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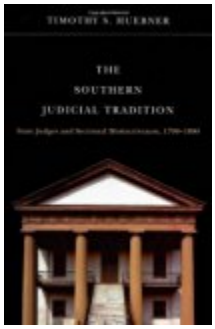
Timothy S. Huebner. *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness,1790-1890.* Athens: University of Georgia Press, 1999. xiii + 263 pp. $45.00 (cloth), ISBN 978-0-8203-2101-1.



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Southern Tradition or American Tradition?

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The search for identifiable subcultures within the larger context of the American legal system in the nineteenth-century has always been a problematic enterprise for historians. All would recognize local and regional variations within American law, but whether these translate into fundamentally different ways of thinking about and practicing the law remains an open question. Was there such a thing, for example, as "frontier law" which differed significantly from legal systems in more settled areas? Did regional differences translate into measurable legal differences in the South, or the East, or the Midwest? Was there such a thing as "southern law," with distinctive boundaries and customs; or were there simply Southern ways of applying American law?

These are difficult questions to answer. Whatever else may have separated nineteenth-century lawyers and judges in different parts of the country, the fact remains that they shared a loose but meaningful set of commonalities. The English common law system–with some variations and idiosyncrasies, of course–prevailed throughout the nation. Nearly every lawyer read Blackstone, Kent and Chitty. Until the end of the century, most stuied for their licenses in individual law offices, rather than formal law schools. Taken together, such common experiences constituted a viable national legal culture.

Add to this the difficulties involved in defining a particular regional identity, even in general, non-legal terms. Before we answer the question of whether there is such a thing as frontier law, we must first decide if there is such a thing as a "frontier," a matter mightily disputed by Western historians. Where the South is concerned, historians who study that region continually emphasize the murky nature of Southern identity, with its complex social, cultural, racial and ideological facets. Southern historians are often unsure of exactly what constitutes a Southern identity, legal or otherwise.

Any scholar who voluntarily enters this thicket of crisscrossing methodological and theoretical issues deserves credit for courage. While in the end I have reservations about the arguments Professor Huebner has advanced in *The Southern Judicial Tradition*, I applaud his valiant effort. He has produced what is in many respects a valuable book.

Huebner chooses the format of collective biography for his excursion into southern law, analyzing the lives and careers of six southern lawyers and jurists. His subjects are well chosen for their breadth of experience and their diversity. Some, like Joseph Henry Lumpkin, embraced the idea of a separate southern nation, while others–John Catron in particular–strongly opposed the creation of the Confederacy. One of Huebner's judges, Spencer Roane, was a member of the southern gentry, while others saw themselves as Jacksonian spokesmen for the rights of common white southerners. Huebner cast as wide a net as possible in selecting his subjects.

His biographies of these six men are crisply written,

well-researched, and grounded in a firm grasp of both history and legal doctrine. Huebner's analysis of southern court decisions in complex areas of criminal law such as justifiable homicide is cogent and through. When he addresses the various issues related to slave law–such as Judge Joseph Lumpkin's decisions on slavery and the "fellow servant rule," for example–he makes a valuable contribution to this rich area of American legal history. He is also quite sensitive to the effects of various non-legal contexts–cultural and social norms, his subjects' personal predilections, class and caste distinctions–on the historical development of the law.

Huebner offers interesting observations concerning the overall tendencies of southern judges, He argues that they increasingly saw their court decisions in national rather than sectional terms as the nineteenth century drew to a close. He also points out that southern judges, while clinging to the rules of precedent and common law procedures, were nevertheless quite sensitive to the social ramifications of their decisions. "Southern judges saw themselves as playing a significant role in their society as both makers of law and models of gentility," Huebner wrote. (p. 187).

There is much to like in *The Southern Judicial Tradition*; in many ways Huebner has produced a first-rate legal history. Yet in the end I was not entirely clear whether or not Huebner himself believed he had uncovered a "southern judicial tradition" in the sense of a uniquely southern take on the law. His choice of words–a "nineteenth-century southern judicial tradition"–would seem to imply that he was searching for a set of tendencies, a judicial paradigm, which set southern judges apart from their counterparts in other sections of the nation. Yet Huebner seemed to draw back from making such a claim. He argues that the central theme of this southern judicial tradition was the "evolving relationship between…political sectionalism and legal nationalism" and that "southern judges revealed the tensions between their involvement in the southern political order and their connection to the American legal community." (pp. 1, 8).

Fair enough; but where then do we find a singularl "southern" tradition in this tension? Would it not be fair to suggest that other jurists in other parts of the country felt pretty much the same tension between local concerns and the national legal culture? For example, in his analysis of Tennessee jurist John Catron's career, Huebner asserts that Catron had come to "think about law and constitutionalism in distinctively southern ways," citing Catron's stance against the National Bank and for Cherokee Indian removal in the 1830s (p. 68). While granting that these were both popular positions in the South at the time, does Catron's point of view make him "distinctively southern? " After all, a good many Americans in other parts of the nation also took Andrew Jackson's side against the bank, and had no qualms about Indian removal. Why would Catron's opinions not be, for example "distinctively western? " And if he was being both a southerner and a westerner, then where are the boundaries of a distinctively southern legal culture?

Perhaps what Huebner has uncovered here is not a "southern judicial tradition" at all, but rather an American judicial tradition which consists of judges who are required to continually balance local, sectional and national concerns. This a valuable contribution, but it is not quite what the reader is led to believe he/she will find in this book. At the very least, Huebner should have provided a detailed explanation of what he means when he uses the words "Southern" and "tradition." These are both problematic terms, and his somewhat lax use of both creates confusion concerning precisely what it is he wishes to assert.

These reservations aside, however, *The Southern Judicial Tradition* is a useful work, illuminating the lives and careers of six heretofore obscure Southern jurists in a learned and interesting fashion. Huebner has not laid to rest questions about whether or not there is such a thing as a distinctive Southern law, but he has at least provided a good starting point for further inquiry.

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