the Supreme Court has declined to recognize such a privilege under the United States Constitution).

\(^{22}\) See People ex rel. Arcara v. Cloud Books, Inc., 503 N.E.2d 492 (N.Y. 1986) (holding that in determining whether state action affects freedom of expression under the state constitution, it is the impact on the protected activity that is crucial and not the nature of the activity as the Supreme Court held under the First Amendment of the United States Constitution).
expression of opinions. According to the New York court, what justifies these decisions is the fact that "New York has a long history and tradition of fostering freedom of expression, often tolerating and supporting works which in other States would be found offensive to the community." In other words, New Yorkers are simply more tolerant of eccentric, dissenting, or distasteful speech than are Americans generally, and the state and national constitutions merely reflect the degree to which each polity possesses this particular character trait.

Other courts have followed suit. The Texas Supreme Court, in yet another free speech case, held that the Texas Constitution provides greater protection than the federal Constitution against the issuance of gag orders by trial courts. The court argued that the Texas Constitution must be understood to "reflect Texas' values, customs, and traditions." The court supported its divergent reading of the Texas free speech provision by reference to the different "experiences and philosophies" of the state's founders, whose views were shaped by "years of rugged experience on the frontier." Similarly, the Alaska Supreme Court held that the rugged Alaskan character, forged in a place that "has traditionally been the home of people who prize their individuality," justifies a generous interpretation of the state constitution's privacy rights.

The propriety of turning to a distinctive state character as an aid to interpreting a state constitution depends upon two critical assumptions. First, state constitutions as a class of documents must be sufficiently like the national Constitution to bear the weight of character-based argument. This means primarily that, like the United States Constitution, they must be capable of being understood as constitutive expressions of a set of values held by the state polity. If state constitutions somehow differ from the national Constitution in this respect, then it is unclear what justifies

23. See Immuno AG. v. Moor-Jankowski, 567 N.E.2d 1270, 1277 (N.Y. 1991) (comparing the "expansive language" of the state constitution with that of the First Amendment and recognizing the state's tradition of providing the broadest possible protection).
25. See Davenport v. Garcia, 834 S.W.2d 4, 7-10 (Tex. 1992) (explaining that the Texas Constitution's affirmative grant of free speech rights offers more expansive protection than the federal Constitution, which only prohibits government regulation of speech).
26. Id. at 16 (quoting LeCroy v. Hanlon, 713 S.W.2d 335, 339 (Tex. 1986)).
27. Id. (quoting JAMES C. HARRINGTON, THE TEXAS BILL OF RIGHTS 41 (1987)).
28. Ravin v. State, 537 P.2d 494, 504 (Alaska 1975). For an enthusiastic endorsement of this view, see Ronald L. Nelson's ominously titled article, Welcome to the "Last Frontier," Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation, 12 ALASKA L. REV. 1, 5-8 (1995) (contending that Alaska's Constitution reflects the state's physical, demographic, and historical uniqueness). For a rather different picture of Alaska, see Carey Goldberg, Alaska Revels in Frontier Image Though Frontier Slips Away, N.Y. TIMES, Aug. 14, 1997, at A1 (noting, for example, that "fully half the population . . . now lives in metropolitan Anchorage, where in most ways they might just as well be living in Minneapolis or Buffalo").
attempts to construe them by this means. Second, the character of the
people of the state must be sufficiently different from that of the national
character to justify invoking the local character in lieu of the national one.
If the local character does not materially differ from the national one, then
resort to local character cannot influence the result and seems pointless.
These two assumptions are related, and I have previously expressed skepti-
cism about both of them. In this paper, however, I shall assume the
first in order to focus on the second—the proposition that the characters of
the various state polities differ so significantly from the national character
as to affect the content of state constitutional law.

It is easy to be skeptical of this hypothesis. All too often arguments
about the unique character and values of the people of a given state resem-
ble nothing so much as chamber-of-commerce-style boosterism. New
York’s free speech jurisprudence again provides a good example. The
Court of Appeals claims for New Yorkers a history of tolerance exceeding
that of Americans generally, yet even a cursory review of the free speech
decisions of the United States Supreme Court reveals something quite dif-
ferent: a long history of New York restrictions on speech. Indeed, some of
the Supreme Court’s best-known free speech rulings came in cases in
which the Court reviewed speech-restrictive regulations from New York.

These decisions, particularly those invalidating New York restrictions on
speech, hardly bespeak a New York tradition of extraordinary attachment
to free speech, much less an attachment stronger than that of the nation.
Perhaps the court may have had in mind Times Square, with its laissez-
faire traditions of sexually explicit speech. Yet Times Square is hardly

29. See Gardner, supra note 10, at 812-30 (rebuking the idea that state constitutions express
fundamental political values by citing the mundane details and frequently changing nature of state con-
stitutions, and arguing that, even if the documents did embody such values, decreasing local distinctiv-
ness makes differences between states’ political values unlikely); James A. Gardner, What Is a State
Constitution?, 24 RUTGERS L.J. 1025, 1044-54 (1993) (viewing state constitutions not as the embodi-
ment of independent political values, but rather as safeguards that reinforce national political values
when the federal government fails to do so).

Board of Educ. v. Pico, 457 U.S. 853 (1982) (invalidating a school board measure that allowed the
removal of books from school libraries); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n,
447 U.S. 557 (1980) (invalidating restrictions on advertising by public utilities); Street v. New York,
394 U.S. 576 (1969) (overturning a conviction under a New York law that made it a misdemeanor to
denounce the American flag); Adler v. Board of Educ., 342 U.S. 485 (1952) (upholding a law that
required a list of subversive organizations to be compiled for the purpose of disqualifying persons from
employment in public schools); Feiner v. New York, 340 U.S. 315 (1951) (upholding actions taken
to silence a speaker whose speech caused the audience to become unruly, thereby threatening a breach
of the peace); Kunz v. New York, 340 U.S. 290 (1951) (invalidating an ordinance that granted wide
administrative discretion in the issuance of permits for public religious gatherings); Saia v. New York,
334 U.S. 558 (1948) (invalidating an ordinance that forbade the public use of a sound amplifier without
a permit); Gitlow v. New York, 268 U.S. 652 (1925) (upholding the punishment of subversive
advocacy).

31. Some of the principal cases in which the Court of Appeals has identified and implemented New
York’s speech-protective traditions involved sexually explicit materials. See, e.g., People ex rel.
representative of midtown Manhattan, much less New York City, downstate New York, or the entire state. As two commentators have observed, the court's invocation of New York's "'traditional' acceptance of the bizarre and offensive [is] a dubious proposition that might well surprise the residents of, say, Elmira [a small city in the western part of the state]."32

But it would be wrong to infer from implausible and badly crafted arguments that persuasive, well-crafted ones are impossible. What I propose to do here is to focus on a case study that provides the best possible conditions for testing the New Judicial Federalism's contentions about character differentiation in state polities: the antebellum and Confederate South. The Civil War era South makes a good example for two reasons. First, the idea that the South is meaningfully different from the rest of the nation is one that persists strongly to this day, and I take it that few who hold this belief would be inclined to think that it was any less true before and during the Civil War. Second, the Confederate South furnishes the only example in American history of a region becoming so alienated from the rest of the nation that it actually attempted to dissociate itself and become a separate nation. If the South's secession in any way responded to regional feelings of difference, surely those differences must have been profound. Furthermore, the solution sought by the South was a complete break at the constitutional level; Southerners thus considered their distinctiveness to be of constitutional dimension.

As I understand them, advocates of the New Judicial Federalism would interpret the events of this period as evidence of a distinctive Southern character and set of values. These character differences eventually became sufficiently pronounced to contribute to the decision of Southern states to secede. Although the political issue of secession was settled by the Civil War, those same regional character differences persist to this day. Accordingly, it would be appropriate today, and would have been all the more appropriate between, say, 1830 and 1865, to interpret the constitutions of Southern states in light of the distinctive aspects of Southern character.

Arcara v. Cloud Books, Inc., 503 N.E.2d 492 (N.Y. 1986) (addressing a government-ordered shutdown of an adult bookstore due to sexual acts on the premises); People v. P.J. Video, Inc., 501 N.E.2d 556 (N.Y. 1986) (involving a seizure of obscene videocassettes). Interestingly, both of these cases arose in the Buffalo area rather than in New York City. Moreover, even if it were once true that Times Square reflected New York's tolerance of explicit sexuality and sexual speech, that tolerance appears to have faded: in the newly redeveloped Times Square, some sex shops have been replaced by a Disney store. See Frank Rich, Goodbye to All That, N.Y. TIMES, Dec. 30, 1995, at 27 (describing the advent of a "de-sexed, partially Disneyfied 42d Street").

In the remainder of this paper I assess the plausibility of a character-based interpretation of Southern constitutions. My conclusion, based on a review of the writings of historians who study the South and of social scientists and historians who study nationalism, as well as a comprehensive review of Southern constitutions and judicial interpretations from the ante-bellum and Confederate period, is that the character differentiation hypothesis does not hold up. Although Southerners may differ in many respects from the general run of Americans, these differences are not differences of "character"—that is, they are not the kind of differences that would cause Southerners to hold values significantly different from those of American society generally. More importantly, any such differences do not rise to a magnitude that is likely to be reflected in a state constitution. Consequently, I conclude as a practical matter that any differences between Southerners and other Americans have no significant ramifications for the interpretation of Southern constitutions.

Part II begins by examining and refining the concept of state uniqueness that underlies the contentions of the New Judicial Federalism. Part III, after considering some of the hazards inherent in attempting to evaluate cultural distinctiveness, responds to claims of Southern distinctiveness by demonstrating a consensus among historians of the South on three related points. First, historians overwhelmingly agree that Southerners are not and have never been a people distinct from Northerners or other Americans. Second, historians persuasively have shown that contemporary beliefs about the existence of a distinctive Southern character far exceed the reality of any differences that might distinguish the South from other regions. Third, many of the strongest claims for Southern distinctiveness are either the fruit of romantic mythologizing or remnants of self-conscious propaganda campaigns waged largely by Southern elites to convince the Southern masses of the justice of secession, the need to prosecute the ensuing war vigorously, and the importance of reshaping the post-war Southern economy to be more modern and competitive.

Part IV approaches the topic from an entirely different perspective. Abandoning the historical approach in light of the possibility that the historians might be wrong or that their analysis might somehow be irrelevant to the subject of constitutional character differences, Part IV focuses on the Southern constitutions themselves for evidence of Southern distinctiveness. Section A begins by setting out several reasons why any differences between the South and North, regardless of whether they can be characterized as differences of character or values, are unlikely to be reflected in constitutions. Section B then undertakes an exhaustive examination of the Constitution of the Confederate States of America and the various constitutions of the Confederate states in force between 1776 and 1861, as well as the substantial body of judicial decisions interpreting
them. My conclusion is that none of these documents or judicial decisions displays the slightest evidence of distinctive Southern character or values. In fact, they tend to show the opposite: Southern courts and constitution makers viewed their constitutions as separate but parallel instantiations of a set of universal constitutional principles common to all American constitutions and the received common law. Indeed, on a constitutional level Southerners distinguished themselves from Northerners not by cloaking themselves in a mantle of distinctiveness, but by casting themselves as the legitimate heirs of the founding generation of Americans and by appropriating the symbols and ideology of the common American political culture. Southerners, in other words, claimed that they were more authentic Americans than Northerners.

Finally, Part V offers a partial explanation of these developments by examining the nature of American nationalism. Unlike the nationalism that has arisen in other nations, American nationalism focuses on political ideals rather than geographic, ethnic, language, or religious commonalities. Moreover, American nationalism has historically been based on a kind of universalism that teaches the inclusiveness of American society and its openness to all who accept American principles of liberty and equality. These features of American nationalism made it especially difficult for Southerners, who had absorbed these ideas for centuries and admired them intensely, to make a decisive break with the United States. Part V concludes with a brief sketch of an alternative account of the nature of constitutional disagreement in the United States, one that sees such disagreements as resulting from internal disputes over the content of a common constitutional tradition rather than external clashes between disparate systems of character and values.

II. The Meaning of State Uniqueness

It is a basic tenet of the New Judicial Federalism that the character and values of each American state polity are unique. Yet this critical proposition is typically advanced as though it were a self-evident truth. In an age of instantaneous global communication, free mobility, concentrated national media ownership, and rampant, homogenizing mallification, the existence of significant state-to-state variation in character and values might well be thought a proposition in need of some defense. In what sense, then, are states unique, and how do we know?

Certainly, in the most basic sense, each state is unique if only in that it occupies a uniquely defined physical territory. Is this enough to generate a distinct set of local values of constitutional dimension? Some evidently think so: two prominent state supreme court justices, for example, list
“geography” and “land” among the factors that must be taken into account in the interpretation of their states’ constitutions. The idea that geography and climate influence national character is an old one in political theory. According to Aristotle,

Those who live in a cold climate and in Europe are full of spirit, but wanting in intelligence and skill; and therefore they retain comparative freedom, but have no political organization, and are incapable of ruling over others. Whereas the natives of Asia are intelligent and inventive, but they are wanting in spirit, and therefore they are always in a state of subjection and slavery.

A more modernly “scientific” account is given by Montesquieu:

Cold air constringes the extremities of the external fibres of the body; this increases their elasticity, and favors the return of the blood from the extreme parts to the heart . . . . On the contrary, warm air relaxes and lengthens the extremities of the fibres; of course it diminishes their force and elasticity.

People are, therefore, more vigorous in cold climates. Here the action of the heart and the reaction of the extremities of the fibres are better performed, the temperature of the humors is greater, the blood moves more freely towards the heart, and reciprocally the heart has more power. This superiority of strength must produce various effects; for instance, a greater boldness, that is, more courage; a greater sense of superiority, that is, less desire of revenge; a greater opinion of security, that is, more frankness, less suspicion, policy, and cunning . . . . The inhabitants of warm countries are, like old men, timorous; the people in cold countries are, like young men, brave.

While these examples are absurd to modern sensibilities, they nevertheless point to the need to avoid the trap of essentialism into which these thinkers fall. “Culture,” Louis Wirth reminds us, “does not spring directly or automatically from the soil or the atmosphere. It develops, rather, through an intricate process . . . . If any relations between natural habitat and social and cultural characteristics exist . . . they must be shown to exist in actuality. They cannot be assumed . . . .” Moreover, Wirth adds, “civilizations as they mature tend to emancipate themselves from the

34. Abrahamson, supra note 17, at 965.
soil and the natural context out of which and in which they developed.\textsuperscript{38} To start, then, from an assumption of state uniqueness, whether on the basis of climate or any other variable, is to risk a kind of platonism in which state constitutions are conceived as imperfectly realized expressions of some ideal state character that is known a priori rather than from the evidence.\textsuperscript{39}

It behooves us, then, to seek a better account of the New Judicial Federalism beliefs in unique state character and in character's relevance to state constitutional interpretation. The best explanation of this position, it seems to me, would go something like this. We begin from the observation that the people of the states are Americans. It follows that American...


\textsuperscript{39} Boyd Shafer argues that there is no such thing as a "constant or ever-present national character," and to attribute some general national character to the climate or geography is "nonsense." BOYD C. SHAFER, \textit{NATIONALISM: MYTH AND REALITY} 228-29 (1955). He continues:

The Germans . . . are supposed to have a disciplined, military character—exactly the opposite of that they were supposed to possess during the early Napoleonic period. The French are thought of today as logical, cultivated . . . , pacifist lovers of freedom; exactly the opposite of what most Europeans considered them during the latter part of the Napoleonic era. . . .

[This error is made by bad history, as well as] by contemporary two-week tourists and society editors temporarily turned foreign correspondents who set out to confirm all their prejudices and to footnote with their profound platitudes all the horrible peculiarities everyone, already of course, knows about without having investigated. Id. at 230. Richard White makes a related point in his discussion of contemporary rejection of the essentialism of past generations of historians of the American West:

New Western Historians, by and large, do not seek essentialism. They do not search for the master traits and master factors of western history. They still assert that the West is a distinct region, but they define that distinctiveness in a fundamentally different way. They have . . . a relational outlook on the West. Now they certainly recognize distinctive attributes of the physical West—aridity, the only high mountains in the continental United States, vast tracts of largely unoccupied land, a general lack of navigable rivers. But . . . they do not see these environmental factors as translating automatically into a distinctive, essentialist western culture. How could they? Each successive group of immigrants has not confronted pure nature; they have confronted worlds created by people who came before them and in many cases continued to live alongside them. What made the West distinctive was not some direct communication of its life force, but rather a series of relationships established with that place which inevitably changed over time.


A very different approach is taken by Benedict Anderson, who argues that nations, regardless of their actual features, are "imagined communities," and that the existence of administrative subdivisions has historically provided a focal point for the imagination of a nation coterminal with the administrative boundaries. See BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 53-65, 163-64, 184-85 (rev. ed. 1991).
character and values must normally be taken to define the outer parameters of the character and values state polities might possess. This is the case not only because all state citizens are formally Americans due to the constitutional structure of federalism, but also because of an extensive shared history and a set of shared beliefs and aspirations, the evidence for which lies in the obvious present success and cohesiveness of the nation.

Cohesiveness, however, need not imply uniformity, especially in a nation of such great size. Consequently, it is possible in theory for the people of a state to occupy any point within the defining parameters of American character and values. Furthermore, it is likely, and perhaps inevitable, that different state polities will occupy different points within the range, if only as a result of an uneven distribution of concededly American characteristics across the nation. It is also likely that some state polities will be the sole occupants of some points within the relevant range. This, then, is what is meant by state “uniqueness”—not that state polities might possess characters and values that are unique in the context of all possible human character and values, but that states might occupy points along a spectrum of American character traits and values that are occupied by no other formal political grouping of Americans.

On the assumption that a state constitution reflects the character and values of the state polity, a preliminary task for state constitutional interpreters would be to determine where within the range of American character and values the polity of a particular state falls. This question can be answered in part by considering the ways in which the state polity differs from the American norm. These differences may be illuminated by the state’s history, culture, politics, and so forth—that is, through examination of the factors that might be thought to influence a polity’s character and values.

This account raises an important question, which may be framed both theoretically and practically. As a theoretical matter, one might ask: what is the available range of variation within the parameters that define the boundaries of American character and values? Is the American character so narrowly defined that deviations from the norm quickly entail conflicts with American values? Or is Americanness a concept sufficiently flexible to accommodate a contextually meaningful range of characters and values? This is a question that has greatly exercised the country at various times. For example, during the McCarthy era, the nation publicly debated whether it was possible to be simultaneously a Communist and an American. My main concern, however, is not with the theoretical extent of Americanness, and I shall simply assume a flexible definition of American character. Instead, I want to focus on the practical formulation of the question: is the

40. See Gardner, supra note 10, at 830-32.
actual, observable variation among the states of a sufficient magnitude to be reflected meaningfully in state constitutions? In other words, do the character and values of any state polity differ from the American mean to such an extent that the meaning of the state constitution can be significantly illuminated by examination of those differences? This is the question to which examination of the antebellum South may provide a partial answer. The South's differences from the rest of the nation not only reached their peak during that period, but attained a magnitude that, in the view of Southerners themselves, actually placed the South outside the boundaries of American values, at least insofar as those values were embodied by the North. Thus, the antebellum and Confederate South provide the historically limiting case against which the extent of variation in the values and character of Americans may be judged.

III. The Nature of Southern Distinctiveness

A. The Elusiveness of Distinctiveness and the Question Posed

Surely no claim about the extent of Southern distinctiveness exceeds that made by Frank Owsley in the 1930 Southern Agrarian manifesto I'll Take My Stand. Even as the United States was being founded, the North and South, according to Owsley, were not merely different in their economic or social structures—they were "two civilizations." "The two sections," he argued,

clashed at every point. Their economic systems and interests conflicted. Their social systems were hostile; their political philosophies growing out of their economic and social systems were as impossible to reconcile as it is to cause two particles of matter to occupy the same space at the same time; and their philosophies of life, growing out of the whole situation in each section, were as two elements in deadly combat. What was food for the one was poison for the other. The authors of I'll Take My Stand did not intend it to be entirely objective—their intention, on the contrary, was to produce a polemical, partisan, and deliberately provocative piece of propaganda to convince


43. Id. at 90-91.
Southerners to live a certain kind of life and to pursue a political program
to secure it. Nevertheless, Owsley’s broadside has reverberated through
the decades and stands as a benchmark against which other claims of
Southern distinctiveness may be judged.

Almost no other historian, even in Owsley’s day, has suggested that
the South’s distinctiveness approaches the magnitude Owsley claimed, and
there are indications that Owsley himself may not quite have believed it.44
Yet historians and social scientists who study the South uniformly agree
that the South is distinct in some way, to some degree. Take, for example,
the elaborate myths of the Old South, which no one has described better
than W.J. Cash. In the legend of the Old South, Cash writes,

gesturing gentlemen move soft-spokenly against a background of rose
gardens and dueling grounds, through always gallant deeds, and
lovely ladies, in farthingales, never for a moment lost that exquisite
remoteness which has been the dream of all men and the possession
of none. Its social pattern was manorial, its civilization that of the
Cavalier, its ruling class an aristocracy coextensive with the planter
group—men often entitled to quarter the royal arms of St. George
and St. Andrew on their shields, and in every case descended from
the old gentlefolk who for many centuries had made up the ruling
classes of Europe.

They dwelt in large and stately mansions, preferably white and
with columns and Grecian entablature. Their estates were feudal
baronies, their slaves quite too numerous ever to be counted, and
their social life a thing of Old World splendor and delicacy.45

Yet even an unabashed Southern sentimentalist like Cash, who insists on
the reality of Southern distinctiveness, readily concedes that this account
is mythical, a kind of “stage piece out of the eighteenth century.”46
At the same time, even a militantly unsentimental writer like Howard Zinn,
who expresses the most skeptical conclusions about the scope of Southern
distinctiveness, concedes not just the power but in important ways the
reality of many of the stock myths and stereotypes about the South—that
it is, for example, racist, violent, evangelical, and xenophobic. Far from
denying the truth of these descriptions of the South, Zinn merely disputes
the contention that such traits are distinctively Southern.47

44. See the biographical sketch by Virginia Rock appended to the 1962 paperback edition of I’LL
TAKE MY STAND, supra note 42, at 360, 374-75 (noting that Owsley admitted some of his essays were
“deliberately provocative”).
46. Id.
47. See HOWARD ZINN, THE SOUTHERN MYSTIQUE 217-19 (1964) (contending that although many
view them as distinctly regional, the Southern traits of racism, violence, and conformity are actually
just more visible manifestations of traits that are endemic to the entire American character).
Yet the truth of the standard accounts of Southern distinctiveness may well be beside the point. As David Potter has observed, nationalist movements like Southern secessionism typically attempt to draw on cultural commonalities, but "if these cultural elements do not exist in reality, the nationalist movement may fabricate them."48 This tactic can sometimes create out of a spurious distinctiveness a genuine one: "If the members of a population are sufficiently persuaded that they have cause to be a unified group, the conviction itself may unify them, and thus may produce the nationalism which it appears to reflect."49 Thus, perceptions of difference may arise from many kinds of distinctiveness or, perhaps, from none. And clearly such perceptions exist: sociologist John Shelton Reed has found that Southerners have a rate of group identification exceeding that of Roman Catholics and union members and approaching that of blacks and Jews.50

All this is to say that attempting to assess the South's distinctiveness can be hazardous. "The quality of distinctiveness," C. Vann Woodward warns, "is notoriously elusive."51 It is easily manipulated for partisan purposes.52 Historians frequently disagree among themselves over the content and significance of Southern distinctiveness. Even one as deeply committed to Southern distinctiveness as Francis B. Simkins has conceded that "Southernism is a reality too elusive to be explained in objective terms. It is something like a song or an emotion, more easily felt than recorded."53

At this point, one may be tempted to ask: If regional distinctiveness is like a song, if it is too elusive to be objectively explained, what business have courts invoking it as a ground for constitutional decisionmaking? And what business have scholars of New Judicial Federalism urging them to do so? Yet the nature of regional distinctiveness may not be so elusive as to render it useless to the task of state constitutional interpretation. Much depends upon the question that is asked, and on this point constitutional lawyers may well be able to provide some assistance to historians instead of the other way around.

The question of difference arises often in the law, particularly in the area of equal protection. Constitutional lawyers have understood for some

49. Id. at 53.
50. See JOHN SHELTON REED, ONE SOUTH: AN ETHNIC APPROACH TO REGIONAL CULTURE 21, 80 (1982).
52. See PAUL M. GASTON, THE NEW SOUTH CREED: A STUDY IN SOUTHERN MYTHMAKING 5, 217-46 (1970) (noting that the symbolic term "'New South' may stand for whatever kind of society that adopters of the term believe will serve the region's interests best or promote their own ambitions most effectively").
time that to speak abstractly of differences and similarities is meaningless. Any two things are alike or different in an infinite number of ways. Consequently, what counts is not whether things are different but whether they are different for some particular purpose. Differences, in other words, must be relevant to the purpose for which they are invoked if they are to be counted as significant.\(^{54}\)

This concept helps to narrow the question. There can be no question of the South's distinctiveness for many purposes. Certainly, the South is different from the North for purposes of deciding what crops to grow and when to plant and harvest them; for purposes of ordering in a restaurant; for purposes of deciding whether to say "yes, sir" or "yes, ma'am" to your parents; and for countless other social purposes. Historians, however, do not address Southern distinctiveness abstractly, but for purposes of historical inquiry—for example, to evaluate forces of historical causation. Thus, historians might inquire into Southern culture not to determine whether it differed in any way from Northern culture—no one seriously disputes this—but to determine whether the differences between the two cultures were sufficient to have contributed to the South's decision to secede. It is significant in this regard, as will soon appear, that the more narrowly the question is framed, the less likely historians are to view the South's cultural distinctiveness as historically meaningful.

The question posed here, then, is a relatively narrow one: was Southern distinctiveness, as it existed during the antebellum and Confederate periods, meaningful for the purpose of interpreting the constitutions of Southern states?

B. The Extent of Southern Distinctiveness

1. The Shared American Experience.—Just how different was the South? Was it, as Owsley claimed, a distinct "civilization"?\(^{55}\) Was it, in Howard Zinn's provocative description, "a sport, a freak, an inexplicable variant from the national norm . . . [whose] apartness goes deeper than the visible elements of soil and sun and large black populations, into the innermost values of the region"?\(^{56}\) Few think so. "[I]t is incorrect," John McCardell bluntly asserts, "to think of Northerners and Southerners in 1860 as two distinct peoples."\(^{57}\) As William Taylor observes in his

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54. A good account of this approach appears in Peter Westen, The Empty Idea of Equality, 95 HARV. L. REV. 537, 543-45 (1982) (clarifying that the relevant likeness for the equal treatment formula "starts with a normative determination that two people are alike in a morally significant respect," which is established by defined categories).
55. Owsley, supra note 42, at 72.
56. ZINN, supra note 47, at 217.
influential study of the myth of the Southern Cavalier, "[w]hile there is a certain basis to the belief that the North and South were distinctly different during the antebellum period, few historians would any longer contend for the idea of a divided culture as this idea was formerly advanced."\textsuperscript{58} Southern culture, David Potter argues, was "distinctive" in many ways, but "this [was] not the same as separateness."\textsuperscript{59} Efforts to show "that the South had a wholly separate culture, self-consciously asserting itself as a cultural counterpart of political nationalism, have led, on the whole," Potter asserts, "to paltry results."\textsuperscript{60} In sum, says C. Vann Woodward, "[t]he South was American a long time before it was Southern in any self-conscious or distinctive way. It remains more American by far than anything else, and has all along."\textsuperscript{61} That the broadest claims for Southern distinctiveness should be undermined by the South's basic Americanness seems unsurprising—Southerners had far too much in common with other Americans to grow so far apart so quickly.

If it is true that experience is "the influence of first importance" in the creation of "group or national character,"\textsuperscript{62} then the extensive shared


\textsuperscript{59}. POTTER, supra note 48, at 68 (emphasis in original).

\textsuperscript{60}. Id. at 68-69.

\textsuperscript{61}. WOODWARD, supra note 51, at 25. According to Charles Sellers, "the most important fact about the Southerner is that he has been throughout his history also an American." Charles Grier Sellers, Jr., Introduction to THE SOUTHERNER AS AMERICAN at vi (Charles Grier Sellers, Jr. ed., E.P. Dutton & Co. 1966) (1960).

\textsuperscript{62}. WOODWARD, supra note 51, at ix. In American historiography, this notion was perhaps most forcefully and influentially advanced by Turner, who argued that the frontier experience decisively shaped the American character. See generally FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY (Robert E. Krieger Pub'l'g Co. 1976) (1920). Turner's enormous influence on contemporary thinking about the variability and development of culture in the American states is obvious in the work of political scientists like Daniel Elazar and his followers such as John Kincaid. See, e.g., DANIEL J. ELAZAR, CITIES OF THE PRAIRIE 3-4 (1970) (analyzing the political culture of small cities of the prairie regions as resulting from American settlement patterns); DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 96-104 (1966) (purporting to identify three distinct political cultures in the United States that exist in specifically identifiable geographic areas resulting from patterns of westward migration); John Kincaid, Political Culture and the Quality of Urban Life, in POLITICAL CULTURE, PUBLIC POLICY AND THE AMERICAN STATES 121-22 (John Kincaid ed., 1982) (purporting to test Elazar's hypothesis by examining the nexus between Elazar's cultural classification of American metropolitan areas and the quantitative "quality of life" measure for those areas). Indeed, Turner's residual influence on these political scientists may well be stronger than it is among historians, many of whom consider Turner's thesis to have been, at the least, greatly overstated. See Ray Allen Billington, Foreword to FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY at xvi-xviii (1976) (surveying historians' criticisms of Turner's frontier thesis through the 1960s); William Cronon et al., Becoming West: Toward a New Meaning for Western History, in UNDER AN OPEN SKY: RETHINKING AMERICA'S WESTERN PAST 3, 3-4 (Cronen et al. eds., 1992); William Cronon, Turner's First Stand: The Significance of Significance in American History, in WRITING WESTERN HISTORY: ESSAYS ON MAJOR WESTERN HISTORIANS 73, 90-91 (Richard W. Etulain ed.,
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experiences of the South and North during the Revolutionary and ante-bellum periods argue strongly against the broadest claims of Southern distinctiveness. Socially, William Taylor writes, the South "experienced in some measure all of the historical forces which were fast changing the face of society in the North." These included the move toward white manhood suffrage, the breaking up of families and kinship groups as a result of frontier settlement, the enthusiasm for capitalism of the Jacksonian period, and a religious awakening. Economically, the North and South traded with each other extensively, forming a system of mutual economic interdependence.

Politically, the South was a key participant in many of the most significant political events of the young United States. The South furnished material and moral support to the North during the British blockade of Boston and attack at Lexington. It provided the major leaders of the founding period such as Washington, Jefferson, and Madison. Like the North, it took pride in the accomplishments of the Revolution and joined in the nation's apotheosis of Washington. It supplied ten of the first twelve presidents—men who held power for more than fifty of the nation's first sixty years—and twenty-three of the first thirty-six Speakers of the House of Representatives. Its influence in Congress was sufficiently great to cause Northerners and Westerners to complain about the South's excessive power. And it "collaborated in the founding of the two major parties which ruled the country until the fifties." Far from going its separate way, the South was so involved in American history during this

1991) (listing many of the criticisms of Turner's frontier thesis); William G. Robbins, Laying Seige to Western History: The Emergence of New Paradigms, in TRAILS, supra note 39, at 184.
63. TAYLOR, supra note 58, at 16.
64. See id. at 16-17.
65. See DAVID M. POTTER, THE IMPENDING CRISIS 1848-1861, at 9-10 (1976) (discussing the ante-bellum economic system in which the South produced exports, the Northwest supplied foodstuffs for the South and Eastern cities, and New England and the Middle States developed most of the manufacturing and commerce).
66. See DEGLER, supra note 41, at 32 (describing the South's participation in various reform movements and in the development of public higher education).
67. See John W. Blassingame, American Nationalism and Other Loyalties in the Southern Colonies, 1763-1775, 34 J.S. HIST. 50, 63-64 (1968).
68. See POTTER, supra note 65, at 12-13.
69. See PETER APPLEBOME, DIXIE RISING: HOW THE SOUTH IS SHAPING AMERICAN VALUES, POLITICS, AND CULTURE 12 (1996) (stating that slaveholding Southerners served as president for 49 of the nation's first 72 years). Before 1861, the South also supplied 24 Presidents Pro Tem of the Senate and 20 of 35 Supreme Court Justices. See id. at 12-13.
70. See AVERY O. CRAVEN, THE GROWTH OF SOUTHERN NATIONALISM, 1848-1861, at 27-35 (1953) (describing the growing partisan and regional tensions over the expansion of slavery, as related to the annexation of Texas, the Mexican War, and the Oregon territory).
71. TAYLOR, supra note 58, at 17.
period that Southern and American political history become difficult to distinguish.  

Nowhere is the basic similarity of the Southern and American outlook more starkly revealed than in the realm of Southern ideology. As antagonisms between North and South grew, Southern political theorists attempted to develop an ideology that would unify the South and provide a justification, should one prove necessary, for secession.  

These writers, including most prominently George Fitzhugh, tried to build a distinctively Southern ideology, one that demonstrated not only the justice but also the superiority of Southern institutions, including slavery. Yet they were unable to escape in any significant measure the basic impulses of their American liberal heritage. 

Working from images of the South as more traditional, more aristocratic, and more hierarchical than the rest of America, Southern theorists attempted to build a political ideology drawing on Burkean traditionalism and the European body of antiliberal thought that sprung up in the wake of the French Revolution. These Southern efforts to develop an organically Southern political ideology have been neatly skewered, with evident glee, by Louis Hartz. "When we penetrate beneath the feudal and reactionary surface of Southern thought," Hartz writes, "we do not find feudalism: we find slavery."  

Southerners, he contends, "exchanged a fraudulent liberalism for an even more fraudulent feudalism: they stopped being imperfect Lockes and became grossly imperfect Maistres." 

The inconsistencies to which Southern theorists were driven, says Hartz, are painful to observe.  

To defend slavery, for example, Southern thinkers found themselves turning against Jeffersonian notions of liberal equality. They tried instead to defend slavery on the grounds of traditionalism, but: "Shouldn't the Southerners, by their own reasoning, be clinging to Jefferson rather than trying to destroy him? Shouldn't they in fact be denouncing themselves?"  

America, Hartz observes, had laid a

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74. LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA 147 (1955). 

75. Id. at 148. William Wiecek makes a similar point. "[T]he South's antebellum constitutionalism," he writes, "was discriminating and opportunistic"; that is, it favored state power on some issues but strong federal power on others when necessary to effectively defend slavery. Southern constitutionalism was thus "a theory neither of rights nor of sovereignty but of power." William M. Wiecek, "Old Times There Are Not Forgotten": The Distinctiveness of the Southern Constitutional Experience, in AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 159, 169 (Kermit L. Hall & James W. Ely, Jr. eds., 1989). 

76. See HARTZ, supra note 74, at 148. 

77. Id. at 151.
trap: by establishing liberal equality as a national birthright, "it had transformed the rationalist doctrine of Locke into the traditionalist reality of Burke, so that anyone who dared to use conservatism in order to refute liberalism would discover instead that he had merely refuted himself." 78 "Few political theorists," Hartz continues, "save possibly in a nightmare dream, have ever found themselves in a predicament quite as bad as this." 79

Carl Degler has made a similar observation about the South's proslavery ideologies. On its face, nothing seems more contrary to traditional American aspirations toward liberal egalitarianism than the doctrine, promulgated in the South particularly near the inception and following the outbreak of hostilities, of black racial inferiority. In fact, Degler points out, the South's proslavery arguments show only "how close in values the South was" 80 to the rest of the nation:

For only if the South had not found it necessary to defend slavery on grounds of [the inferiority of the black] race would it have shown itself to have a different value system from the North. The reason the other slave societies of the New World did not find it necessary to arrive at a racial defense of slavery is that they saw no fundamental contradiction between slavery and the social order. In those slave societies slavery was only one of several forms of subordination, albeit a severe one. In the United States, on the other hand, with its historic emphasis on equality and freedom, slavery was an anomaly. 81

Because slavery conflicted with the ideals of the Declaration of Independence and the American history of political democracy, in the American context of equality, slavery could be defended only on the ground that some persons were not truly men. As a consequence, America became the only slave society in which race became an important defense of slavery. 82

2. Southern Internal Diversity.—If the proponents of Southern distinctiveness have at times underacknowledged the similarities that bind Americans North and South, they have at other times overstated the South's internal unity and social cohesion. 83 Both kinds of errors tend to

78. Id.
79. Id. at 153.
80. DEGLER, supra note 41, at 89.
81. Id. at 90 (emphasis in original).
82. See id. Another account of the inconsistency of slaveholding with liberal principles can be found in Charles Grier Sellers, Jr., The Travail of Slavery, in THE SOUTHERNER AS AMERICAN, supra note 61, at 40-71.
83. Even the use of the terms "North" and "South," Edward Pessen has noted, tends to presuppose the existence of the very differences historical inquiry is designed to examine. See Edward
limit the value of generalizations regarding Southern character, Southern values, and Southern distinctiveness. To gloss over the South’s internal diversity is to construct “a monolithic South, a region without internal differences, a people without diversity—a South, in sum, that never was.”

As Emory Thomas has noted, the seceding states were hardly a unity: “Topographically the section varied from the swamps of Louisiana to the mountains of western Virginia; culturally Southerners included such diverse peoples as Creoles, European immigrants, mountaineers, the first families of Virginia, and Texas frontiersmen.” Cotton was grown principally in the states of the Lower South and tobacco in the states of the Upper South. Plantation culture, associated with the cultivation of cotton, accordingly was far more influential in the Lower South. Attitudes toward slavery also differed somewhat in the two regions, in consequence perhaps of the more complete dependence of cotton production on slave labor, or of the more overt capitalism of the parvenu Gulf state cotton magnates as compared with the more restrained and self-consciously aristocratic aspirations of the established Virginia tobacco planters. To the extent, then, that Southern distinctiveness is traced to climate, particular modes of agricultural organization, plantation culture, or the qualities of slaveholding society, any assertion of Southern distinctiveness must be qualified to

Pessen, How Different from Each Other Were the Antebellum North and South?, 85 AM. HIST. REV. 1119, 1119 (1980).

84. DEGLER, supra note 41, at 7.


87. See CRAVEN, supra note 70, at 13-16 (contrasting the tendency of the Lower South to disfavor change with the Upper South’s gravitation toward the industrialization of the North); CLEMENT EATON, THE GROWTH OF SOUTHERN CIVILIZATION 1790-1860, at 1-48 (1961) (discussing the social characteristics existing at different times and in different regions of the South); SYDNER, supra note 86, at 7-8 (noting that raising tobacco did not require large numbers of slaves).

88. See, e.g., JESSE T. CARPENTER, THE SOUTH AS A CONSCIOUS MINORITY, 1789-1861: A STUDY IN POLITICAL THOUGHT at 7-8 (1930) (“The roots of Southern unity are grounded in the laws of nature; for soil, climate, and topography had created a South of agriculture as opposed to a North of manufacturing and commerce . . . .”); CRAVEN, supra note 70, at 2-3 (arguing that industrialism threatened the Southern way of life); EATON, supra note 87, at 297, 298 (maintaining that the planter class preserved English traditions of noblesse oblige and personal honor and that slavery unified Southerners); EUGENE D. GENOVESE, THE WORLD THE SLAVEHOLDERS MADE: TWO ESSAYS IN INTERPRETATION 118-19 (1969) (positing that the institution of slavery organized Southern thought and culture so as to produce a distinctive world view); ROLLIN G. OSTERWEIS, ROMANTICISM AND NATIONALISM IN THE OLD SOUTH 11 (1949) (stating that climate and the plantation system created conditions receptive to particular aspects of European romanticism); SYDNER, supra note 86, at 31 (claiming that the whole South was unified by being primarily agricultural); WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 15 (1977) (“The slavery controversy was the most important single influence on American constitutional development before the Civil War.”); Simkins, supra note 53, at 148 (giving a similar account of the impact of climate and soil).
reflect the South's diversity in these respects. Although it may not be entirely true that "[t]he distance from Charleston to Birmingham is in some respect measurable only in sidereal terms," it may well be the case, as Clement Eaton has remarked, that the subregions of the South constituted "a federalism of cultures."

While some divisions within the South were associated strongly with specific regions, others were less geographically confined. Among the latter were divisions of class. Many of the attributes that are sometimes said to mark Southern distinctiveness—gracious plantation life, elaborate manners, and aristocratic leanings, for example—were found, if at all, primarily in the lives of members of the planter class. Yet this was a social class whose interests, as Eugene Genovese has shown, were unique among Southerners. It is this group that had the most to lose from the abolition of slavery and that most vigorously supported active resistance, and it is also this group that in its customs and way of life most differed from Northerners and other Americans.

Farther down in the Southern social order, life among the middle and lower classes was considerably more likely to resemble its Northern counterparts both in the characteristic outlooks of class members and in their views on Southern secession. The commercial life of merchants, for example, tends to be similar from place to place, and it should come as no surprise that the Southern mercantile classes, whose livelihoods depended to some extent on the levels of economic activity available within a strong union, opposed secession until resistance became essentially pointless. Among ordinary farmers, who did not own slaves and were unlikely to spend much time sipping mint juleps on the veranda, differences with the North were likewise less pronounced: "The resemblances between the Southern yeomanry and the small farmers and villagers of the North were much greater than their differences."

89. CASH, supra note 45, at viii.
90. EATON, supra note 41, at 24.
92. See EATON, supra note 41, at 222-23 ("It is to the aristocracy . . . of the South that one must look for the most marked differences between the North and the South."); EATON, supra note 87, at 297 ("In 1860 the South was differentiated from the North more by the character of its upper class than by the distinguishing qualities of its great middle class, the yeoman farmers.").
93. See EATON, supra note 41, at 60-62.
94. Id. at 113. Eaton, however, contends that by 1860 agreement on a set of basic, defining tenets of Southern life cut across social classes. See id. at 241-42 (listing several regional mores that differentiated the South from the North just prior to the Civil War).
Nor was the South monolithically united politically. Secession itself, for example, did not occur as the result of a deliberate, unified act of Southern states mutually recognizing some common destiny. While the states of the Lower South—South Carolina, Mississippi, Alabama, Florida, Georgia, Louisiana, and Texas—voted to secede shortly after Lincoln’s election, the Upper South was in no comparable rush. Secession movements were beaten back in North Carolina, Virginia, Tennessee, Arkansas, Missouri, Kentucky, Maryland, and Delaware—all slave states, and all places where “not only states but many individuals were painfully divided in their sympathies.” Indeed, the standoff in the Upper South might have lasted even longer had not President Lincoln forced the issue by requisitioning troops from every state remaining in the Union to defend the United States, following the attack on Fort Sumter. Compelled to choose between competing loyalties, the states of the Upper South reluctantly joined the seceding Southern states.

Finally, even after all the states of the Confederacy had seceded and founded what they believed would be a new nation, the South was far from united behind the military defense of secession. Perhaps the most vivid manifestation of this internal division was the campaign of outright resistance to the Confederacy, carried on in some cases by military means, by unionists in numerous areas of the South. Thus, as the South was waging full-scale war against the Union, it also faced pockets of internal rebellion in northern Alabama, eastern Tennessee, western North Carolina, northern Georgia, and northwest Arkansas. In eastern Tennessee, for example, an organized campaign of sabotage by unionists required the Confederate government to send an occupation force of 11,000 troops.

3. Individual Southern Traits.—The great majority of historians who study the South seem to agree that the two-culture hypothesis, especially in view of the South’s internal diversity, represents an unhelpful overgeneralization. Most seem inclined, therefore, to treat the South’s

95. It is by no means clear that public opinion even in the Lower South was united in favor of secession. Voting on secession in these states was characterized by turnout lower than in the immediately preceding presidential election, and the voting results revealed a significant division of public opinion. See Paul D. Escott, After Secession: Jefferson Davis and the Failure of Confederate Nationalism 25-26 (1978).

96. This account draws primarily on Craven, supra note 70, at 349-90; and Potter, supra note 65, at 491-554 (both describing the wave of Lower Southern states’ secession after South Carolina’s lead, followed by hesitant actions by Upper Southern states).

97. Potter, supra note 65, at 548.

98. See Escott, supra note 95, at 41-44 (describing the events that eventually led the Upper Southern states to secede).

99. See Degler, supra note 41, at 103.

100. See Kenneth M. Stampp, The Imperiled Union: Essays on the Background of the Civil War 265 (1980).
distinctiveness as a phenomenon of some complexity, constituted by numerous social, demographic, and economic factors. Yet beyond agreeing on a framework of complexity, historians seem to agree on little else; for every historian who identifies some factor as contributing to Southern distinctiveness, there is another historian waiting in the wings to argue that the factor in question has played no significant role.

One factor sometimes mentioned as setting apart the antebellum South is its ethnic homogeneity. Emory Thomas, for example, claims that "[c]ompared with other Americans, white Southerners were a homogeneous people ethnically and culturally."\textsuperscript{101} Carl Degler points to the reluctance of new immigrants to settle in the South, which he attributes to a lack of economic opportunity and the aristocratic character of Southern life, something that may have reminded many immigrants too strongly of the European societies they consciously chose to abandon.\textsuperscript{102} John Shelton Reed goes so far as to propose that "[m]any of what are seen as regional differences in the United States may simply be disguised and diffused ethnic differences."\textsuperscript{103} Yet at the same time Kenneth Stampp contends that the South's white population "came from the same stocks as the northern population,"\textsuperscript{104} and David Potter argues that "[e]thnically, America has probably never shown a greater degree of sameness than at the time when the nation was dividing and moving toward civil war."\textsuperscript{105} Even if the factual assertions of all these historians could be reconciled, which may well be possible,\textsuperscript{106} it is nevertheless clear that they differ fundamentally on the question of the impact of the South's ethnic makeup on its distinctive character, or indeed on whether the South was meaningfully distinct in this regard at all.

Another frequently mentioned aspect of Southern distinctiveness is the agrarian character of Southern life. The Southern Agrarians, of course, placed the agrarian life at the heart of Southernism,\textsuperscript{107} but other historians without so obvious an ideological axe to grind have also pointed to the agrarian lifestyle as distinguishing the South. Carl Degler, for

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\item \textsuperscript{101} THOMAS, supra note 85, at 9.
\item \textsuperscript{102} See DEGLER, supra note 41, at 46-47.
\item \textsuperscript{103} REED, supra note 50, at 25.
\item \textsuperscript{104} STAMPP, supra note 100, at 255.
\item \textsuperscript{105} POTTER, supra note 65, at 8.
\item \textsuperscript{106} To give just one example, Sydner reports census figures showing that in 1820 there were just over 12,000 unnaturalized aliens in the South as compared with over 41,000 in the North. See SYDNER, supra note 86, at 3. The North was thus home to nearly four times as many recent immigrants as the South. On the other hand, the South's white population in 1820 was about 2.7 million, and the North's was about 5.4 million. Id. This means that recent immigrants comprised less than one percent of the population of either region. These figures might thus be taken to show both that the South was more homogeneous than the North and that both regions were extremely homogeneous.
\item \textsuperscript{107} See Owsley, supra note 42, at 72-76 (contrasting the agrarian South with the industrial North).
\end{itemize}
instance, notes that the South was the most agricultural region of the nation and contained the fewest cities, while Avery Craven claims that the prevalence of rural agriculture in the South made closeness to the soil a stamp of Southern life.

On the other hand, Thomas Govan observes that the various agricultural occupations found in the South, and their accompanying outlooks, were found throughout the states. David Potter also argues against a juxtaposition of Southern "planter" and Northern "industrial" cultures: "the common conditions of life of plain farmers throughout an overwhelmingly rural republic," he claims, "completely transcended these distinctions. Dirt farmers, South and North, were the backbone of both sections, planter aristocrats and rising industrialists notwithstanding."

Indeed, says Potter, most Americans during the antebellum period were "farmer folk who cultivated their own land and cherished a fierce devotion to the principles of personal independence and social equalitarianism."

North and South alike, Americans were proud of their revolutionary heritage, scorned Europe, practiced a "somewhat intolerant, orthodox Protestantism," and professed faith in "rural virtues, and a commitment to the gospel of hard work, acquisition, and success."

A third factor sometimes mentioned as characteristic of Southern distinctiveness is the South's penchant for violence. The case for the violent Southerner has been made most strongly by Frank Vandiver. Southerners, Vandiver explains, have been portrayed as arrogant, cheroot-puffing planters, sipping juleps; power-sodden, leisure-ridden fops, watching in slack-jawed pleasure the beating of a slave; dirt-grubbing sharecroppers, hating their debts to the country store; anonymous amalgams of men, faceless and pale behind their

108. See DEGLER, supra note 41, at 14. But see Pessen, supra note 83, at 1133 (arguing that although the South lagged behind the North in urban development, its cities were growing rapidly during the antebellum years and qualitatively resembled Northern cities).
109. See CRAVEN, supra note 70, at 9, 11.
111. POTTER, supra note 48, at 73-74; see also BERINGER ET AL., supra note 72, at 81 (expressing doubt about whether "the average Georgia plowman sues a distinct nationality from the average Ohio plowman, even after the war began"); Pessen, supra note 83, at 1122 (asserting that "Northerners and Southerners alike made their living primarily in agriculture," although specializing in "different crops").
112. POTTER, supra note 65, at 472. Again, census figures support both sides of the agrarian question. In 1820, for example, 90% of employed Southerners were engaged in agriculture as compared with 77% elsewhere in the nation. See SYDNER, supra note 86, at 5. Thus, it is true both that the South was more agricultural than the North in 1820 and that both regions were overwhelmingly agricultural. Id. at 5-6.
sheets, burning crosses, lynching fellow men; money-worshipping scalawags, grasping the trough of the Great Barbecue; gross politicos, bellowing racist catechisms with Bilbo-like fervor; indignant men of liberal stripe, . . . fighting lonely, dirty battles; masses with hate-contorted faces, screaming at television cameras, frothing on schoolyards in Little Rock, New Orleans, Oxford. But one trait, according to Vandiver, “brands them all: violence.” He goes on to relate this trait to a particular way of responding to challenge which he calls the “offensive-defense mechanism.” Other historians make a similar point: Emory Thomas, for example, contends simply that violence was more socially acceptable in the South than elsewhere. Again, though, these contentions do not go undisputed. Howard Zinn, for instance, while conceding the prevalence of violence in the South, argues that it was a trait that was far from distinctively Southern. The West, claims Zinn, was just as violent, but the object of the violence was Indians rather than blacks. “Puritans,” Zinn adds, “killed Indians as savagely as did Virginians,” and the two most important revolts in early American history, Shay’s Rebellion and the Whiskey Rebellion, were Northern phenomena.

The South, then, if these historians are to be believed, was ethnically homogeneous, but not uniquely so. It was rural and agrarian, but not uniquely so. It was violent and evangelical, but not uniquely so. It was individualistic and xenophobic, but not uniquely so. It was racist, but far, far from uniquely so. This pattern causes Howard Zinn to reject Southern distinctiveness in principle:

the South, . . . far from being utterly different, is really the essence of the nation. It is not a mutation born by some accident into the normal, lovely American family; it has simply taken the national genes and done the most with them. It contains, in concentrated and dangerous form, a set of characteristics which mark the country as a whole. It is different because it is a distillation of those traits

115. Id.
116. Id. at 46.
117. See Thomas, supra note 85, at 20.
118. See Zinn, supra note 47, at 239.
119. Id. In a mid-1970s survey, 75% of white Southerners agreed with a statement that “guns should be registered like cars, with a requirement that owners be tested in order to be able to use one.” Jack Bass & Walter DeVries, The Transformation of Southern Politics: Social Change and Political Consequence Since 1945, at 17 (1977).
120. Historians seem exceptionally unified in their belief that racism has always been an American problem rather than a uniquely Southern one. See, e.g., Potter, supra note 48, at 75; Thomas, supra note 85, at 11; Zinn, supra note 47, at 219-38.
which are the worst (and a few which are the best) in the national character. Those very qualities long attributed to the South as special possessions are, in truth, American qualities, and the nation reacts emotionally to the South precisely because it subconsciously recognizes itself there.\textsuperscript{121}

4. Reducibility to Slavery.—Zinn's solution to the puzzle of Southern distinctiveness is neat and pleasingly paradoxical, but there is another, more straightforward solution that has proven attractive to many historians. According to this account, many—perhaps most—of the complex, vague, and disputed aspects of Southern distinctiveness may be traced to a single factor in which the South was obviously and indisputably distinct: its practice of slavery.

On this view, slavery is implicated in the production of Southern distinctiveness in two ways, one proceeding organically from within Southern life and the other proceeding more artificially from a combination of external and internal factors. The internal account has been well articulated by David Potter. According to Potter, theories of Southern distinctiveness tend to stress either economics, culture, or values.\textsuperscript{122} But, says Potter, the differences between a slaveholding and non-slaveholding society could be reflected in all three: slavery posed an ethical question that precipitated a "sharp conflict of values";\textsuperscript{123} it was a "vast economic interest";\textsuperscript{124} and it was "basic to the cultural divergence of North and South, because it was inextricably fused into the key elements of southern life—the staple crop and plantation system, the social and political ascendency of the planter class, [and] the authoritarian system of social control."\textsuperscript{125} Slavery, Potter concludes, had an impact on cultural and economic matters unmatched by any other sectional factor.\textsuperscript{126} A similar analysis leads Carl Degler to argue that the acceptance of slavery not only put the South on the road to secession, but also set it on the course to its modern distinctiveness.\textsuperscript{127} Slavery, he argues, made the South biracial, shaped its economic and demographic patterns and its society, and created a culture in which free whites lived together with black slaves.\textsuperscript{128} Even the Southern fondness for religions favoring biblical literalism, Degler

\textsuperscript{121} Zinn, supra note 47, at 218 (emphasis in original). For a similar argument see Grady McWhiney, Southerners and Other Americans (1973) (arguing that writers have blown societal differences out of proportion and ignored the fundamental patterns of social history).
\textsuperscript{122} See Potter, supra note 65, at 41 (noting that "cultural, economic, and ideological" formulas have long been used to explain the sectional conflict).
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 42.
\textsuperscript{125} Id. at 42.
\textsuperscript{126} See id. at 43.
\textsuperscript{127} See Degler, supra note 41, at 42-43.
\textsuperscript{128} See id. at 45-46.
claims, can be traced in part to the Southern defense of slavery. That is, only interpretive forms of biblical exegesis like those favored by abolitionists could produce a reading of the Bible that prohibited slavery.\textsuperscript{129}

The external account of the role of slavery in forging Southern distinctiveness, in contrast, takes no position on the extent to which slavery might have produced a distinctive set of customs and beliefs. According to the external account, slavery's role in shaping Southern society, even if minimal in fact, was enormously and decisively magnified by the South's reaction to Northern attacks on slavery. Avery Craven, for example, argues that Southerners were at first far from united about the merits of slavery.\textsuperscript{130} Nevertheless, many outside the South began to treat Southerners as unified around the question of slavery and as having monolithic interests and beliefs: "A symbol of Southern values—political, social, and economic—had been created. The force inherent in a great humanitarian, democratic crusade was now added to normal sectional rivalries, and the equally powerful force inherent in the defense of an accepted social order was drawn about Southern positions."\textsuperscript{131} Out of indifference and division, Craven contends, came unity, along with the perception of "[a] fight for equality and the preservation of a way of life."\textsuperscript{132} With this Potter agrees: slavery, he writes, gave "false clarity and simplicity to sectional diversities which were otherwise qualified and diffuse. One might say that the issue structured and polarized many random, unoriented points of conflict on which sectional interests diverged."\textsuperscript{133} The South's mistake, C. Vann Woodward notes wistfully, was that it "allowed its whole cause, its way of life, its traditional values, and its valid claims in numerous nonmoral disputes with the North to be identified with one institution—and that an institution of which the South itself had furnished some of the most intelligent critics."\textsuperscript{134}

\textsuperscript{129} See id. at 61. An even more robust version of the internal account is offered by Bertelson, who argues that the differing degree to which slavery took root in the South and the North itself reflects antecedent differences between Southerners and Northerners in their attitudes toward work, which can be traced to different patterns in the earliest settlement of the American colonies. See DAVID BERTELSON, THE LAZY SOUTH 244-45 (1967). For a cogent response, see C. Vann Woodward, The Southern Ethic in a Puritan World, 25 WM. & MARY Q. 343 (1968).

\textsuperscript{130} See CRAVEN, supra note 70, at 17-19.

\textsuperscript{131} Id. at 19.

\textsuperscript{132} Id. at 20, 19-20.

\textsuperscript{133} POTTER, supra note 65, at 43; see also MCCARDELL, supra note 57, at 3-4, 85 (arguing that slavery "came to represent for Southerners a whole ideological configuration—a plantation economy, a style of life, and a pattern of race relations—which made Southerners believe that they constituted a separate nation" and that by the 1850s "more and more Southerners came to rest their advocacy of a Southern nation upon the preservation of slavery and the preservation of slavery upon the doctrine of white supremacy and enhancement at the Negro's expense").

\textsuperscript{134} WOODWARD, supra note 51, at 180-81. Potter adds that the conditions dictated by the presence of slavery "became the criteria for determining what constituted the South." POTTER, supra note 65, at 451.
Compounding this error, Southerners, Woodward continues, "set about to celebrate, glorify, and render all but sacrosanct with praise the very institution that was under attack and that was responsible for the isolation and insecurity of the South."135

Southerners, then, according to these accounts, were not ultimately distinct from Northerners in their culture, values, or fundamental beliefs. They were, at bottom, Americans—Americans who practiced slavery. What we think of as Southern distinctiveness, then, may be in some sense what happens to Americans when they are placed in and their interests aligned with those of a slaveholding society.136 To treat the differences between Northerners and Southerners as manifestations of underlying fundamental differences of character, on this view, misinterprets the evidence: it attributes different behaviors to different underlying characters rather than to different circumstances capable of eliciting correspondingly different behaviors from a single, consistent underlying character. It is, in other words, a bit like attributing a person's growing crabiness during the late fall and winter to a change of character and values when the only thing that has changed is the weather. If this view is correct, then the various elements of Southern distinctiveness are reducible, more or less, to the practice of slavery, and any apparent differences between the North and South in values or beliefs must be recast as superficial rather than deeply or organically held.

It is possible, however, to view the matter differently. Exactly where external circumstances leave off and internal character begins is notoriously a matter of interpretation. Whether one is inclined to view a hungry man who steals a loaf of bread as a good man driven by circumstance to do an evil deed or an evil man acting consistently with his character—a Jean Valjean or a Fagin—depends greatly on one's views about individuals' capacity for self-determination. It may be perfectly true that Southerners were Americans who practiced slavery, but it does not necessarily follow that their character and values as slaveholders, particularly after many generations, may not with some justice be deemed internalized, organic,

135. Woodward, supra note 51, at 182.
136. V.O. Key makes a similar point about the post-slavery South. Writing in 1949, Key found the South to have a distinctive style of politics associated with a one-party system. See V.O. Key, Jr., Southern Politics in State and Nation 8-11 (1949). Yet "the major peculiarities of southern politics," be claimed, "go back to the Negro." Id. at 5. Indeed, Key wrote,

[i]t must be conceded that there is one, and only one, real basis for southern unity: the Negro. . . . The maintenance of southern Democratic solidarity has depended fundamentally on a willingness to subordinate to the race question all great social and economic issues that tend to divide people into opposing parties.

Id. at 315-16. Other "nonracial bonds of unity" exist, but they "differ little from those factors that lend political cohesion, for example, to the wheat states or to the corn belt," which do not practice the kind of politics that distinguishes the South. Id. at 665.
and different from the character and values of Americans living in nonslave societies.

This is the perspective adopted by Eugene Genovese in his Marxian account of Southern society. According to Genovese, slavery gave rise in the South to a “special psychology” manifested in the creation of a slaveholding class with interests and tendencies antithetical to those of urban, bourgeois capitalism. The social and political structure of slavery, Genovese argues, forged slaveholders into “a ruling class of a distinct type and with a special character.” In creating for themselves this world of privilege and power, slaveholders came to possess a distinctive “world view”, slavery, Genovese contends, created “a body of sensibilities, a way of judging human relationships, [and] a notion of social order.” Those who lived this life, then, held a fully internalized set of values and possessed character traits that differed from those found elsewhere in the nation.

There is no easy way to adjudicate between these different accounts of the impact of slavery on Southern life. In his response to Genovese, however, Carl Degler in effect proposes a test. If the observable differences between the antebellum North and South are attributable principally to superficial effects of slavery, then we would expect the post-war elimination of slavery in the South to eliminate most of these differences and to permit the underlying American values of Southerners quickly to reassert themselves. If, on the other hand, Southern differences run deep in the form of a distinctive, fully internalized world view, then we would expect such views to persist for some considerable time following the war’s end and to make sectional reconciliation difficult. In the view of Degler and many others, the speed and ease with which the South rejoined the Union suggest strongly that slavery “had not resulted in a novel world view.”

5. Ease of Reintegration.—One of the striking facts about the Civil War is the alacrity with which the South capitulated following Appomattox. Unlike many other nationalisms that have survived decades, and in some cases centuries, of “occupation, partition and repression,” “the myth of

137. GENOVESE, supra note 88, at 3, 26.
138. Id. at 118.
139. Id. at 127.
140. Id. at 244.
141. See DEGLER, supra note 41, at 106-08 (emphasizing the small impact that emancipation had on the South).
142. See id. at 107 (arguing that the ease with which Southerners accepted emancipation implies that the South had not constructed an ideology around slavery).
143. Id. at 107.
Southern nationalism," in the words of Kenneth Stampp, "died remarkably soon."\footnote{144} Many historians see in this phenomenon evidence that beliefs about Southern distinctiveness never took deep roots in the South and that most Southerners on some level realized that their differences with the North were simply not of a magnitude sufficient to justify their departure from what was, at bottom, their own nation.

Before the outbreak of hostilities, Southern intellectuals and propagandists promoted secession by spreading the message of the South’s distinctiveness, yet they were frustrated by their lack of success among the general populace. According to David Potter, antebellum Southern writers who proclaimed the need for a distinctive southern literature failed for lack of readers.\footnote{145} Despite attempts to liberate Southern education from Northern textbooks, curricula, and teachers, “Southern education continued to be American education.”\footnote{146} Furthermore, notes Potter, “the advocates of a Southern culture spent much of their time complaining that the South would not accept their cultural program.”\footnote{147}

Kenneth Stampp concludes bluntly from this evidence that “the notion of a distinct southern culture was largely a figment of the romantic imaginations of a handful of intellectuals and proslavery propagandists.”\footnote{148} The South, he argues, was even after four years of intense conflict still bound to the Union by “a heritage of national ideals and traditions.”\footnote{149} As a result, the South’s military defeat did not represent the overthrowing of a distinct culture or society. On the contrary, “[d]efeat restored to Southerners their traditions, their long-held aspirations, and, as part of the federal Union, the only national identity they ever had.”\footnote{150} Thomas Govan makes a similar point: the South, he writes, “re-accepted membership in the national society with little or no

\footnote{144} STAMPP, supra note 100, at 259-60. Stampp compares the myth of Southern nationalism to the reality of Polish nationalism. \textit{Id.} Recent history provides other examples of ingrained nationalisms. Vietnamese nationalism survived decades of occupation and war against the French and Americans. More recently, the breakup of the Soviet Union has shown the degree to which the nationalist sentiments of many peoples were suppressed by, and have survived, Soviet dominance.

\footnote{145} See POTTER, supra note 48, at 69.

\footnote{146} \textit{Id.}

\footnote{147} \textit{Id.} McCordell likewise contends that “calls for a distinct Southern literature degenerated into increasingly shrill announcements of sectional superiority,” McCARDELL, supra note 57, at 143, that “Southerners continued to subscribe to Northern periodicals and patronize Northern authors while neglecting their own sectional publications,” \textit{id.} at 157, and that “the most strident calls for ‘Southern education’ were completely lacking in substance.” \textit{Id.} at 205.

\footnote{148} STAMPP, supra note 100, at 256; see also BERINGER ET AL., supra note 72, at 76 (claiming that Confederate nationalism was “the movement of an intellectual elite, exercising a generous amount of wishful thinking”).

\footnote{149} STAMPP, supra note 100, at 256.

\footnote{150} \textit{Id.} at 259.
change in basic attitudes and beliefs, because none was required. Its return to the nation was not an abandonment of its ancient tradition, but a return to it . . . .”

Even slavery, Carl Degler argues, was never “firmly integrated into [Southerners’] value structure”—they abandoned it too quickly and were “simply too much a part of the bourgeois world to accept slavery wholeheartedly . . . .” Furthermore, Degler observes, “emancipation was not accompanied by the kind of emotional resistance that a challenge to deeply held values can be expected to call forth.” He finds a significant contrast in the South’s strong and united resistance to Reconstruction programs that threatened to end white supremacy. Once Southerners saw that they did not need slavery to maintain their social and economic superiority over blacks, they were willing to relinquish it without further ado. But when Reconstruction began to interfere with their ability to maintain that relationship of superiority through other means, they engaged in “a prolonged period of guerrilla warfare.” To these historians, then, the ease with which the South returned to the Union shows that it had never strayed too far.

151. Govan, supra note 110, at 38-39. James McPherson has criticized this position as mistakenly associating the Confederate defeat with a lack of will rather than a loss of will. See James M. McPherson, American Victory, American Defeat, in Why the Confederacy Lost 15, 34-35 (Gabor S. Boritt ed., 1992). In a recent study of the correspondence of Civil War soldiers, McPherson concludes that feelings of Southern nationalism were a significant motivation for those who fought, especially among those who enlisted early in the war. See James M. McPherson, What They Fought For, 1861-1865, at 9-25 (1994). McPherson’s evidence, though, provides little support for his conclusions. First, his sample, as he readily concedes, overrepresents those who would be likely to express nationalist sentiments—officers drawn from slaveholding families, for example. Second, even apart from this methodological difficulty, the absence of a deeply rooted Southern nationalism is hardly inconsistent with enthusiastic professions of nationalistic feeling at the outset of hostilities. A more relevant test would seem to be the extent to which such sentiments continued to be expressed even after prolonged conflict, including setbacks. Here, McPherson acknowledges an eventual erosion in patriotic enthusiasm, id. at 24-25, corresponding to a loss of will to continue the war. McPherson, supra, at 34-35. His study, then, does little to undermine the conclusions of historians who believe that Southern nationalism faded so quickly precisely because it was weakly established.

Another recent dissenting voice is that of Gary W. Gallagher. Gallagher disputes the “prevalent scholarly image” that the South’s defeat is attributable to the weakness of its nationalism. See GARY W. GALLAGHER, THE CONFEDERATE WAR 5 (1997). According to Gallagher, “[s]trong feelings of national identity helped spawn the impressive will Confederates exhibited during their war for independence.” Id. at 63. Scholars, he contends, confuse acceptance of defeat with absence of Confederate identity. Id. at 71. In support of his contentions, Gallagher quotes expressions of loyalty from many Southern sources. Id. at 73-111. Gallagher’s evidence, however, is subject to a criticism much like the one he levels at his opponents: he confuses popular support for the troops, and the obedience of the troops to official authority, with nationalistic sentiment.

152. DEGLER, supra note 41, at 107.
153. Id. at 108.
154. See id. (noting the fierce resistance to Reconstruction).
155. See id. at 109-10 (describing the means that southern whites used to control blacks once slavery was abolished).
156. Id. at 109.
6. Mythmaking and Propaganda.—For all their many disagreements, historians seem virtually united in their belief that Southerners "had created a myth of difference that went beyond the facts of difference."\footnote{Id. at 60 (emphasis in original).} What strikes numerous historians as significant about this divergence is the way it came about: through what was in many cases a deliberate propaganda campaign aimed at hardening Southern attitudes against the North. To the extent that contemporary beliefs about Southern distinctiveness are merely artifacts of a program of politically motivated mythologizing, those beliefs must, of course, be viewed with a certain skepticism.

According to John Hope Franklin, Southern historiography as a discipline was for many years guilty of dedicating itself to the creation of a myth of Southern cohesiveness for political purposes. Franklin claims that the long-discredited Cavalier thesis,\footnote{According to this thesis, differences between the North and South could be traced to different patterns of colonial settlement following the English Civil War. The South, in this view, was settled primarily by loyalists (Cavaliers) and the North by the crown's opponents (Roundheads). See Taylor, supra note 58, at 15-16.} for example, was "propagated by politicians, literary men, and publicists, against the opposition of Virginia's abler historians, for it arose not from new historical knowledge, but from the exigencies of the mounting sectional controversy."\footnote{John Hope Franklin, "As For Our History . . . ", in Sellers, supra note 61, at 3, 5 (citing Wesley Frank Craven, The Legend of the Founding Fathers 109-12 (1956)).} By the late 1840s and 1850s, Franklin argues, Southern historians were deliberately writing history "that asserted the South's difference from and superiority to the North."\footnote{Id. According to John Blassingame, the people we now describe as Southerners lacked any self-conscious regional identity before the American Revolution. Blassingame, supra note 67, at 59; see also McCordell, supra note 57, at 13 (noting that there is no evidence of feelings of distinct regional communities in the colonies). William Taylor adds that Southern sectional consciousness was generally unknown to members of the founding generation. See Taylor, supra note 58, at 333.}

Not all Southern myths necessarily arose from calculated sectional politics. According to William Taylor, for example, the two main periods of mythmaking in literary fiction about the South were approximately 1832 to 1855 and 1880 to 1900,\footnote{See Taylor, supra note 58, at 148. A study of Southern literature more specifically devoted to its use of history is F. Garvin Davenport, Jr., The Myth of Southern History: Historical Consciousness in Twentieth-Century Southern Literature (1970).} periods in which the political benefits of promoting Southern distinctiveness seem uncertain. Nevertheless, it seems clear that the image of the South that we have inherited, and the idea of Southern distinctiveness itself, results at least in part from deliberate campaigns of political propaganda waged by Southern political and cultural elites for the purpose of solidifying Southern support for secession and war.

Southerners went to great lengths in the period immediately preceding the Civil War to create a distinct Southern identity. According to Drew
Gilpin Faust, some Southerners, under the influence of nineteenth century European theories of nationalism stressing unities of race, language, and religion, portrayed Northerners as Saxons and Southerners as Normans to give Southern identity a racial or ethnic basis. Some Southern intellectuals even began a movement to lead Southern speech toward a restoration of what was conceived to be its original English purity as a way to distinguish it from Northern speech, which was characterized as degraded.

Religion, too, was invoked to provide a framework for Southern nationalism. Southerners, Faust writes, considered themselves the "most godly of Americans." While this created some understandable tension with the need for war, Southern clergy worked to justify the war in religious terms: "[T]he Confederacy's claim to divine sanction extended beyond the question of the war's origins or immediate political purposes to an examination—and reevaluation—of the southern social and moral order in light of God's commands. The purpose of the war . . . was not simply to achieve independence, but to defend the moral right of survival for the South's peculiar civilization." Northerners, it was claimed, had fallen from the divinely sanctioned path of the American Revolution. This made "God himself into a nationalist and made war for political independence into a crusade." The Confederacy, in this view, became the new Israel, and "[t]he reciprocity between God and his chosen thus obligated southerners as a group."

Paul Escott, in his study of Jefferson Davis, also shows how political leaders could deliberately cultivate a sense of difference. Throughout 1861, Davis attempted to whip up support for the Confederacy by casting the Confederacy as "the true embodiment of American principles of government. Rather than destroying the American system, the formation of the Confederacy preserved and vindicated it. The Confederacy had become the guardian of the founders' legacy." Yet by 1862, in response to increasingly shrill attacks on the central Confederate government by member states, Davis abruptly changed his message. Instead of casting the South as heir to American values, Davis focused on what he characterized as the North's barbarity. "[C]lose identification of Confederate
purposes with the traditions and ideals of the United States,” writes Escott, had lost its political usefulness: “For if the ties between the North and the South seemed too clear, people were likely to ask whether the high cost of the war was necessary.” 171 Before the war, Southerners “had viewed their fellow citizens in the North as part of a common nation, and this image remained strong.” 172 To keep Southern morale high, Davis tried to change the South’s image of the North. 173 The task of Southern nationalism, according to Escott,

was to accelerate the divergence between the image of the confederacy and that of the United States and to create a separate and distinct image of the South as opposed to the North. Southern nationalists had to convince their fellows that in some way the South was the negation of northern qualities and that no commonality could overcome the differences between them. 174

Davis’s attack on Northern perfidy “helped tear down the long-established nexus between southerners’ images of themselves and of their fellow citizens in the North” and helped convince Southerners “that they were a separate people.” 175

The deliberate creation of Southern mythology did not cease with the end of the Civil War. In his study of the mythology of the New South, Paul Gaston shows how the end of the war merely bifurcated Southern mythmaking into a romanticization of the Old South and a pragmatic creation of a mythical New South. On the one hand, Southerners in their defeat “expressed reverence for the civilization that had existed in the South, but conceded that it had passed irrevocably into history, had become an ‘Old South’ that must now be superseded by a new order.” 176 This gave them a certain freedom of imagination which, combined with despondency over defeat, “called forth a collection of romantic pictures of the Old South and a cult of the Lost Cause that fused in the Southerner’s imagination to give him an uncommonly pleasing conception of his region’s past.” 177 On the other hand, Southern leaders continued to drum up public support for a variety of projects such as economic modernization,

171. Id. at 180.
172. Id.
173. See id. at 180.
174. Id. at 181.
175. Id. For discussions of counter-mythologizing by two of the North’s great advocates of union, Abraham Lincoln and Walt Whitman, see GARRY WILLS, LINCOLN AT GETTYSBURG (1992), and DAVID S. REYNOLDS, WALT WHITMAN’S AMERICA: A CULTURAL BIOGRAPHY (1996).
176. GASTON, supra note 52, at 4.
177. Id. at 6; see also JAMES C. COBB, INDUSTRIALIZATION AND SOUTHERN SOCIETY, 1877-1984, at 13-14 (1984) (“[T]he glorification of the Old South was at least in part a psychological device, designed to help humiliated southerners hold their heads up as they accepted much-needed investment capital from their Yankee conquerors.”).
industrialization, and the achievement of economic self-sufficiency through the creation of images of a New South, images that stood increasingly in opposition to the fast-receding era of the Old South.  

7. The Distinctiveness of Southern Experience.—The reason for historians' warnings about the elusive quality of Southern distinctiveness should now be clear. The broadest claims for Southern cultural separate-ness founder on the strength of the Americanness shared by Southerners and Northerners, their many common experiences, and the internal diversity of Southern life. A wide variety of factors sometimes singled out as contributing to Southern distinctiveness are shown to be either not unique to the South, or less than decisive influences on Southern life, or both. Moreover, to the extent that these factors are traceable to the South's practice of slavery, their ability to capture continuing dimensions of Southern distinctiveness is diminished. Finally, a combination of Southern propagandizing and its apparent failure to take root or to impede the process of reintegrating the South into the Union after the war suggests that the extent of Southern distinctiveness is not only less than is often claimed, but also was understood to be less by Southerners who lived in the period in question. The nature of Southern distinctiveness, it seems, has slipped through our fingers.

In recognition of this phenomenon, C. Vann Woodward has offered a far more modest theory of Southern distinctiveness, which has influenced many historians. Is Southern identity, Woodward wonders, meaningful any more? Social and economic changes across the South, he muses, "may end eventually by erasing the very consciousness of a distinctive tradition along with the will to sustain it." The South has often been identified by its shortcomings, Woodward notes, but even its faults "are increasingly the faults of other parts of the country, standard American faults." Southerners, he claims, are "haunted" by "[t]he threat of becoming 'indistinguishable.'"  

178. See GASTON, supra note 52, at 23-79 (describing the programs proposed by various Southern leaders to revive Southern prosperity).
179. See id. at 153-60 (discussing the tension between the proponents of the New South movement, who espoused economic progress in the form of industrialization, and the spokesmen for the Old South, who accused the New South of abandoning the Southern heritage).
180. See WOODWARD, supra note 51, at 3.
181. Id. at 4.
182. Id. at 5. For an elaborate cataloguing of the way the South and other American regions are coming to resemble each other, and a critique of what they are jointly becoming, see JOHN EGERTON, THE AMERICANIZATION OF DIXIE: THE SOUTHERNIZATION OF AMERICA (1974).
183. WOODWARD, supra note 51, at 8. In a recent book, Peter Applebome argues that regional homogenization has occurred more as a result of the South's emerging social dominance than the other way around. Now, Applebome claims, it is not just the South but the nation that is
Nevertheless, Woodward contends, there is one area in which the South is meaningfully and permanently distinct from the rest of America: its collective experience. The hard facts of this experience include the South's long history of poverty in a nation of plenty; its history of "frustration, failure and defeat" rather than success; and its history of guilt in a nation of perpetual innocence.\textsuperscript{8} As a result, says Woodward, Southerners do not easily share some typically American ideas such as "the doctrine of human perfectibility"\textsuperscript{18} and a corresponding, characteristically Northern, optimism. The South, he concludes, has remained "basically pessimistic in its social outlook and its moral philosophy."\textsuperscript{186}

With Woodward's thesis we have come a long way indeed from the provocative contentions of Frank Owsley. Where Owsley thunders about distinct and incompatible Southern and Northern civilizations, Woodward bitterly antigovernment and fiercely individualistic, where race is a constant subtext to daily life, and God and guns run through public discourse like an electric current;... where influential scholars market theories of white supremacy, where the word "liberal" is a negative epithet, where hang-'em-high law-and-order justice centered on the death penalty and throw-away-the-key sentencing are politically all but unstoppable;... obsessed with states' rights, as if it were the 1850s all over again and the Civil War had never been fought.\textsuperscript{184} APPLEBOME, supra note 69, at 8.

Bass and DeVries also find Southern distinctiveness eroding in the political arena. In V.O. Key, Jr.'s classic study of Southern politics, Key found that the exclusion of blacks and the one-party system were the hallmarks of a distinctive regional form of political organization. Key, supra note 136, at 665. In a follow-up study undertaken 25 years later, Bass and DeVries found that blacks had entered the mainstream of political participation and that the Republican party had mounted a successful challenge to one-party Democratic dominance. BASS & DEVRIES, supra note 119, at 3-4. Their survey data further showed that "differences between the South and non-South are fading—the effect of such forces as network television, migration patterns, and urbanization—and that racial differences within the region were greater than any differences between southern whites and nonsoutherners." Id. at 16.

Cobb challenges this view, at least as applied to the results of Southern industrial development. Proponents of Southern industrialization, Cobb notes, expected that economic prosperity would give rise in the South to "the same affluent progressive, egalitarian, socially conscious society" that existed in the North. COBB, supra note 177, at 143. However, due to development patterns that impeded the rise of an urban middle class, Southern economic development occurred on a very different pattern, one free from many of the conditions of the Northern economy such as unions, high wages, and progressive corporate policies. Id. at 145-59. This result, says Cobb, "challenged the assumption that all enlightened Americans shared a set of values and preferences typically associated with the lifestyles of the northern urban bourgeoisie. ... Industrialization has not obliterated the socioeconomic and structural differences that have traditionally represented the fundamental basis of southern distinctiveness." Id. at 162-63.

\textsuperscript{184} WOODWARD, supra note 51, at 17-21. \textsuperscript{185} Id. at 21. \textsuperscript{186} Id. In a more recent work, Woodward acknowledged some weaknesses in his thesis relating mainly to the South's lack of response to its distinctive experience. The South, he writes, has not learned from these experiences, nor has it failed to embrace wholeheartedly the standard American myths and beliefs. See C. VANN WOODWARD, THINKING BACK: THE PERILS OF WRITING HISTORY 116 (1986).
quietly muses about a vague sense of pessimism growing out of a history of military defeat and economic frustration. Woodward's thesis, moreover, makes no claims about the nature or distinctiveness of Southern identity before the Civil War.

The historians' analysis of Southern distinctiveness, if it is correct, takes us to a point that confronts proponents of the New Judicial Federalism with a difficult question: If the differences between North and South during the antebellum and Confederate periods can be measured only in the subtlest shadings, to what degree can regional distinctiveness really serve as the basis for distinguishing the constitutions of Southern states from those of states in other regions and from the Constitution of the United States? Are the differences that historians of the South have identified strong enough and discrete enough upon which to build an approach to state constitutional interpretation? Certainly, there are ample grounds for skepticism.

On the other hand, perhaps the historical account I have set out here is wrong; perhaps it relies on the wrong historians, or misapplies their work, or overlooks important facts. Or perhaps the historical account, having been prepared by historians for historiographical purposes rather than by lawyers for legal purposes, is simply irrelevant to the question of state character as it is manifest in constitutions.

In either case, it is clear that an examination of the historical record cannot provide a conclusive test of the distinctive state character hypothesis for purposes of constitutional interpretation. In the following Part, I take the next step by examining the constitution of the Confederate States of America, the constitutions of the various antebellum Southern states, and their official interpretations, for signs of the kinds of Southern distinctiveness previously discussed. I conclude that there is no evidence that Southern distinctiveness, to whatever degree it might have existed, played any appreciable role in the formulation or interpretation of these constitutions.

IV. The Irrelevance of Southern Distinctiveness for Constitutional Interpretation

A. Constraints on Character-Based Constitutional Variations

Before we turn to the Southern constitutions themselves for evidence of Southern distinctiveness, it is worthwhile to note certain aspects of American constitutionalism that, in general, reduce the likelihood that any state's constitution will differ excessively from the American norm, regardless of the distinctiveness of the state's culture or values.

First, to write a constitution at all and to adopt it by popular ratification is, generally speaking, to manifest a belief in a certain set of political
principles central to American political thought and practice. These principles, derived largely from Enlightenment political philosophers such as Locke and Sidney, include not only the doctrine of popular sovereignty but also a substantial set of accompanying philosophical baggage. For example, most versions of popular sovereignty are undergirded by the belief that individuals are fundamentally equal, that humans have a capacity for rational thought adequate to give meaningful consent to social and governmental arrangements, and so on. Consequently, it is unlikely that an American-style constitution would reflect a substantially different set of views, because a polity holding substantially different political beliefs would be unlikely to implement them by way of an American-style constitution.

Second, the existence of cultural differences between two polities is by no means a sufficient condition for the development of differences between their constitutions. Not every kind of difference between polities is likely to show up in a constitution. A constitution, it bears repeating, is a political document, and obviously is so understood by those who create it to serve as a charter of self-government. To be sure, a constitution inevitably reflects important cultural assumptions of those who made it. Nevertheless, a constitution, at least in the American tradition, simply does not embrace every aspect of the culture of its makers; it deals, on the contrary, only with those aspects of culture that have been made the subject of politics—which are, that is, contextually political for that society. It is difficult to imagine a society for which every aspect of local culture is imbued with political significance of constitutional dimension, and it is even more difficult to imagine it for a society that embraces American traditions of liberalism. Of course there is no theoretical reason why a polity could not adopt a totalizing constitution that aims to merge the cultural with the political—perhaps an Islamic constitution that adopts by reference the entire Sharia would qualify. But such a constitution would represent a significant departure from American constitutional traditions, a degree of deviation that no American constitution has ever approached.


188. See, e.g., JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 4, 95-98, 122, 134, 140-41, 149-54 (Thomas P. Pearson ed., The Bobbs-Merrill Co. 1952) (1690) (explaining that governments should be formed through the voluntary consent of naturally equal, intelligent men); JOHN LOCKE, ESSAY CONCERNING HUMAN UNDERSTANDING 121-43 (Alexander Campbell Fraser ed., Oxford University Press 1984) (1690); ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 109 (Thomas G. West ed., Liberty Classics 1990) (1698) (claiming that consent is only given by “an explicit act of approbation, when men have ability and courage to resist or deny”).
This notion of constitutions as representationally limited, and thus possessing only a circumscribed ability to reflect cultural and character differences of state polities, is reinforced in the American tradition by the universal acceptance of the basic liberal distinction between a public and a private realm.\textsuperscript{189} Every American constitution, without exception, acknowledges some aspects of life as private and thus attributes to them no political ramifications, or at least none that are appropriately the subject of constitutional regulation. It follows that any distinctive feature of a state polity that falls within that polity's conception of the private realm is unlikely to be reflected in the state constitution. For example, the way people speak—their accents, pronunciation, and so forth—is in the American tradition (though not, perhaps, the French) thought to be a private matter, and it is difficult to imagine any American constitution purporting to regulate such matters. Yet the way in which people speak and express themselves is sometimes thought to be an important component of cultural distinctiveness.\textsuperscript{190}

A third factor limiting the degree to which American-style constitutions are likely to reflect cultural differences is the fact that American constitutions are widely understood to be reserved for important matters of self-governance rather than the minutiae of daily politics. This understanding flows from a set of familiar principles fundamental to American constitutionalism. According to these principles, the purpose of a constitution is to set out a society's decisions about its fundamental law and to insulate those decisions from ordinary political processes by precluding changes in the constitution without supermajority approval. At the same time, a constitution is understood to be an appropriate place for a society to create and empower a legislature to deal with matters of everyday politics. Thus, a constitution by definition divides a society's politics into the fundamental and the ordinary, reserving constitutional status for the former. Consequently, even if many aspects of a state's political life were driven by distinctive cultural features, it is unlikely that

\textsuperscript{189} See Hannah Arendt, The Human Condition 28 (1958) (“The distinction between a private and a public sphere of life corresponds to the household and political realms, which have existed as distinct, separate entities at least since the rise of the ancient city-state . . . .”).

\textsuperscript{190} It is often said, for example, that Southerners think more particularistically than other Americans, which leads them to avoid abstractions in favor of concrete narratives. See, e.g., Reed, supra note 50, at 49-52 (describing Southern culture as “more particularistic than American culture” and as having more emphasis on storytelling); id. at 163 (using “the approved Southern manner” of “telling a lengthy anecdote” to describe Southern differences); Thomas, supra note 85, at 19 (asserting that the Southern mind focuses on “the here and now” and fears “abstraction”). Perhaps not surprisingly, just the opposite has also been said of Southerners—for example, that they are “unscientific” because they are “given to vague generalizations and inexact speech.” Eaton, supra note 87, at 243-44.
much of it would be reflected in the state constitution because the bulk of culturally driven politics is unlikely to be deemed so fundamental by the polity as to justify enshrinement in a constitution. Of course, state constitutions are notorious for including provisions that often seem trivial and unworthy of constitutional status. Nevertheless, this trend is far from being pervasive enough to justify any expectation that multiple aspects of a state's cultural distinctiveness will be reflected wholesale in its constitution.

B. The Americanness of Southern Constitutions

1. The Constitution of the Confederate States of America.—If any constitution is likely to reflect a distinctively Southern character and set of values, it is the Constitution of the Confederate States of America (CSA). The CSA Constitution was drafted by the states of the Lower South shortly after they seceded from the Union. According to the thesis of Southern distinctiveness, secession resulted in large part from the development in the South of constitutionally significant differences of character and values. Moreover, the Confederacy's act of constitutional refounding was intended, in this view, to create a new Southern nation more hospitable to those distinctively Southern characteristics that caused the South to find continued union with the North unacceptable. It follows that the CSA Constitution, more than any other Southern constitution, ought to express the values and aspirations of a distinctive South, brought at last to full national self-consciousness.

The reality, however, is quite different: anyone hoping to find evidence of Southern distinctiveness in the CSA Constitution will be sorely disappointed. As Emory Thomas observes, "Ironically, the most striking feature of the Confederate Constitution was not its Southern orientation. The permanent Constitution prescribed for the Confederacy much the same kind of union which the Southerners had dissolved." Or, as Carl Degler puts it,

what is striking about the Confederacy is how congruent its institutions and political values were with those of the United States.

One searches in vain through the Confederate Constitution, for

192. See CONFEDERATE STATES OF AMERICA CONST. of 1861, preamble.
193. See supra subpart III(A).
194. See id.
195. THOMAS, supra note 85, at 64.
example, for those innovations and changes that would signal the arrival on the world stage of a slaveholders' republic, which repudiated the bourgeois elements characterizing the United States.196

Yet these authors understate the case: the CSA Constitution is virtually word-for-word identical with the Constitution of the United States; its authors essentially lifted the United States Constitution in its entirety, made a few minor changes, and then adopted it as the founding charter of the new Confederate nation.197 None of these changes, moreover, reflects in any way the kinds of Southern distinctiveness that secessionists so loudly proclaimed. Most of the provisions in the CSA Constitution that differ from the United States Constitution merely contain the kinds of innovations that by 1861 were becoming commonplace in state constitutions throughout the nation—provisions like supermajority requirements for appropriations legislation, single-subject rules, and rotation in office.198 A few provisions deal explicitly with slavery but do not treat it any differently than the United States Constitution.199 A few other provisions incline the CSA Constitution somewhat more favorably toward states' rights. For example, states are authorized to impeach federal judges sitting within their

196. DEGLER, supra note 41, at 99.
197. It was, in McCordell's words, "a virtual duplicate of the United States Constitution." MCCARDELL, supra note 57, at 337.
198. CONFEDERATE STATES OF AMERICA CONST. of 1861, art. I, § 9, cl. 9, 20; id. art. II, § 1, cl. 1. The CSA Constitution was also the first in the nation to include an item veto, id. art. I, § 7, cl. 2, a now commonplace feature of state government. See Richard Briffault, The Item Veto in State Courts, 66 TEMP. L. REV. 1171, 1176 n.19 (1993). As Donald Nieman has argued, these changes "were not peculiarly southern: they mirrored constitutional theory and practice in other sections and were within the mainstream of American constitutional development." Donald Nieman, Republicanism, the Confederate Constitution, and the American Constitutional Tradition, in AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 201, 202 (Kermit L. Hall & James W. Ely, Jr. eds., 1989) [hereinafter AN UNCERTAIN TRADITION]. "Many of the Confederate Constitution's innovations," he adds, "were strikingly similar in both spirit and practice to constitutional changes in the North before and after the Civil War . . . . [T]he spirit that animated Confederate constitutional reform, far from being distinctively southern, was well within the mainstream of the American constitutional tradition." Id. at 219. For an overview of these kinds of provisions in state constitutional law, see ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW 659-90, 692-96, 748-56, 799-856 (2d ed. 1993) (discussing the item veto power of state governors; procedural limitations on state legislatures; term limits; and the taxing, spending, and borrowing powers of state legislatures).
199. The CSA Constitution retains the three-fifths clause and the fugitive slave clause. CONFEDERATE STATES OF AMERICA CONST. of 1861, art. I, § 2, cl. 3; id. art. IV, § 2, cl. 3. In addition, it continues the ban on the slave trade, id. art. I, § 9, cl. 1, and formalizes the holding of Dred Scott v. Sandford, 60 U.S. 393 (1857). Id. art. IV, § 2, cl. 1. It also explicitly authorizes slavery in any new territories acquired by the CSA. Id. art. IV, § 3, cl. 3. A more radical provision that would have limited admission of new states to slave states was rejected in favor of a compromise that allowed the admission of free states on a two-thirds vote of Congress. See CHARLES R. LEE, JR., THE CONFEDERATE CONSTITUTIONS 112-16 (1963).
borders, and the congressional power over interstate commerce is more limited. Nevertheless, an orientation toward state power in a federal system hardly qualifies as an organic manifestation of Southern distinctiveness.

No evidence of distinctive Southern values or character materializes when we turn from the text of the CSA Constitution to its interpretation by Southern officials; if anything, these interpretations only underscore the degree to which the Confederate constitutional structure rests on constitutional traditions that are distinctively American rather than Southern. Because the CSA never appointed a Supreme Court, we must look to constitutional interpretations made by other officials.

One of the major constitutional disputes that arose in the short life of the Confederacy concerned the power of the Confederate government to conscript citizens into military service. As the war began to strain Confederate resources, the Confederate Congress instituted programs of conscription and taxation. Many Southerners, habituated to thinking in terms of the rightfulness of state power, found themselves opposing these exercises of central CSA power. This led the central government into numerous clashes with states' rights extremists. One such antagonist was Governor Joseph E. Brown of Georgia, who wrote to CSA

200. CONFEDERATE STATES OF AMERICA CONST. of 1861, art. I, § 2, cl. 5.
201. Id. art. I, § 8, cl. 3 provides that Congress has the power "To regulate commerce . . . among the several States . . . ; but neither this nor any other clause contained in the Constitution shall be construed to delegate the power to Congress to appropriate money for any internal improvement intended to facilitate commerce; except for the purpose of furnishing lights, beacons, and buoys, and other aids to navigation upon the coasts, and the improvement of harbors, and the removing of obstructions in river navigation . . . ."
202. As David Potter has written, the states' rights position is "less a philosophical position than a tactical device, attractive to any minority regardless of latitude, and the doctrine of national supremacy [is one] exalted by those who possessed power and wanted to take advantage of it. Scratch a spokesman of state sovereignty and you find, not necessarily a Southerner, but almost invariably a man who sees that he is outnumbered . . . ." POTTER, supra note 48, at 74. At the Hartford Convention during the War of 1812, the New England states, which opposed the war, due to the prospect of interrupted overseas trade, grumbled about states' rights and high-handed exercises of national power. See JAMES M. BANNER, JR., TO THE HARTFORD CONVENTION: THE FEDERALISTS AND THE ORIGINS OF PARTY POLITICS IN MASSACHUSETTS, 1789-1815, at 306-08 (1970); see also Herman Belz, THE SOUTH AND THE AMERICAN CONSTITUTIONAL TRADITION AT THE BICENTENNIAL, IN AN UNCERTAIN TRADITION, supra note 198, at 17, 33 (stating that leading Southern historians claim that the purpose of the CSA Constitution was "to uphold and perpetuate the fundamental principles of the American Constitution"); LEE, supra note 199, at 62 ("The Montgomery delegates were not dissatisfied with the United States Constitution; indeed, they held it dear. The South had always been proud of its part in the Philadelphia Convention. . . . The Montgomery Convention intended to retain the old instrument of government, making such changes as history and experience directed to be urgent and necessary.").
203. See LEE, supra note 199, at 109-10.
204. See ESCOTT, supra note 95, at 63-73 (describing the various methods used by the South to raise revenue).
205. See id. at 86-90 (discussing various state government challenges to the CSA conscription law).
President Jefferson Davis complaining that the conscription law was unconstitutional. Davis's reply is revealing. "I hold," he wrote, that when a specific power is granted by the Constitution... Congress is the judge whether the law passed for the purpose of executing that power is "necessary and proper." It is not enough to say that armies might be raised in other ways, and that therefore this particular way is not "necessary." The true and only test is to enquire whether the law is intended and calculated to carry out the object whether it devises and creates an instrumentality for executing the specific power granted; and if the answer be in the affirmative, the law is constitutional.

This language is immediately recognizable as a concise restatement of Chief Justice John Marshall's analysis of the United States Constitution's Necessary and Proper Clause in *McCulloch v. Maryland*.

A similar reliance on the reasoning of United States courts under the United States Constitution appears in judicial opinions addressing the same question. In *Burroughs v. Peyton*, for example, the Virginia Supreme Court upheld the Confederate conscription law against a constitutional challenge by several conscripts. To decide this question, the court looked not to Southern values or legal traditions, but to American ones: "The clauses of the Confederate constitution relating to the military power and its exercise," the court said, "have been adopted without change from the constitution of the United States... Whatever therefore throws light upon the meaning of the constitution of the United States, on this point, throws equal light upon the meaning of ours." The court then made an extensive survey of the American experience during the revolutionary period, canvassed the intent of the framers and ratifiers of the United States Constitution, and reviewed subsequent U.S. history, including numerous decisions of the United States Supreme Court. Furthermore, in deciding whether the power of conscription lay in the Confederate Congress or in the states, the possibility that the allocation of state and federal power under a Confederate Constitution might differ from the allocation under the United States Constitution apparently did not even occur to the Virginia court.

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206. See id. at 81-82 (detailing Governor Brown's "long philippic" against conscription including constitutional attacks on the law).
207. Id. at 83 (quoting Letter to Joseph E. Brown (May 29, 1862), in 5 JEFFERSON DAVIS: CONSTITUTIONALIST: HIS LETTERS, PAPERS, AND SPEECHES 254, 256-57 (Dunbar Rowland ed., 1923)).
209. 57 Va. (16 Gratt.) 470 (1864).
210. Id. at 474.
211. See id. at 485-92.
212. See id. at 473-85. The Confederate conscription laws were upheld by every state court to consider them. See *Ex parte Tate*, 39 Ala. 254, 256-57 (1864) (upholding repeal of substitute
By far the largest body of interpretations of the Confederate Constitution may be found in the opinions of the Confederate Attorneys General. Dozens of opinions issued by four different Attorneys General expound the meaning of provisions of the CSA Constitution and provide advice to CSA officers on a wide variety of constitutional problems. Yet if these opinions reveal anything, it is that Confederate officials at the highest levels, presumably among the Southerners most committed to Southern distinctiveness and separate nationhood, simply did not understand the Confederate Constitution to require a different interpretive approach than that required by the United States Constitution.

In opinion after opinion, the Attorneys General approach and construe the CSA Constitution precisely as they would were they sitting in a law office somewhere in the United States of America interpreting the United States Constitution. Methodologically, their opinions show their acceptance of standard American principles of constitutional interpretation prevailing at the time—for example, that the plain language of the constitutional text controls its meaning and that history and precedent may be consulted to illuminate the meaning of the text. Substantively, they openly exemption); Ex parte Hill, 38 Ala. 458, 479-85 (1863) (upholding conscription); Parker v. Kaughman, 34 Ga. 136, 139-41 (1865) (upholding repeal of disability exemption); Barber v. Irwin, 34 Ga. 28, 31-33 (1864) (upholding repeal of agricultural exemption); Daly v. Harris, 33 Ga. 38, 52-55 (1864) (upholding repeal of substitute exemption); Jeffers v. Fair, 33 Ga. 347, 348-51 (1862) (upholding basic conscription law); Simmons v. Miller, 40 Miss. 19 (1864) (upholding conscription); Gatlin v. Walton, 60 N.C. (Win.) 325, 331-34 (1864) (upholding conscription and repeal of substitute exemption); Ex parte Mayer, 27 Tex. 715, 718 (1864) (upholding conscription); Ex parte Turman, 26 Tex. 708 (1863) (finding that the conscription of a man charged with a crime did not violate the state constitution's guarantee of a speedy trial); Ex parte Coupland, 26 Tex. 387 (1862) (upholding conscription).

The only CSA defeat in a state court was the Georgia Supreme Court's invalidation of the conscription laws as applied to state officials. The court ruled that the conscription of state officials would put the very existence of state governments at the mercy of the Confederacy, a result contrary to the structure of the federal constitution and violative of the federal constitutional guarantee of state republican government. See Andrews v. Strong, 33 Ga. 166, 170-72 (1864).

213. These opinions are collected in THE OPINIONS OF THE CONFEDERATE ATTORNEYS GENERAL, 1861-1865 (Rembert W. Patrick ed., 1950) [hereinafter CONFEDERATE AG OPINIONS].


embraced, without any apparent need for justification, such familiar principles of American constitutional law as separation of powers,\textsuperscript{216} judicial review,\textsuperscript{217} and the limitation of governmental powers to those either specifically enumerated or logically inferred.\textsuperscript{218} And when the guidance of historical practice or prior interpretation was required, the Attorneys General turned immediately to United States sources such as the opinions of the United States Attorney General\textsuperscript{219} or the decisions of the United States Supreme Court.\textsuperscript{220}

In only one area did the Confederate Attorneys General depart materially from practice under the United States Constitution—the area of states' rights. In an opinion issued March 4, 1863, Attorney General Thomas Hill Watts set out a Confederate account of the nature of the Union.\textsuperscript{221} In his view, citizens of the states "were never, since the Declaration of Independence of the King of Great Britain, member-citizens of the same political community. . . . The United States, in the relation which they bore to the Citizens of the several States, never constituted a Nation."\textsuperscript{222} This, Watts declared, was the "cardinal principle of State Rights," which was "[t]he fundamental principle upon which the several Confederate States withdrew from the U.S. Government."\textsuperscript{223} Again, though, it would stretch notions of Southern distinctiveness to the breaking point to insist that an inclination toward decentralized power in a federal system somehow grows organically from Southern character traits, or lies so far from Northern values as to be incompatible with them. In any event, as we have seen, such a conclusion is undermined not only by the fact that the Confederacy soon found itself exercising extensive centralized power through conscription and taxation, as well as through the establishment of


\textsuperscript{221} See Op. Confederate Att'y Gen. (To President Jefferson Davis, Mar. 4, 1863), in CONFEDERATE AG OPINIONS, supra note 213, at 231, 238-41.

\textsuperscript{222} Id. at 239-40 (emphasis in original).

\textsuperscript{223} Id. at 240.
national welfare programs to relieve war-induced hunger, but also by the ease with which the defeated South slipped back into the national political framework.

If Confederate officials and Southern judicial officers approached and interpreted the CSA Constitution using the methods and doctrines with which they were familiar from United States constitutional law, one might perhaps respond that they were simply prisoners of their American training and upbringing. Yet that is precisely the point. Confederate officials acquired and internalized their understandings of law, of constitutions, and of the principles underlying the formation and construction of constitutional government as Americans, not as Southerners. They could no more have awakened one morning to find themselves holding a Southern view of constitutional language and interpretation materially different from the prevailing American view than they could have awakened to find themselves the possessors of a Southern character materially different from the prevailing American one.

Indeed, the Confederacy’s appropriation of the United States Constitution and accompanying principles of constitutional law and interpretation are only one manifestation of a broader trend. One of the principal assumptions of the New Judicial Federalism is that a state’s uniqueness will find its expression in state efforts to differentiate itself from actions and approaches of other jurisdictions, particularly the United States. This assumption, however, is belied by the experience of the Confederacy. In fact, CSA officials initially attempted to legitimate secession and the founding of a new nation less by differentiating South from North than by appropriating American history, American political beliefs, and American symbols for the Confederacy.

The Great Seal of the CSA, for example, depicted an equestrian George Washington, and Washington and Jefferson appeared on CSA postage stamps along with Davis and Calhoun. Davis chose to be inaugurated at the base of a statue of Washington on Washington’s birthday, and a popular ballad hailed Davis as “our second Washington.” In his public addresses during 1861, Davis claimed that

224. See THOMAS, supra note 85, at 298.
225. See supra subsection III(B)(5).
226. In the words of Confederate Senator Williamson S. Oldham of Texas: “men who had for years attached themselves to their parties and party leaders, who had for years, been taught by the latter to glorify the Union, as the greatest blessing . . . could not in the course of a few days surrender up sentiments, they had entertained all their lives.” BERINGER ET AL., supra note 72, at 33 (quoting Williamson S. Oldham, Memoirs of W.S. Oldham, Confederate Senator, 1861-1865, at 143-45 (unpublished manuscript, on file with the Barker Texas History Center, University of Texas, Austin)).
227. See THOMAS, supra note 85, at 222.
228. See FAUST, supra note 73, at 14.
“the Confederacy was the true embodiment of American principles of
government. Rather than destroying the American system, the formation
of the Confederacy preserved and vindicated it. The Confederacy had
become the guardian of the founders’ legacy.” The CSA’s “[p]ublic
rhetoric and national symbols continually played upon the theme of the
Confederacy as lineal descendant of the American revolutionary
process.” In so doing, the Confederates “intended to claim American
nationalism as their own, to give themselves at once an identity and a
history.”

It is thus by no means the case that a state or region, thin-
king itself distinct, will necessarily express its distinctiveness by distancing
itself from the national heritage; it is equally possible that any such distinc-
tiveness could take the form of a powerful dedication to national traditions,
national symbols, and national legal and constitutional principles.

Of course, some historians interpret the South’s embrace of American
national history and symbols as evidence of its lack of true distinctiveness.
As Emory Thomas observes, much of this activity was “propaganda and
self-delusion,” the purpose of which was to “identify the new Southern
nation with a sacred heritage and establish innocence by association.”
No one has put this point more strongly than Kenneth Stampp: “By 1861,”
Stampp writes, “it was too late for Southerners to escape [their American]
heritage, and rather than seeking to escape it they claimed it as their own.
But in doing so they confessed rather pathetically the speciousness of
southern nationalism.”

2. Constitutions of Southern States.

a. Constitutional texts.—Between 1776 and 1861, the eleven
states of the Confederacy framed and ratified a total of twenty-one
constitutions. Yet these constitutions, like the Confederate

229. ESCOTT, supra note 95, at 40; see also MCPHERSON, supra note 151, at 30 (“Confederates
regarded themselves as the true heirs of American nationalism, custodians of the ideals for which their
forefathers of 1776 had fought.”).
230. THOMAS, supra note 85, at 222.
231. FAUST, supra note 73, at 14.
232. THOMAS, supra note 85, at 222.
233. STAMPP, supra note 100, at 258.
234. Alabama had only one constitution during this period, adopted at the time of its admission
to the Union in 1819. See 1 FRANCIS NEWTON THORPE, THE FEDERAL AND
STATE CONSTITUTIONS 96 (1909). Arkansas also had only one constitution dating from 1836. Id.
at 268. Florida’s only constitution likewise dated from its admission in 1838. 2 id. at 664. Georgia adopted
three constitutions— in 1777, 1789, and 1796. Id. at 777, 785, 791. Louisiana had three: 1812, 1845, and
1852. 3 id. at 1380, 1392, 1411. Mississippi had two, in 1817 and 1832. 4 id. at 2032, 2049. North Carolina
had one, adopted in 1776. 5 id. at 2787. South Carolina adopted three, in 1776, 1778, and 1790.
6 id. at 3241, 3248, 3258. Tennessee adopted two, in 1796 and 1834. 6 id. at 3414, 3426. Virginia
had three—in 1776, 1830, and 1850. 7 id. at 3812, 3819, 3829. Texas adopted only one constitution,
in 1845, unless one also counts the 1836 Constitution of the Republic of Texas. 6 id. at 3532, 3547.
Constitution, provide little evidence of the kind of Southern distinctiveness discussed earlier. The main impression yielded by a review of the Southern states’ constitutions is that they are strikingly similar to each other, to contemporaneous constitutions of Northern and Western states, and to the United States Constitution. Not only are there few provisions intimating, however suggestively, that Southern constitutions were drafted and ratified by people holding values different from those prevailing elsewhere in the United States, but those provisions that do seem to offer potential constitutional evidence of Southern distinctiveness usually turn out not to be uniquely Southern at all.

For example, evidence of the South’s reputed penchant for violence might be reflected in constitutional provisions from Florida, Louisiana, Mississippi, Tennessee, Texas, and Virginia that disqualified from public office anyone who had fought a duel. Yet precisely the same disqualification appears in antebellum constitutions of California, Connecticut, Indiana, Iowa, Michigan, Oregon, and Wisconsin—states not ordinarily associated with a culture of violence. Moreover, it would be difficult to maintain that Southern constitutions reflect, for interpretational purposes, a Southern character trait of violence when these documents specifically condemn duelling, thereby officially repudiating the very trait they would otherwise be said to reflect.

The South is also sometimes said to have been more religious than other regions. Certainly, Southern constitutions reveal a keen interest in religious matters. For example, Georgia’s 1777 constitution and South Carolina’s 1778 constitution limit public office holders to Protestants—but so do the New Jersey Constitution of 1776 and the New Hampshire Constitutions of 1784 and 1792. The Massachusetts

235. See Fla. Const. of 1838, art. VI, § 5; La. Const. of 1852, art. 126; La. Const. of 1845, art. 130; Miss. Const. of 1832, art. VII, § 2; Miss. Const. of 1817, art. VI, § 2; Tenn. Const. of 1834, art. IX, § 3; Tex. Const. of 1845, art. VII, § 5; Va. Const. of 1850, art. IV, § 17; Va. Const. of 1830, art. III, § 12.
236. See Cal. Const. of 1849, art. XI, § 2; Conn. Const. of 1818, art. VI, § 3; Ind. Const. of 1851, art. II, § 7; Iowa Const. of 1857, art. I, § 5; Mich. Const. of 1850, art. VII, § 8; Or. Const. of 1857, art. II, § 9; Wis. Const. of 1848, art. XIII, § 2.
237. Similarly, laws banning the carrying of concealed weapons were upheld, by every Southern court to consider them, against challenges based on state constitutional provisions guaranteeing the right to bear arms. See State v. Reid, 1 Ala. 612 (1840); State v. Buzzard, 4 Ark. 18 (1842); Nunn v. State, 1 Ga. 243 (1846); State v. Chandler, 5 La. Ann. 489 (1850); Ayemette v. State, 21 Tenn. (2 Hum.) 154 (1840).
238. See Ga. Const. of 1777, art. VI; S.C. Const. of 1778, art. XIII. Several other Southern constitutions contained a more general religious qualification for public office, typically a belief in God. See Ark. Const. of 1836, art. VII, § 2; Miss. Const. of 1832, art. VII, § 2; Miss. Const. of 1817, art. VI, § 6; N.C. Const. of 1776, art. XXXII; Tenn. Const. of 1834, art. IX, § 2; Tenn. Const. of 1796, art. VIII, § 2.
239. See N.H. Const. of 1792, Part II, §§ XIV, XXIX, XLII; N.H. Const. of 1784, Part II, Senate, ¶ 10; id. Part II, House of Representatives, ¶ 5; id. Part II, President, ¶ 2; N.J. Const. of 1776, § XIX.
Constitution of 1780, somewhat more generously, allows public offices to be filled by any Christian.\textsuperscript{240} Not only do these New England constitutions contain provisions parallel to those appearing in their Southern counterparts, but by 1790 both Georgia and South Carolina, like most other states, had phased out these qualifications.\textsuperscript{241} In so doing, they brought their constitutions into conformity with those of other states in all regions of the nation, including the South, and with the federal Constitution.

Another unusual religious provision found in numerous Southern constitutions is a provision barring practicing ministers from holding public office.\textsuperscript{242} Yet it is hardly possible to argue that such provisions reflect a uniquely Southern attitude toward religious life when the same provision may be found in New York's constitutions of 1777 and 1821.\textsuperscript{243} In addition, it is hard to say just what attitude toward religion these exclusions reveal. By their own terms, the minister-exclusion provisions were intended to assure that ministers tend to their flocks, and the provisions may thus represent a kind of state protection of the integrity of religious worship.\textsuperscript{244} But an equally plausible explanation might be that these provisions create an additional barrier between church and state by preventing sectarian colonization of government offices. If so, constitutions containing these provisions evince a respect for religious life, but a religious life that is confined primarily to the private sphere. This is just the opposite of what one might expect in light of claims for the centrality of religion to a Southern constitutional—that is to say, public—culture.

If any Southern constitution stands out for its public treatment of religion, it is South Carolina's constitution of 1778, which establishes Protestantism as the official state religion.\textsuperscript{245} Once again, though, the provision in question was soon eliminated by the constitution of 1790, and

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\textsuperscript{240} See MASS. CONST. Part the Second, ch. II, § I, art. II (stating the requirement that the governor be a Christian).

\textsuperscript{241} See generally GA. CONST. of 1789; S.C. CONST. of 1790.

\textsuperscript{242} See FLA. CONST. of 1838, art. VI, § 10; LA. CONST. of 1845, art. 29; LA. CONST. of 1812, art. II, § 22; MISS. CONST. of 1817, art. VI, § 7; N.C. CONST. of 1776, art. XXXI; S.C. CONST. of 1790, art. I, § 23; S.C. CONST. of 1778, art. XXI; TENN. CONST. of 1834, art. IX, § 1; TENN. CONST. of 1796, art. VIII, § 1; TEX. CONST. of 1845, art. III, § 27; REPUB. TEX. CONST. of 1836, art. V, § 1, reprinted in 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 1069, 1075 (Austin, Gammel Book Co. 1898); VA. CONST. of 1830, art. III, § 7.

\textsuperscript{243} See N.Y. CONST. of 1821, art. VII, § 4; N.Y. CONST. of 1777, art. XXXIX.

\textsuperscript{244} A typical version provides: "whereas the ministers of the gospel are, by their profession, dedicated to the service of God and the care of souls, and ought not to be diverted from the great duties of their function, therefore no minister of the gospel or public preacher of any religious persuasion, whilst he continues in the exercise of his pastoral functions, shall be eligible to the office of governor, lieutenant-governor, or to a seat in the senate or house of representatives." S.C. CONST. of 1790, art. I, § 23.

\textsuperscript{245} See S.C. CONST. of 1778, art. XXXVIII.
it thus provides little support for the existence of a distinctive Southern character trait during the period when South and North are said to have been growing apart.246

The treatment of slavery is another area in which Southern constitutions might be thought to reflect distinctively Southern values, if they existed. Yet one of the most surprising things about the constitutions of Southern states, like the Constitution of the Confederate States of America, is how little they say about slavery. The Georgia Constitutions of 1777 and 1789, the South Carolina Constitution of 1776, and the Virginia Constitution of 1776 make no mention of slavery whatsoever.247 And constitutions from Louisiana, North Carolina, Tennessee, and Virginia mention slavery only indirectly, either through the use of a three-fifths clause for purposes of apportionment,248 as in the United States Constitution,249 or in the limitation of certain rights to freemen.250

Of course, it would be odd if no Southern constitution dealt with an institution as important to Southern life as slavery, and most do so by acknowledging and to some extent formalizing or regulating various aspects of the slave system. Some constitutions, for example, take up administrative matters such as the taxation251 and movement252 of slaves and the conditions of emancipation,253 while others authorize the enactment of humane slave laws.254 Many constitutions state formally, and perhaps somewhat redundantly, the conditions of American slavery: that only

246. See S.C. Const. of 1790.
250. See La. Const. of 1852, arts. 10, 59; La. Const. of 1845, arts. 6, 10, 60; La. Const. of 1812, art. II, § 4; id. art. III, § 2; N.C. Const. of 1776, §§ VII-IX; id. Declaration of Rights, §§ VIII-IX, XII-XIII; Tenn. Const. of 1796, art. III, § 1; id. art. XI, §§ 8, 14, 26. The term "freemen" was sometimes construed to exclude free blacks. See State v. Claiborne, 19 Tenn. (Meigs) 331, 341 (1838).
251. See Va. Const. of 1830, art. IV, § 23.
252. See Ark. Const. of 1836, art. IV, § 25; Fla. Const. of 1838, art. XVI, §§ 2-3; Ga. Const. of 1798, art. III, § 11; Miss. Const. of 1832, art. VII, §§ 1-2; Miss. Const. of 1817, art. VI, § 1; Tex. Const. of 1845, art. VIII, § 1; Repub. Tex. Const. of 1836, General Provisions, § 9, reprinted in 1 Gammel, supra note 242, at 1079.
253. See Ala. Const. of 1819, art. VI, § 1; Ark. Const. of 1836, art. VII, § 1; Fla. Const. of 1838, art. XVI, § 1; Miss. Const. of 1832, art. VII, § 1; Miss. Const. of 1817, art. VI, § 1; Tenn. Const. of 1834, art. II, § 31; Tex. Const. of 1845, art. VIII, § 1; Repub. Tex. Const. of 1836, General Provisions, § 9, reprinted in 1 Gammel, supra note 242, at 1079; Va. Const. of 1850, art. IV, §§ 19-21.
254. See Ala. Const. of 1819, art. VI, § 1; Ark. Const. of 1836, art. VI, § 1; Tex. Const. of 1845, art. VIII, § 1.
whites could be citizens,^255^ hold public office,^256^ or vote;^257^ and that the principles of equal rights^258^ and due process^259^ apply only to freemen.

While these provisions certainly reveal that slavery was practiced in the South, it is less clear that they reveal anything more about Southern character or values than is revealed in the knowledge that Southerners practiced slavery. That is, one's opinion about whether the South's history of slavery reflects a set of values different from those held in the North will depend principally on one's opinion about the values reflected in the practice of slavery itself, and not in the values reflected by the institutionalization of slavery at the constitutional level.

Furthermore, any analysis of the significance of provisions in Southern constitutions concerning slavery must account for the fact that many Northern and Western state constitutions of the same period, as well as the United States Constitution, contain similar provisions. The United States Constitution contains three provisions that acknowledge and formalize the practice of slavery itself, and not in the values reflected by the institutionalization of slavery at the constitutional level.

Among non-Southern states, the right to vote was restricted to whites or freemen in Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Michigan, Ohio, Oregon, Pennsylvania, Vermont, and Wisconsin.\textsuperscript{263} Iowa, Kansas, and

\textsuperscript{256} See Ala. Const. of 1819, art. III, § 5; Ark. Const. of 1836, art. IV, §§ 4, 6; Fla. Const. of 1838, art. IV, §§ 4-5; La. Const. of 1845, art. 6; La. Const. of 1812, art. II, § 4; S.C. Const. of 1790, art. I, §§ 6, 8.
\textsuperscript{257} See Ala. Const. of 1819, art. III, § 5; Ark. Const. of 1836, art. IV, § 2; Fla. Const. of 1838, art. VI, § 1; Ga. Const. of 1777, art. IX; La. Const. of 1852, art. 10; La. Const. of 1845, art. 10; La. Const. of 1812, art. II, § 8; Miss. Const. of 1832, art. III, § 1; Miss. Const. of 1817, art. III, § 1; N.C. Const. of 1776, Declaration of Rights, §§ VII-VIII; id. art. I, § 3, cl. 3 (1835); S.C. Const. of 1790, art. I, § 4; S.C. Const. of 1778, art. XIII; Tenn. Const. of 1834, art. IV, § 1; Tenn. Const. of 1796, art. III, § 1; Tex. Const. of 1845, art. III, §§ 1-2.
\textsuperscript{258} See Ala. Const. of 1819, art. I, § 1; Ark. Const. of 1836, art. II, § 1; Fla. Const. of 1838, art. I, § 1; Miss. Const. of 1832, art. I, § 1; Miss. Const. of 1817, art. I, § 1; Tex. Const. of 1845, art. I, § 2.
\textsuperscript{259} See Ark. Const. of 1836, art. II, § 10; Fla. Const. of 1838, art. I, § 8; N.C. Const. of 1776, Declaration of Rights, art. XII; S.C. Const. of 1778, art. XLI; Tenn. Const. of 1834, Declaration of Rights, art. I, § 8; Tenn. Const. of 1796, Declaration of Rights, art. XI, § 8. For obvious reasons, the right to bear arms was also often expressly restricted to whites or freemen. See Fla. Const. of 1838, art. I, § 21; La. Const. of 1852, art. 59; La. Const. of 1845, art. 60; La. Const. of 1812, art. III, § 22; Tenn. Const. of 1834, art. I, § 26; Tenn. Const. of 1796, Declaration of Rights, art. XI, § 26.
\textsuperscript{260} See U.S. Const. art. I, § 2, cl. 3, repealed by U.S. Const. amend. XIV, § 2.
\textsuperscript{261} See id. art. IV, § 2, cl. 3.
\textsuperscript{262} See id. art. I, § 9, cl. 1.
\textsuperscript{263} See Conn. Const. of 1818, art. VI, § 2; Del. Const. of 1831, art. IV, § 1; Del. Const. of 1792, art. VI; Ill. Const. of 1848, art. IV, § 1; Ill. Const. of 1818, art. II, § 27; Ind. Const. of 1816, art. VI, § 1; Iowa Const. of 1857, art. II, § 1; Iowa Const. art. 2, § 1 (amended 1868);
Michigan barred blacks from holding public office. Illinois, Indiana, and Oregon prohibited blacks from entering the state, and Illinois and Oregon limited due process and equality rights to freemen or whites. The presence of such restrictions in Northern and Western constitutions undermines the claim that they reflect uniquely Southern character traits and values.

Perhaps the Southern constitution that suggests most strongly the kind of value differences attributed to the South by supporters of the difference thesis is the South Carolina Constitution of 1778. While property qualifications for office holding were not uncommon among the first generation of American constitutions, the 1778 South Carolina Constitution limits eligibility for the office of governor to those possessing a freehold of "at least ten thousand pounds currency, clear of debt," and eligibility for the Senate to those possessing a freehold of two thousand pounds. These requirements far exceed any property-holding limitations set by other states; Georgia, for example, at that time required of its officials property in the amount of 250 pounds, and Virginia required only that its officials be freeholders. Outside the South, only Delaware, Massachusetts, and New Jersey come close, requiring one thousand pounds of candidates for certain offices. The amount

KAN. CONST. of 1855, art. II, § 2; MICH. CONST. of 1835, art. II, § 1; OHIO CONST. art. V, § 1 (amended 1923); OHIO CONST. of 1802, art. IV, § 1; OR. CONST. art. II, § 6 (repealed 1927); PA. CONST. of 1838, art. III, § 1; PA. CONST. of 1790, art. III, § 1; PA. CONST. of 1776, § 6; WIS. CONST. art. III, § 1 (amended 1882). In New York, blacks were permitted to vote, but only if they were freeholders in the amount of $250. See N.Y. CONST. of 1846, art. II, § 1; N.Y. CONST. of 1821, art. II, § 1.

264. See IOWA CONST. art. 2, § 1 (amended 1868); KAN. CONST. of 1855, art. IV, § 4; MICH. CONST. of 1835, art. IV, § 7.

265. See ILL. CONST. of 1848, art. XIV; IND. CONST. art. XIII, § 1 (amended 1881); OR. CONST. art. II, § 6 (repealed 1927).

266. See ILL. CONST. of 1848, art. XIII, § 8; ILL. CONST. of 1818, art. VIII, § 8; OR. CONST. art. I, § 32 (repealed 1970).

267. See DEL. CONST. of 1792, art. II, § 3 (200 acres or 1000 pounds for senators); GA. CONST. of 1777, art. VI (250 acres or 250 pounds for representatives); MASS. CONST. Part the Second, ch. II, § I, art. II (1000 pounds for governor); id. Part the Second, ch. I, § II, art. V (300 pounds for senators); id. Part the Second, ch. I, § III, art. III (100 pounds for representatives); N.H. CONST. of 1784, Part II, Senate, ¶ 10 and President, ¶ 2 (200 pounds for senators, 500 pounds for president); N.J. CONST. of 1776, § III (500 pounds for assembly, 1000 pounds for council); N.C. CONST. of 1776, arts. V-VI (300 acres for senators, 100 acres for representatives); N.Y. CONST. of 1777, art. X (100 pounds for senators).

268. S.C. CONST. of 1778, art. V.

269. See id. art. XII. Representatives were also required to possess significant property, but the amount was set by legislation. Id. art. XIII.

270. See GA. CONST. of 1777, art. VI.

271. See VA. CONST. of 1776, ¶¶ 2-3.

272. See DEL. CONST. of 1831, art. II, § 3 (senators); DEL. CONST. of 1792, art. II, § 3 (senators); MASS. CONST. Part the Second, ch. II, § I, art. II (governor); N.J. CONST. of 1776, § III (council).
required to serve as South Carolina Governor dwarfs property eligibility requirements for voters; this sum, for example, is fully one thousand times the property qualification required to vote in Georgia. In this respect, then, the South Carolina Constitution of 1778 came as close as any American constitution ever has to creating an aristocratic form of government. Moreover, if, as seems likely, the few who could qualify to rule would have been overwhelmingly planters and slaveholders, then the political aristocracy so created would have been something like the social and economic aristocracy said to dominate South Carolina life and culture during the antebellum period.

With the adoption of a new constitution in 1790, however, South Carolina quickly concluded its experiment in plutocracy. The property requirement for governor, though still substantial, was reduced to fifteen hundred pounds, and the requirements for senator and representative were cut to three hundred pounds and one hundred fifty pounds, respectively. In other states, too, high property qualifications were ultimately phased out. For example, Louisiana's property qualifications,

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273. See GA. CONST. of 1777, art. IX.

274. As Madison observed, "A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect." JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 427 (Adrienne Koch ed., 1966).


Perhaps more to the point are estimates of how many South Carolinians would have been eligible to serve as governor under the 1778 constitution. According to Soltow, the average wealth of an American free male over the age of 21 was approximately $1,000. See SOLTOW, supra, at 27. Soltow estimates the number of Americans worth $10,000 or more in 1801 at 4100, id. at 134, and the total number of Americans worth $50,000 or more in 1798 at just over 100, id. at 47 tbl.9. If this number is accurate, the number of eligible people in South Carolina would have been no more than a handful.

Finally, Marion Chandler, an archivist at the South Carolina Dept. of Archives and History, was kind enough to perform a brief search of a computerized database of South Carolina conveyance records and estate inventories. Mr. Chandler's search turned up the names of about 25 people who might have been able to meet the eligibility requirement in 1784.


277. See id. art. I, §§ 6, 8.
which in 1812 stood at $5000 for governor and $1000 for senators, were eliminated entirely in the Constitution of 1845. Thus, it cannot very plausibly be maintained that Southern constitutions reflect the kind of aristocratic, plantation-centered value system which the South is often said to have possessed. Property qualifications were being lowered at the very time the South is said to have been growing apart from the North—the record shows regional convergence rather than divergence. Indeed, historians who have studied this record argue that the democratization of Southern office holding is simply one aspect of the Jacksonian egalitarianism that swept all parts of the nation during the 1820s and 1830s.

b. Judicial interpretation.—While the absence of textual evidence tends to undermine the proposition that Southern constitutions reflect distinctively Southern character and values, it is not dispositive. One of the key premises of the New Judicial Federalism is that commonly employed constitutional terms like freedom of speech, freedom of religion, or due process of law might mean different things in different states because the people of each state bring to these phrases local understandings informed by local values and beliefs. Consequently, we must look not only to the constitutional texts for evidence of Southern distinctiveness, but also to judicial interpretations of the texts.

A review of the antebellum and Confederate decisions of the supreme courts of the Confederate states, however, discloses no more evidence of Southern distinctiveness than do the constitutional texts themselves. As an initial matter, the state judicial decisions might seem like fertile ground for evidence of unique state values if only because so many state courts were so active in the development of a robust state constitutionalism. Unlike the United States Supreme Court, which by the eve of the Civil War had struck down only two federal laws—in Marbury v. Madison and Dred Scott v. Sandford—state supreme courts during the same

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278. See LA. CONST. of 1812, art. III, § 4; id. art. II, § 12.
279. See LA. CONST. of 1845, arts. 18, 39.
280. See, e.g., CLEMENT EATON, A HISTORY OF THE OLD SOUTH 270-72 (2d ed. 1966); McWHINEY, supra note 121, at 131.
281. For this study, I have examined every reported state constitutional decision issued between 1776 and 1865 by the highest court of each Confederate state except South Carolina, which I excluded because my library did not contain an indexed annotated set of the relevant decisions. In conducting this review, I relied exclusively on indices of the decisions prepared by the official reporters. While these indices were for the most part very thorough and well done, this was not uniformly the case, and it is likely that I was not directed to every relevant decision. I am confident, however, that the account set out in the text is more than adequately supported by the decisional law.
282. 5 U.S. (1 Cranch) 137, 177-80 (1803) (holding that the Judiciary Act of 1789 was unconstitutional to the extent that it attempted to add to the Supreme Court's original jurisdiction as provided in Article III, Section 2).
283. 60 U.S. (19 How.) 393, 441-42 (1857) (holding that the Missouri Compromise was invalid insofar as Congress had no power to outlaw slavery in territories acquired in the Louisiana Purchase).
period struck down dozens of state laws. During this same period the Tennessee Supreme Court, for example, alone invalidated at least ten state actions. A clear indication of the seriousness with which Southern courts viewed their state constitutions is the fact that they continued to strike down state laws throughout the period of the Civil War—a time of severe crisis and deprivation during which state courts might have been expected to show a good deal more deference to the legislative and executive branches.

While Southern courts were active, their decisions provide little support for the distinctiveness hypothesis. The subject matter of the state constitutional rulings for the most part reflects the standard preoccupations

284. See, e.g., Morgan v. Reed, 39 Tenn. (2 Head) 275, 281-82 (1858) (invalidating a statute which purported to nullify a previous statute on the grounds that the former was passed only for the benefit of an individual, thereby violating the state constitution); State v. Armstrong, 35 Tenn. (3 Sneed) 634, 655-56 (1856) (invalidating a law allowing circuit courts to grant charters of incorporation); State v. Fleming, 26 Tenn. (7 Hum.) 151, 153-54 (1846) (invalidating a statute that provided for the discharge of two individuals indicted for violating another statute); Governor v. Porter, 24 Tenn. (5 Hum.) 165, 167-68 (1844) (voiding a statute that required a specific construction of another statute on the ground that the state constitution extended the authority to determine statutory construction to only the judiciary); Jones' Heirs v. Perry, 18 Tenn. (10 Yer.) 59, 69-71 (1836) (invalidating a statute on the grounds that the statute amounted to a judgment for an individual, and thus the legislature had violated the state constitution by assuming powers within the exclusive domain of the judiciary); Bank of the State v. Cooper, 10 Tenn. (1 Yer.) 599, 607-08 (1831) (nullifying a statute that created a special tribunal because the tribunal's powers conflicted with the powers provided to the state supreme court under the state constitution); Marr v. Enloe, 9 Tenn. (1 Yer.) 452, 459 (1830) (striking down a law delegating taxation power to county courts); Jones v. Kears, 8 Tenn. (Mart. & Yer.) 241, 246-48 (1827) (holding invalid a state court practice that required a plaintiff to give new security in costs or have his case dismissed); Townsend v. Townsend, 7 Tenn. (Peck) 1, 18-19 (1821) (using both the federal and state constitutions to strike down a law requiring a two-year delay on the execution of judgments); Barrows v. Page, 6 Tenn. (5 Hayw.) 97, 98-100 (1818) (concluding that a defendant's trespass of a private citizen's food supply on behalf of a militia was indefensible because there was neither a showing of extreme necessity, as required in the Tennessee Bill of Rights, nor a statutory authorization of the trespass).

Not every Southern supreme court devoted such attention to its state constitution; the North Carolina Supreme Court, for example, seems to have interpreted the state constitution in any depth only once. See State v. Newsom, 27 N.C. (5 Ired.) 250, 254-55 (1844) (upholding a law barring free negroes from carrying firearms). Unlike, for instance, the Alabama Supreme Court, which evidently thrived on constitutional interpretation, the North Carolina Supreme Court seemed far more comfortable adjudicating in a common-law mode.

285. See, e.g., Ex parte Haughton, 38 Ala. 570 (1863) (striking down as a violation of the state constitutional right of appeal a state vagrant law that provided no mechanism for appeals); Alabama Life Ins. & Trust Co. v. Boykin, 38 Ala. 510 (1863) (striking down on separation of powers and due process grounds a state law reviving a conveyance previously invalidated by the court); Burt v. Williams, 24 Ark. 91 (1863) (invalidating state legislation that granted an automatic continuance for all criminal and civil cases until after the Civil War on the grounds that the law violated the Arkansas Constitution's guarantee of speedy trials).

of early nineteenth century American constitutional law: banking; \(^{287}\) railroads, canals, and other internal improvements; \(^{288}\) and the jurisdiction of courts. \(^{289}\) When the decisions are not focused on technical aspects of governmental structure, their focus is overwhelmingly on constitutional questions of property: uncompensated takings; \(^{289}\) impairment of the obligation of contracts; \(^{290}\) ex post facto laws; \(^{291}\) and the extent of the powers of taxation \(^{292}\) and eminent domain. \(^{293}\) This strong emphasis on

\(^{287}\) See, e.g., Andress v. Roberts, 18 Ala. 387 (1850); Nance v. Hemphill, 1 Ala. 551 (1840); Lynn v. State Bank, 1 Stew. 442 (Ala. 1828); State v. Stebbins, 1 Stew. 299 (Ala. 1828); State v. Ashley, 1 Ark. 513 (1839); Carey v. Giles, 9 Ga. 253 (1851); Goddin v. Crump, 35 Va. (8 Leigh) 120 (1837).


\(^{289}\) See, e.g., Herrin v. Buckelew, 37 Ala. 585 (1861); State v. Porter, 1 Ala. 688 (1840); Johnston v. Atwood, 2 Stew. 225 (Ala. 1829); Ward v. Lewis, 1 Stew. 26 (Ala. 1827); Carter v. Dade, 1 Stew. 18 (Ala. 1827); Ex parte Allis, 12 Ark. 101 (1851); State v. Graham, 1 Ark. 428 (1839); Trustees Internal Improvement Fund v. Bailey, 10 Fla. 213 (1863); Taylor v. Smith, 4 Ga. 133 (1848); State v. Corporation of Savannah, 1 Ga. Rep. Annotated (T.U.P.C. 235) 83 (Super. Ct. Chatham County 1809); State v. Judge of the Fifth Judicial Dist., 5 La. Ann. 756 (1850); Camper v. Hawkins, 3 Va. (1 Va. Cas.) 18 (1793).

\(^{290}\) See, e.g., Gibbons, 36 Ala. at 411; Commissioners Court of Lowndes County v. Bowie, 34 Ala. 461 (1859); Sadler v. Langham, 34 Ala. 311 (1859); Ex parte Martin, 13 Ark. 198 (1853); Parham v. Justices of the Inferior Court, 9 Ga. 341 (1851); Brewer v. Bowman, 9 Ga. 37 (1850); Wetherspoon v. State, 8 Tenn. (Mart. & Yer.) 118 (1827); Turner, 36 Va. (9 Leigh) at 313.

\(^{291}\) See, e.g., Blann v. State, 39 Ala. 353 (1864); Kenney, 39 Ala. at 307; Moore, 36 Ala. at 371; Benford v. Gibson, 15 Ala. 521 (1849); Dale v. Governor, 3 Stew. 387 (Ala. 1831); Woodruff v. State, 3 Ark. 285 (1841); Winter v. Jones, 10 Ga. 190 (1851); Hall v. Carey, 5 Ga. 239 (1848); Ferguson v. Miners & Mfrs. ' Bank, 35 Tenn. (1 Sneed) 363 (1856); Craighead v. State Bank, 19 Tenn. (Meigs) 198 (1838); Townsend v. Townsend, 7 Tenn. (Peck) 1 (1821); Phalen, 40 Va. (1 Rob.) at 713.

\(^{292}\) See, e.g., In re Anonymous, 2 Stew. 228 (Ala. 1829); Wynne's Lessee v. Wynne, 32 Tenn. (2 Swan) 404 (1852); Bank of the State v. Cooper, 10 Tenn. (1 Yer.) 599 (1831); Bell v. Perkins, 7 Tenn. (Peck) 261 (1823); Townsend, 7 Tenn. (Peck) at 1; Perry v. Commonwealth, 44 Va. (3 Gratt.) 632 (1846).

\(^{293}\) See, e.g., Stein v. City of Mobile, 24 Ala. 591 (1854); Gibson v. County of Pulaski, 2 Ark. 309 (1840); Stevens v. State, 2 Ark. 291 (1840); Cumming v. Mayor & Aldermen, 1 Ga. Rep. Annotated (26 R.M.C.) 126 (Super. Ct. 1815); Griffin v. Mixon, 38 Miss. 424 (1860); Marr v. Enloe, 9 Tenn. (1 Yer.) 452 (1830); Gillkeson v. Frederick Justices, 54 Va. (13 Gratt.) 577 (1856).

\(^{294}\) See, e.g., Kenney, 39 Ala. at 307; State v. Caroline, 20 Ala. 19 (1852); Brown v. Beatty, 34 Miss. 227 (1857); Barrows v. Page, 6 Tenn. (5 Hayw.) 97 (1818).

The substantive business of the state supreme courts appears to have differed little from the substantive business of the United States Supreme Court during the same period. For a discussion of the United States Supreme Court's focus on property issues during the early 1800s, see generally DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888 (1985). Of course, the mix of cases heard by federal and state courts before 1865 differed substantially from the mix that those courts hear today. See Robert A. Kagan et al., THE BUSINESS OF STATE SUPREME COURTS, 1870-1970, 30 STAN. L. REV. 121, 133-55 (1977) (describing the evolution of state court dockets from cases arising from commercial disputes involving private parties to cases arising from
the legal treatment of property seems to bear out the position taken by some historians that the South, contrary to the agrarian myth, was in most respects as capitalistic and preoccupied with economic success as the North.295

Methodologically, the Southern courts employed all the techniques of constitutional interpretation familiar to the period. Principal reliance was placed on the language of the text and what the courts seemed to view as logical deductions from the text.296 Other sources less frequently invoked included the intentions of the framers of the state constitutions; the provisions of English law; treatise writers like Story, Blackstone, and Vattel; and the decisions of sister states from all regions of the nation297—the common building blocks of constitutional decision making throughout the nation. The only Southern flavor to the judicial use of

confrontations between citizens and the state). It is only comparatively recently that courts, state or federal, have had a docket consisting of a large number of cases involving individual rights. See, e.g., LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 74 (1994) (showing that the proportion of the United States Supreme Court's caseload devoted to cases dealing with due process, substantive rights, and equality rose from 7.8% in the 1930s to 56.7% in the 1980s).

295. See, e.g., DEGLER, supra note 41, at 65; HARTZ, supra note 74, at 134-39; MCWHINEY, supra note 121, at vii, 8; Pessen, supra note 83, at 1146, 1149. Horwitz has shown convincingly that this period was one in which state courts actively reshaped the law to facilitate modern, capitalistic business enterprise. See generally MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

296. The Tennessee Supreme Court is notable in this respect for its reliance on what the judges probably viewed as simple common sense. Unlike some other decisions of the period, the Tennessee decisions almost never rely on any kind of authority—not treatises, not decisions by sister states, not even their own precedents. A striking example of this is the court's decision in State v. Fleming, 26 Tenn. (7 Hum.) 151, 154 (1846), in which the court struck down on separation of powers grounds a state law dismissing pending criminal prosecutions. The court cites no authority in its opinion despite the fact that only two years earlier it had issued a major separation of powers decision in Governor v. Porter, 24 Tenn. (5 Hum.) 165 (1844). The earlier decision invalidated a legislative attempt to dictate the interpretation to be given a statute and contained much relevant analysis. On the other hand, it was not uncommon even much later in American history for state courts to reach decisions without citing any authority. See Lawrence M. Friedman et al., State Supreme Courts: A Century of Style and Citation, 33 STAN. L. REV. 773, 796 (1981) (calculating that as late as 1870, nearly one quarter of state supreme court decisions cited no authority).

297. Except for Tennessee, which looked more frequently to North Carolina, from which it was formed, the Southern courts do not display any discernible preference for the decisions of Southern states. See Act Admitting the State of Tennessee, 1 Stat. 491 (1796). Mississippi looked somewhat more frequently to Alabama, presumably because both were created from the same territory. See Act Creating Territorial Government of Alabama, 3 Stat. 371 (1817).

Furthermore, Southern courts continued freely to refer to decisions from Northern states even after secession. See, e.g., Ex parte Tate, 39 Ala. 254, 260-70 (1864) (relying on decisions from Ohio, New Hampshire, Illinois, and Massachusetts); Ex parte Hill, 38 Ala. 458, 462 (1863) (referring to decisions from New Jersey and New Hampshire); Ex parte Hill, 38 Ala. 429, 439-40 (1863) (citing cases from Pennsylvania, Massachusetts, and New Jersey); Trustees Internal Improvement Fund v. Bailey, 10 Fla. 213, 230 (1863) (citing a Massachusetts decision); Ex parte Mayer, 27 Tex. 715, 723-23 (1864) (referring to a case in Massachusetts); Ex parte Coupland, 26 Tex. 387, 394-95 (1862) (citing cases from Massachusetts).
authority was an occasional invocation of the writings of John C. Calhoun.\textsuperscript{298}

Other than the text itself, the most frequently cited authority was undoubtedly the United States Supreme Court, which Southern courts clearly held in high regard not only during the antebellum period but even well after secession. Indeed, the authority of the United States Supreme Court was only enhanced in the South by its fateful decision in \textit{Dred Scott}, and the Court was subsequently praised for being "faithful to the [United States] [c]onstitution, while every other branch of the [United States] government seemed to conspire its overthrow . . . ."\textsuperscript{299} Chief Justice Taney, so often reviled in the North, was in Southern judicial eyes "venerable and illustrious"\textsuperscript{300} and an "enlightened jurist and venerated patriot."\textsuperscript{301} The Supreme Court's proslavery decisions, if anything, cemented the commonalities of Southern and American constitutional jurisprudence just as they helped unravel the corresponding political relationships.

But the similarities binding Southern state constitutional jurisprudence to the general American variety go much deeper than the subject matter or methodology of constitutional decision making. What the Southern decisions ultimately reveal is a fundamental belief that the constitutions of the United States and the various states, regardless of region, are merely independent instantiations of a single set of common American values and principles. Nowhere is this made clearer than in the 1852 decision of the Georgia Supreme Court in \textit{Campbell v. State}.\textsuperscript{302} In \textit{Campbell}, a criminal defendant convicted of manslaughter challenged his conviction on the ground that admission into evidence of the dying declaration of the victim violated his right to confront witnesses under the Sixth Amendment of the United States Constitution. The Georgia Constitution then in effect contained no equivalent provision.\textsuperscript{303} The state argued, logically enough, that the federal Bill of Rights did not restrain state power—a point settled by the United States Supreme Court twenty years earlier\textsuperscript{304}—and that in the absence of any binding constitutional restriction the state was free to do as it pleased.

The Georgia Supreme Court, untroubled by the lack of a confrontation clause in the state constitution, rejected this argument. According to the court, the question was not whether the amendments in the federal Bill of

\begin{itemize}
  \item \textsuperscript{298} \textit{See}, e.g., \textit{Tate}, 39 Ala. at 258-59 (1864); \textit{Ex parte Hill}, 38 Ala. 458, 478, 480-82 (1863);
  \item \textsuperscript{299} \textit{Hill}, 38 Ala. at 436.
  \item \textsuperscript{300} \textit{Id}.
  \item \textsuperscript{301} \textit{Id.} at 456 (Stone, J., concurring).
  \item \textsuperscript{302} 11 Ga. 353 (1852).
  \item \textsuperscript{303} \textit{See GA. CONST.} of 1798.
  \item \textsuperscript{304} \textit{See} Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833).
\end{itemize}
Rights "were intended to operate as a restriction upon the government of the United States, but whether it is competent for a State Legislature . . . to pass an Act directly impairing the great principles of protection to person and property, embraced in these amendments?" The court continued:

That the power to pass any law infringing on these principles is taken from the Federal Government, no one denies. But is it a part of the reserved rights of a State to do this? May the Legislature of a State, for example, unless restrained by its own Constitution, pass a law "respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press . . . ?" If so, of what avail . . . is the negation of these powers to the General Government? . . . Now, the doctrine is [argued], that Congress may not exercise this power, but that each State Legislature may do so for itself. As if a National religion and State religion, a National press and State press, were quite separate and distinct from each other; and that the one might be subject to control, but the other not!

Any such doctrine, the court concluded, is to be rejected because "notwithstanding we may have different governments, a nation within a nation, imperium in imperio, we have but one people; . . . it is in [vain] to shield them from a blow aimed by the Federal arm, if they are liable to be prostrated by one dealt with equal fatality by their own [state]." The federal Bill of Rights, then, is not merely a restraint on federal power; its purpose was "to declare to the world the fixed and unalterable determination of our people, that these invaluable rights . . . should never be disturbed by any government." The Bill of Rights thus does not merely establish positive restrictions on the national government but rather acknowledges "that independently of written constitutions, there are restrictions upon the legislative power, growing out of the nature of the civil compact and the natural rights of man." It is these underlying principles—principles shared in common by all Americans—that "constitute a limit to all legislative power, Federal or State, beyond which it cannot go."

Similar expressions of a belief in universal constitutional principles appear in several other cases from this period. In Ex parte Martin, for

305. Campbell, 11 Ga. at 365.
306. Id. at 365-66.
307. Id. at 366.
308. Id. at 367 (emphasis in original).
309. Id. at 369.
310. Id. at 372.
311. 13 Ark. 198 (1853).
example, decided in 1853, the Arkansas Supreme Court struck down a state law providing for reclamation of swampland and levee construction because the law failed to compensate landowners. "The constitution of this State," the court conceded, "contains no provision that private property shall not be taken for public use, without just compensation . . . ."312 Nevertheless, the court continued, "[t]he duty of making compensation may be regarded as a law of natural justice, which has its sanction in every man's sense of right, and is recognized in the most arbitrary governments."313 This holding accords with a proposition announced by the Arkansas Supreme Court in one of its earliest cases to the effect that the constitutions of the states are to be understood as so many "bill[s] of rights, declaratory of the great and essential principles of civil and political justice."314

The belief that all American constitutions instantiate the same set of values and principles is also manifested during this period by a not uncommon judicial tendency to treat state constitutions, the United States Constitution, and "the great and essential principles of civil and political justice" as interchangeable.315 One example of this approach is State v. Moor,316 an 1823 Mississippi case in which a criminal defendant challenged his conviction under the double jeopardy provision of the Fifth Amendment to the United States Constitution. Despite the fact that the Mississippi Constitution of 1817 contained its own double jeopardy clause,317 the Mississippi Supreme Court based its ruling on the United States Constitution, which it held applicable to the states, and never even mentioned the equivalent state constitutional provision.318 The court nevertheless went on to base its double jeopardy ruling on principles of English common law.319 In a similar case, the Tennessee Supreme Court

312. Id. at 206.
313. Id.
314. State v. Ashley, 1 Ark. 513, 513 (1839); see also Gibson v. County of Pulaski, 2 Ark. 309, 313 (1840) (invalidating a tax on the keeping of stallions as violating a "common right"); Ex parte Allis, 12 Ark. 101, 105 (1851) (ruling that the state constitution must be interpreted "in conne[ct]ion with known political truths").
315. Ashley, 1 Ark. at 513. Interestingly, this trend may stand in some opposition to a contrary trend of treating the common law in a more functional, flexible, and ultimately positivistic way. See HORWITZ, supra note 295, at 1-3, 30 (discussing the trend of nineteenth century judges to use the common law instrumentally to create social change and policy). The impulse, however, seems understandable in light of the sentiment that constitutions, unlike the common law, really are expressions of fundamental principles of justice, designed to last in perpetuity.
316. 1 Miss. (1 Walker) 134 (1823).
318. See Moor, 1 Miss. (1 Walker) at 138-40.
319. As late as 1864, the North Carolina Supreme Court held that powers of "the legislatures of the free States of America" differed little from the powers of the English Parliament and turned to English precedents for guidance. Gatlin v. Walton, 60 N.C. (Win.) 325, 328 (1864); see also Brown v. Beatty, 34 Miss. 227, 239 (1857) (holding that the power of eminent domain is inherent in state sovereignty and requires no express constitutional recognition).
invalidated a state law having a "retrospective effect." The state constitution expressly prohibited ex post facto laws, the court never mentioned the provision. Instead, the court, after setting out certain principles of English common law, ruled that these common law principles governed the case because they were "eternal principles of justice which no government has a right to disregard." The legislature, the court concluded, is not free to do everything not forbidden by the state constitution: "Some acts, although not expressly forbidden, may be against the plain and obvious dictates of reason.

The offhand way in which these courts dealt with state constitutional law, federal constitutional law, and English common law suggests strongly that the courts do not differentiate between them. The congruence of these bodies of law is simply assumed on the ground that all three reflect substantially identical principles of justice, reason, or natural law. These principles, moreover, are understood to be the common inheritance of all Americans, and that they turn up in a variety of places, such as the various state and federal constitutions, is viewed as an historical artifact—the consequence of political events unrelated to the substance of the underlying universal principles.

In sum, judicial interpretations of antebellum and Confederate era Southern constitutions do not simply fail to support the hypothesis that distinctive Southern character traits and values are manifest in state constitutions of the period, but suggest just the opposite. The court decisions, like the constitutional texts themselves, tend to show that the

320. Bank of the State v. Cooper, 10 Tenn. (1 Yer.) 599, 599 (1831).
321. See TENN. CONST. of 1796, art. XI, § 11.
322. Cooper, 10 Tenn. (1 Yer.) at 603 (opinion of Green, J.) (emphasis added).
323. Id. (emphasis added); see also Jeffers v. Fair, 33 Ga. 347, 365-66 (1862) ("There are certain first principles which underlie all governments and all organized society, the violation of which the framers of governments are not supposed to intend."). A belief in the congruence of common law, natural law, and constitutional law is also suggested in many of the popular arguments made by opponents and proponents of slavery concerning its constitutionality. For an overview, see WIECEK, supra note 88, at 228-75.
324. For further examples emphasizing the natural law roots of this approach to constitutional interpretation, see Suzanna Sherry, Natural Law in the States, 61 U. CIN. L. REV. 171, 183-222 (1992) (examining the reliance on natural law in the state court decisions of Massachusetts, New York, South Carolina, and Virginia).
325. A notable exception to this approach is that of the Alabama Supreme Court, which repeatedly held that the United States Constitution did not apply to the states and that state constitutions could not be assumed to embody universal principles of natural law. See Dorman v. State, 34 Ala. 216 (1859) (describing the power of the state as limited only by the will of the people "in the aggregate," and the state constitution as not restrained by inherent, fundamental principles of democracy); Noles v. State, 24 Ala. 672 (1854) (holding that the Fifth Amendment was intended to safeguard against encroachments by the federal government, not to restrict the state's powers); Boring v. Williams, 17 Ala. 510 (1850) (holding that the Constitutional provision guaranteeing a right to trial by jury restricts only the federal government, not the states).
Southern states participated in and unreservedly embraced a constitutional culture that was American in character and national in scope.

V. The Nature of American Nationalism

I have thus far suggested two principal reasons why Southern constitutions fail to reflect a distinctively Southern character or set of values. First, it may well be that the South and the North were never very different from one another as a matter of historical fact. Second, even if the South was significantly different from the rest of the nation, it was not different in ways that are likely to be reflected in a liberal, American-style constitution. In this Part, I suggest a third reason: the nature of American nationalism. Southern secessionism was a proto-nationalistic movement that attempted to transfer Southerners’ existing loyalties from the United States to a new state defined in territorial, cultural, and sometimes ethnic and religious terms. Such a transfer would have been difficult under any circumstances, but in American circumstances it was far more difficult because American nationalism has never been defined in territorial, ethnic, or cultural terms. American nationalism, on the contrary, is an ideological nationalism: it is based on a commitment to a set of ideas. Consequently, to replace American nationalism with Southern nationalism would have required Southerners to embrace not only a new object of national loyalty, but also a new kind of nationalism as well. Southern nationalism, then, failed in part because Southerners could not or did not wish to relinquish the ideas to which their American identity had previously committed them—the very ideas that were first embodied, and then retained, in Southern constitutions.

A. American Nationalism: Ideology and Universalism

Nationalism is usually associated with a variety of commonalities with which it often coexists—commonalities of language, culture, religion, ethnicity, or territory, for example. The frequency with which groups nowadays demand “[t]hat political boundaries should coincide with ethnographic or linguistic frontiers” and the increasing intensity around the globe of nationalisms based on ethnicity and religion sometimes make

326. See supra Part III.
327. See supra subpart IV(A).
328. See, e.g., Kohn, supra note 162, at 14 (viewing these commonalities as the bonds that usually delimit a social group as a nationality); Snyder, supra note 162, at 14-55 (providing views of the term nation from geography, sociology, psychology, psychiatry, and political science).
329. Kohn, supra note 162, at 17.
330. Numerous recent works address this subject. For arguments about the great power of ethnic nationalism around the globe, see Walker Connor, Ethnonationalism: The Quest for Understanding 42-46 (1994) (arguing that the conflict underlying disputes over national identity is
it difficult to conceive of a nationalism understood in any other terms. Yet authorities on nationalism have long criticized this customary view of the subject as superficial\textsuperscript{331} or even incoherent,\textsuperscript{332} and it seems clear that the association of nationalism with the traditional laundry list of commonalities gives at best a partial picture of the subject.

Nationalism, it is generally agreed, was born alongside the doctrine of popular sovereignty.\textsuperscript{333} It arose in Enlightenment England at the moment when political ideology began to "locate[] the source of individual identity within a ‘people,’ which [was] seen as the bearer of sovereignty, the central object of loyalty, and the basis of collective solidarity."\textsuperscript{334} As
the people in their collective capacity began to replace the king as the locus of sovereignty, the people themselves came to be identified with the nation in a way that had formerly been reserved for the monarch.

From this common starting point, however, nationalism evolved in two quite different directions. One branch of nationalism stressed its democratic origins. This nationalism implied "symbolic elevation of the people," and "was fundamentally liberal and universal, carrying a message for all mankind and implying (if not always granting) the liberty and equality of every individual." Liberal nationalism proclaimed whenever it was found that "a nation of free men has emerged, free politically as well as spiritually, without kings, aristocracy or priesthood . . . ."

Another kind of nationalism, however, also arose from the same root. In this kind of nationalism, "national identity tends to be associated with and confounded with a community’s sense of uniqueness and the qualities contributing to it." As a result, the social, cultural, or ethnic qualities that make a people unique or identifiable to itself or others acquire special significance; the sovereign people becomes "a unique sovereign people." This kind of nationalism can be collectivistic, authoritarian, and exclusive. Unlike the liberal variety, in which nationality is civic and ideological, and may thus in principle be acquired, nationality of the collectivist kind is ethnic or cultural, and therefore limited to a distinct and identifiable populace. It is to this latter kind of nationalism that distinctions of language, religion, culture, and ethnicity become important.

In its most extreme forms, Southern nationalism, as we have seen, was the latter sort. Its proponents appealed for allegiance to a new nation defined primarily by geography and culture; occasionally Southern nationalists went so far as to appeal to linguistic and religious differences as

constituted them a state which was their political expression"); POTTER, supra note 48, at 38-45 (observing that historians often use nationalism as a way of answering questions about the legitimacy of political power exercised by a particular group within a particular territory).

335. GREENFELD, supra note 333, at 10.
336. Kohn, supra note 162, at 167.
337. Id. at 171.
338. GREENFELD, supra note 333, at 8.
339. Id.
340. See id. at 11. For slightly different typologies of nationalisms, see CARLTON J.H. HAYES, THE HISTORICAL EVOLUTION OF MODERN NATIONALISM 303-11 (1931) (dividing nationalism into categories of humanitarian nationalism, Jacobin nationalism, traditional nationalism, liberal nationalism, and integral nationalism); GELLNER, supra note 332, at 88-109 (examining various combinations of power, educational access, and cultural diversity to create a typology of nationalism); SMITH, supra note 330, at 9-13 (explaining that every nationalism is informed by tensions between a dominant civic nationalism, based on a community of shared legal institutions, and a weaker ethnic nationalism, which emphasizes immutable native culture).
well.\textsuperscript{341} In these respects, the strongest form of Southern nationalism closely resembled the kind of Romantic, ethnicity-centered nationalisms of the nineteenth century with which it was contemporary—for example, the German \textit{volk}-based nationalism inspired by Fichte and Hegel.\textsuperscript{342}

The American nationalism which Southern secessionists sought to displace, however, was of a different sort. Imported from England with the earliest settlers, American nationalism asserted itself not from outside the English linguistic, ethnic, and cultural patrimony, but from within it. Americans sought independence to vindicate rights they held not on account of their status as a distinct people but on account of being English.\textsuperscript{343} What made this paradox possible were the universal aspirations of the Anglo-American ideology of liberty, an ideology that understood liberty to be a universal human right.\textsuperscript{344} Thus, American nationalism “was not founded on the common attributes of nationhood—language, cultural tradition, historical territory or common descent—but on an idea . . . . To become an American has always meant to identify oneself with the idea.”\textsuperscript{345}

The content of that idea, of course, is difficult to define with precision. Hans Kohn describes it as a philosophy of natural rights derived from the ideology of the English revolutionary period of the seventeenth

\textsuperscript{341} See supra subsection III(B)(6).

\textsuperscript{342} See GREENFELD, supra note 333, at 476 (“The nascent Southern ideology bears unmistakable resemblance to the Romantic ethnic nationalisms such as the German and Russian ones.”); KEDOURIE, supra note 333, at 56-69 (describing the importance of language in defining the German nation); HANS KOHN, AMERICAN NATIONALISM: AN INTERPRETIVE ESSAY 114 (1957) (placing expressions of Southern nationalism within the framework of nineteenth century European nationalist movements).

\textsuperscript{343} See GREENFELD, supra note 333, at 405-20 (stating that the formation of a unique American identity did not interfere with Americans’ English national identity); KOHN, supra note 162, at 272 (claiming that “the colonies could and did revolt only because they were English”).

\textsuperscript{344} See GREENFELD, supra note 333, at 412, 422-23 (observing that Americans pledged themselves to the principle of universal liberty much more ardently than did the English before them); KOHN, supra note 342, at 9 (noting that the natural rights of Englishmen were broadened by eighteenth century ideas to become the universal rights of mankind).

\textsuperscript{345} KOHN, supra note 342, at 8-9; see also HOBBSPAM, supra note 330, at 88 (“Americans are those who wish to be.”). Connor goes so far as to suggest that Americans might be entirely unable to produce an ethnic nationalism: “[T]he absence of a common origin may well make it more difficult, and conceivably impossible, for the American to appreciate instinctively the idea of the nation in the same dimension and with the same poignant clarity as do the Japanese, the Bengali, or the Kikuyu.” CONNOR, supra note 330, at 95. A dissenting position is taken by Michael Lind, who argues that American nationalism is based primarily on race. See MICHAEL LIND, THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION 26-36 (1995). Lind’s argument, however, which is based on the history of race relations in America, relies on a false distinction between culture and political ideology; surely the latter is partly constitutive of the former. A better explanation for the role of race in American nationalism is provided by Samuel Huntington, who argues that the most salient characteristic of American history is a commitment to high ideals accompanied by a constant failure to live up to them. See SAMUEL P. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 221 (1981).
century. \textsuperscript{346} Samuel Huntington uses the shorthand phrase "the American Creed," which he defines as a notion of "liberty, equality, individualism, democracy, and the rule of law under a constitution" that draws on seventeenth-century Protestantism and Lockean and Enlightenment ideas of natural rights and social contracts. \textsuperscript{347} Americans, according to Huntington, were defined from the beginning as those who "hold these truths to be self-evident"; as a result, "national identity and political principles were inseparable." \textsuperscript{348}

Based as it was on a set of political beliefs, American nationalism was far removed from the territorial nationalisms of the nineteenth and twentieth centuries. Indeed, as Liah Greenfeld explains, one of the earliest disputes faced by Americans concerned "what was to be the concrete geopolitical referent of the American national loyalty." \textsuperscript{349} Tories feared that separation from Great Britain would lead to disintegration. Federalists contemplated a single nation of continental scope. Anti-Federalists doubted the possibility of a continental nation that was capable of ruling legitimately as the object of popular loyalty rather than through force and tyranny. \textsuperscript{350} The Constitution itself, by setting up a federal system that contemplates popular loyalties shifting between the state and national governments, \textsuperscript{351} seems to equivocate on "the question of what was, or whether there was, the American nation." \textsuperscript{352}

The issue of the proper territorial embodiment of American nationalism was further complicated by the continual westward expansion of the nation. Where was the proper repository of American ideals? The eastern seaboard? Non-Spanish North America? The entire continent, or beyond? The very idea of Manifest Destiny reveals starkly the American belief in the United States as "a new Canaan for those who wished to throw off the yoke of Egyptian oppression." \textsuperscript{353} As the bearer of a universal message for all mankind, \textsuperscript{354} America, wherever located, was in principle open to all who shared its ideals regardless of culture, ethnicity, or religion. America was thus open to the immigrant, whose loyalty "did not derive from the love of country [but] from the uplifting, dignifying effects of

\textsuperscript{346} See Kohn, supra note 342, at 9.
\textsuperscript{347} Huntington, supra note 345, at 14-15. Similar accounts are given by Belz, supra note 202, at 20; and McCardell, supra note 57, at 6, 336.
\textsuperscript{348} Huntington, supra note 345, at 24.
\textsuperscript{349} Greenfeld, supra note 333, at 403.
\textsuperscript{350} See id. at 423-26.
\textsuperscript{351} See The Federalist No. 46, at 295 (James Madison) (Clinton Rossiter ed., 1961) (explaining that the people have ultimate authority in a federalist system).
\textsuperscript{352} Greenfeld, supra note 333, at 423 (emphasis in original).
\textsuperscript{353} Kohn, supra note 162, at 310.
\textsuperscript{354} See id. at 167, 273; Greenfeld, supra note 333, at 422-23, 437 (describing the message of the universality of liberty as a part of the American Revolution, westward expansion, and immigration).
liberty and equality, the exhilarating lure of opportunity, and the enjoyment or even the expectation of a greater prosperity."\(^{355}\)

This fluidity in the concept of a territorially embodied America goes a long way toward accounting for the way in which Southern secession occurred. Radical Southern secessionists sought to replace an ideological American nationalism with one based on ethnicity, culture, and territory. Yet they soon found that their arguments were better received when framed within the long-standing debate concerning the proper territorial embodiment of the traditional, ideological American nationalism. Thus, secessionists like Davis soon found themselves arguing not that the South was the territorial embodiment of a Southern ideal, but that it was the territorial embodiment of the American ideal itself. Secessionists ended up arguing, that is, that America was properly understood to be located in the South because that was where American ideals were most fully realized.\(^{356}\) Of course, Southerners who made this argument were wrong—slavery was irreconcilably at war with basic American ideals of liberty and equality. Nevertheless, the version of Confederate nationalism that had the greatest impact and survived the longest did not propose a new identity based on a distinct culture or set of values, but proposed instead only a new territorial embodiment for an existing, common identity and set of values.\(^{357}\) It is for this reason that Southern constitutions and judicial decisions interpreting them—the official record and embodiment of Southern principles of self-government—contain not even a trace of anything that might be considered a distinctively Southern value.

B. Constitutional Disagreement in the American Nation

If this view is correct, it casts considerable doubt on the belief, associated with the New Judicial Federalism, that the various states differ materially in their fundamental values and political character. If being American implies a dedication to a set of common principles, ones held to be universally valid not only for all Americans but potentially for all humankind, then the possibility seems slight that the denizens of any American state, whether in the South or elsewhere, would diverge materially from those principles.\(^{358}\)

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355. Greenfeld, supra note 333, at 435.
356. See supra notes 227-33 and accompanying text.
357. See Kohn, supra note 342, at 106, 114-15 ("They separated from the Union not because they wished to assert themselves as un-American, but because they believed themselves the better Americans, more faithful to the original idea.").
358. See Huntington, supra note 345, at 61-75 (describing the difficulty that Americans have in changing their beliefs because of the centrality of those beliefs to their identity as Americans, and the various strategies they have adopted to deal with the tension caused by Americans' frequent failures to live up to their own principles). As to regions other than the South, one wonders what the Oregon
By no means, however, does this ideological uniformity imply unanimity. The content of the underlying American ideals is open to dispute, and is in fact continually disputed. Indeed, constitutional law itself is sometimes understood as a forum in which Americans debate the content of their principles and the nature of their identity. But the ideological grounding and universalism of American nationalism does carry implications for the meaning of constitutional disagreements among state and federal courts. The nature of American nationalism suggests that such disagreements are asserted not from without the system of American values by Virginians or Oregonians or New Yorkers possessed of a constitutionally distinct character or set of values, but from within the American identity by a polity that shares it at the constitutional level. Such disputes, that is, are internal disputes over the content of a common identity and common values.

This conclusion, in turn, has significant implications for the way in which state constitutions should be interpreted. It means, at a minimum, that state constitutions should not be approached from the perspective of some hypothetical, unique state character but from the perspective of a common American character. Consequently, as Paul Kahn has written, state courts need not rely on “unique state sources” to support interpretations of state constitutions; rather, they should treat state constitutions as attempts “to realize for [state] communities the ideals that are the common heritage of the nation.”

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Court of Appeals, see supra note 20, or the Alaska Supreme Court, see supra note 28, might make of the following passage from a leading recent book on the history of the American West:

Of all the meanings assigned to Western independence, none had more emotional power than the prospect of becoming independent of the past. But Western Americans did what most travelers do; they took their problems with them. Cultural baggage is not, after all, something one retains or discards at will. While much of the Western replication of familiar ways was voluntary and intentional, other elements of continuity appear to have caught Westerners by surprise—as if parts of their own character were specters haunting them despite an attempt at exorcism by migration. No wonder, then, that emigrants made so much of their supposed new identity; no wonder they pressed the case of their supposed adaptations to the new environment, their earned status as real Westerners. Accenting the factor of their migration and new location, Westerners tried to hold the ghosts of their old, imported identities at bay.

The West had no magic power for dissolving the past, a fact that Americans confronted at all levels, from the personal to the national.


359. See supra note 4.


361. Id. at 1166.
Similarly, state courts need not justify divergences from federal constitutional law in terms of unique state values or character because the divergences reflect no such thing. When a state court disagrees with federal interpretations of the United States Constitution, its disagreement is one among joint participants in a common American tradition; and it is a disagreement arising within that tradition, not outside it. Consequently, as a coequal participant with federal courts in the interpretation of a common constitutional heritage, a state court is entitled to part company with the United States Supreme Court for no other reason than, in the state court’s view, the Supreme Court has gotten it wrong.\(^3\)

The academic community has loudly criticized this position.\(^3\) Clearly, the criticism has had an effect. State courts seem far less willing in recent years to dispute United States Supreme Court rulings on the merits;\(^3\) instead, they seek support for divergent rulings with

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362. I hope in a future work to show that this result is not only consistent with, but dictated by, the constitutional framework of federalism.  

363. See, e.g., Ronald K.L. Collins, Reliance on State Constitutions—Away From a Reactionary Approach, 9 HASTINGS CONST. L.Q. 1, 2-3 (1981) (noting the tendency of courts and commentators to “brush aside . . . core considerations that underlie constitutionalism at the state level . . . in their scurry to foil philosophically unaccommodating federal precedents”); George Deukmejian & Clifford K. Thompson, Jr., All Salt and No Anchor—Judicial Review Under the California Constitution, 6 HASTINGS CONST. L.Q. 975, 975 (1979) (discussing the various dangers of the trend by some state courts to use state constitutions to supplant the federal Constitution as the basis for judicial review of the actions by branches of state government); Peter J. Galie, The Other Supreme Courts: Judicial Activism Among State Supreme Courts, 33 SYRACUSE L. REV. 731, 779, 786 (1982) (finding state judicial activism in interpreting state constitutional provisions differently than the United States Supreme Court has interpreted federal provisions to be problematic when based on ideological differences); Ken Gormley, Ten Adventures in State Constitutional Law, 1 EMERGING ISSUES ST. CONST. L. 29, 35 (1988) (observing that courts have “begun to demand more than mere disagreement” with the U.S. Supreme Court as a basis for creating new law under their own constitutions); Howard, supra note 14, at 1, 12-13 (noting the “danger that use of state constitutions will be simply ‘reactive,’” in that a judge who is disappointed with a U.S. Supreme Court doctrine will resort to the state constitution to achieve the preferred result); Paul S. Hudnut, State Constitutions and Individual Rights: The Case for Judicial Restraint, 63 DENV. U. L. REV. 85, 95 (1985) (criticizing state court divergence because it is often inspired by disagreement with the U.S. Supreme Court and “appears unseemingly result-oriented and unprincipled”); Kaye, supra note 15, at 399, 418 (“An argument for a broader construction under a state constitution than that established under the federal Constitution requires more than merely urging that some other result is preferred.”); Robin B. Johansen, Note, The New Federalism: Toward a Principled Interpretation of the State Constitution, 29 STAN. L. REV. 297, 300 (1977) (calling for standards for determining when and how a state constitution should be used to protect against unprincipled, result-oriented state decisions).

364. See, e.g., People v. Tisler, 469 N.E.2d 147, 157 (Ill. 1984) (“[W]e should not suddenly change course and go our separate way simply to accommodate the desire of the defendant to circumvent what he perceives as a narrowing of his [federal] fourth amendment rights . . . .”); State v. Muhammad, 678 A.2d 164, 173 (N.J. 1996) (“[I]t is not enough to say that because we disagree with a majority opinion of the Supreme Court, we should invoke our State Constitution to achieve a contrary result.” (quoting State v. Hempele, 576 A.2d 793, 815 (N.J. 1990) (O’Hern, J., concurring in part and dissenting in part))); State v. Gunwall, 720 P.2d 808, 812-13 (Wash. 1986) (arguing that departures from federal precedent should be “principled” and should be “made for well founded legal reasons and not by merely substituting our notion of justice for that of . . . the United States Supreme Court”).
justifications that go beyond mere disagreement. Yet this lack of confidence has driven state courts to search desperately for alternative ways to justify divergence from federal law, including the notion of unique state character. In making arguments based on unique state character and values, however, these courts have embraced a kind of justification that has no basis in fact, a development that can only further reduce the credibility of state constitutional decision making—credibility that state courts can ill afford to squander.

VI. Conclusion

Interpreting state constitutions in light of some supposed unique state values and character is a tempting strategy for state courts confused about the role assigned to them by federalism, uncertain about their relationship to the federal courts, and unaccustomed, after a long period of deferring reflexively to the Supreme Court, to being called upon for leadership in the protection of popular liberties. The proposition that every state polity has a unique and distinctive character guiding its constitutional choices appeals nicely to sentiments of chauvinism and local boosterism. Like modern Norman Vincent Peales, state courts tend to serve up the state’s unique character and values in a way that seems calculated to build local self-esteem, much as the state’s mouth-watering cuisine or unsurpassed trout fishing might be touted in other contexts. The unique state character thesis also allows state courts to occupy a comfortable and unthreatening position between state and national authority: it gives them just enough authority to assert a modicum of independence in constitutional interpretation, but not so much as to permit them to move from beneath the national umbrella.

The existence of these unique state values and characters, however, is principally a matter of faith: the evidence provides no hint of them. Surely if any part of the nation in any period might be expected to have displayed a distinct character and set of values, it would be the antebellum and Confederate South. Yet the historical and constitutional records tell a different story. As a matter of historical fact, according to historians who study the South, any differences between the South and North in culture, character, or values were slight—too slight, at least, to have played any significant role in the events that led to the decisions of Southern states to secede from the Union, and too slight by far to support contemporary

In a recent survey, Latzer demonstrates that state courts have most often followed the Supreme Court in the area of constitutional criminal procedure. See Barry Latzer, State Constitutional Criminal Law § 1:1, at 1-2 (1995). For a notable exception, see Hempele, 576 A.2d at 814-15 ("[T]he trouble with [the federal cases dealing with searches of garbage] is that they are flatly and simply wrong as the matter of the way people think about garbage" (internal quotation marks deleted)).
impressions, which have been artificially inflated by more than a century of political propaganda and romantic mythologizing.

This conclusion is borne out by examination of the Constitution of the Confederate States of America and the various constitutions of the individual Southern states in force between the Revolution and the Civil War, as well as the many judicial decisions interpreting them. There is quite simply no sign in these documents or in the body of judicial decisions, of any value or character trait that might be thought of as distinctively Southern. If anything, the constitutions and opinions show quite the opposite: that Southern courts and constitution makers accepted and openly embraced the most broadly national aspects of American constitutional tradition. Indeed, they went further: in several decisions the highest courts of Southern states unmistakably took the position that the national Constitution, the various state constitutions, and the inherited body of common law should be understood as separate instantiations of a single, unified body of universal constitutional principles. It is hard to imagine a position more directly opposed to the New Judicial Federalism’s hypothesis of unique state characters and values.

One possible explanation for this lack of Southern differentiation lies in the nature of American nationalism. Unlike other nationalisms based on territory, culture, ethnicity, or religion, American nationalism is an ideological nationalism based upon a shared commitment to a set of political ideals. If being American means sharing a set of values and ideals, then doubt is cast on more than historical claims concerning the distinctiveness of the South of a bygone era—doubt is cast as well on contemporary claims by contemporary courts that their state constitutions must be interpreted in light of the distinct character and values of the present state populace.

We live in an age that seems obsessed by the concept of difference. The identification and acknowledgement of differences undoubtedly has its place. Many of these differences create obstacles to shared understanding and appreciation that are difficult enough to accommodate, much less to transcend. In such an environment, to imagine differences where none exist or to elevate insignificant differences to the status of obstacles to the achievement of common goals seems a deeply misguided enterprise. The doctrine of unique state characters and values is a step in this wrong direction. It should be abandoned.