EX UNO PLURA

STATE CONSTITUTIONS AND THEIR POLITICAL CULTURES

JAMES T. McHUGH

Ex Uno Plura

SUNY series in American Constitutionalism

Robert J. Spitzer, Editor

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To Eve

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Preface

Several years ago, I was interviewed for a faculty position at Caspar College in Caspar, Wyoming as I was finishing my doctorate. I was informed, at that time, that one of my responsibilities would be to teach a state-mandated course in Wyoming constitutional law. I was reassured by one of the faculty members that the task would not be as mundane as it might seem, for the Wyoming Constitution includes, I was told, unique and interesting variations upon the usual American constitutional themes. For example, I was told that land owners in Wyoming are constitutionally barred from holding exclusive property rights over the water found on their land.

This reference to Wyoming's constitutional provision of state-controlled riparian water rights seemed to contradict a common and popular image of this state and its political community. The popular image of Wyoming as an archtype of the "Old West" and the spirit of the rugged, individualistic cowboy, gun slinger, and frontier entrepreneur would have led me to believe that individual property rights (especially as vested in the category of real property that is typified by a land claim) would be jealously and rigidly guarded and lauded by the Wyoming constitutional tradition. This apparent contradiction forced me to think seriously about the nature and sources of the fundamental values that would make public ownership of water on a person's otherwise-private property a constitutionally entrenched principle of Wyoming society. So, even though I ultimately did not become a member of the faculty at this Wyoming institution of higher education, I did take from this brief experience a desire to explore this matter further, as though I had, indeed, accepted the responsibility for teaching the sort of course that this faculty position would have required of me. The final result of that inquiry, several years later, is this book.

Just as this book was about to enter its final production, the Vermont Supreme Court ruled on a landmark case that reinforced this same inquiry. It provided, therefore, an intellectual "bookend" to the process of critical thought that began in Wyoming, several years earlier. The 2003 case of *State of Vermont*

vs. Jonathan L. Sprague reinforced, dramatically, the first premise of the thesis that this book has sought to prove: constitutions are political and philosophical documents that reflect (in the tradition of legal positivism) the ultimate will of the sovereign, especially in terms of that sovereign's most fundamental beliefs, values, ideals, and cultural norms.

Chapter one, article eleven of the Vermont Constitution was invoked, within *Vermont vs. Sprague*, as providing a more stringent standard of privacy than the federal constitutional tradition, consistent with previous rulings that have pondered the singular history and heritage of Vermont. The argument underlying this unanimous Vermont Supreme Court ruling and its evaluation of a uniquely Vermont understanding of the right to privacy is not merely a legal one; it reveals the special role that constitutions play in identifying and shaping the political culture of a society. That process is particularly obvious and effective regarding relatively cohesive and homogeneous societies that small American states, like Vermont, most often provide. But the validity of this sentiment remains true, even when it is not so obvious.

The full thesis of this book is fourfold: (1) constitutions are political expressions that are understood particularly well within the framework of a political-culture method of analysis; (2) that analysis requires the inclusion of traditional, normative political philosophy, considerations of historical influences (especially regarding the presence and migration of various peoples), and an evaluation (even if only isolated or cursory) of examples of cultural expression through the work of artistic, religious, and literary elites; (3) American states are not merely geographically-manufactured entities defined by arbitrary boundaries but unique societies with their own special histories and cultures; (4) this political-culture analysis of select state constitutions provides important insights into the true political nature of constitutional law and its proper role within the American federal polity.

Therefore, this book begins with a general overview of the political culture of the broader American constitutional tradition, including a review of widely accepted analyses of the competing variations of American liberal democracy. Then, several state constitutional traditions are examined (varying in size, region, diversity, and heritage), providing an original analysis of each one from this legal, philosophical, and political culture perspective. The book concludes with observations regarding the increased relevance of state constitutions to American society and its many political systems.

A decentralizing trend in American judicial federalism has made the study of state constitutions increasingly important. That trend parallels a general and ongoing need for political, social, and philosophical analyses of American states and local communities. Constitutional law began, as an area of serious study and application, within the discipline of political science; it was included within the general law school curriculum only later. This book seeks to contribute to the

search for insight in this vital area, in addition to the attempt to remove constitutional jurisprudence and public law from the parochial and overwhelming dominance of technical practitioners and return them to their origins in the study of the humanties and, especially, the social sciences.

Laws, after all, are not created by law clerks but by politicians representing (in a democracy) a sovereign people. In a federal system, such as the United States, those people function at more than one level of sovereign social and political existence. These people are motivated by profound beliefs, values, and ideals, expressed through their respective interpretations of history, politics, art, and philosophy. This book seeks to identify and understand some of these people in a constitutional context and, hopefully, in a truly meaningful way, even if the method employed has its own limitations and imperfections. Hopefully, in this way, the fundamental legal expression of these sovereign people can be applied toward an equally meaningful and just ideal.

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Chapter 1

Introduction

American Constitutionalism and Political Culture

This book provides a survey of eight state constitutions, their judicial histories, the background of their creation and development, and an interpretation of the political culture that is unique to that state, which can be used to explain distinctive features and practices of that particular constitutional tradition. The selected states represent a cross section of various regions of the United States. They also range from large, diverse states, like California, to small and relatively homogeneous states, like Wyoming. Most importantly, the choice of these states was determined by the fact that each one offers a distinctive example of the variety of cultural and legal influences that have shaped the wide mosaic of American constitutionalism. This analysis ranges from the "frontier autonomy" found in Alaska to the microcosm of the broader American experience found in California; the republicanism of the Deep South found in Georgia; the Polynesian and Pacific rim influences found in Hawaii; the Spanish and French patriarchal legacies found in Louisiana; the religious and humanist collaboration found in Utah; the progressive republicanism found in Vermont; and the communitarian prairie experience found in Wyoming.

This book will *not* attempt to analyze American Federalism, nor will it offer novel theoretical insights upon this subject. Nonetheless, the already well-documented trends of judicial federalism of the late twentieth and early twenty-first centuries should be acknowledged, in passing, as a prime source of a greatly increased interest in, and equally increased relevance of state constitutions. The efforts of the Burger and Rehnquist Courts to reverse the centralizing trend of American federalism since the end of the American Civil War and, especially, since the time of the New Deal and the Warren Court era, have created opportunities for a potential expansion of the role of state judicial systems.[1] Reinterpretations of the Eleventh Amendment of the United States Constitution and the application of a doctrine of judicial restraint, especially regarding civil rights

and liberties at the federal level, seem to be part of an ongoing general withdrawal of federal courts from their previous activism.[2] Therefore, renewed attention has been focused upon state judiciaries and their respective state constitutional traditions as an alternative source of individual protections, as well as sources for redefining policies and shaping the political community. This opportunity for greater state constitutional activity has been labeled by some commentators as a "revolution" of American political development.[3] This reaction to a decentralization of judicial activity that has been identified as part of a movement called the "new federalism" has created both an opportunity and a need for state judicial bodies to reevaluate their own constitutional traditions, especially in terms of addressing matters of government authority, civil rights, and liberties.[4]

A growing interest in state constitutional law requires a critical appraisal of the constitutions of individual states as separate and distinct traditions. Emphasis needs to be placed upon the underlying cultural and ideological values that define these constitutions and direct their interpretive development. Despite the occasional disdain of some legal practitioners who regard constitutional law as primarily a technocratic process, these documents are, in fact, political instruments that provide the foundational expression of the political ideals and values of a society that are derived, in turn, from philosophical experience and discourse.[5] Judicial originalists and activists, alike, are extremely solicitous of this interpretive approach, whether it emphasizes the "original understanding" of the constitutional framers and their society or a maturing of beliefs and principles through an evolution of that cultural dialogue. Constitutions are supreme declarations of the political culture of any society, including both the state and national level of the United States.[6]

Constitutions As Philosophical Declarations

Constitutions are neither technical instruments of bureaucratic means, nor are they mere tools of enforcing raw political power. Constitutions are philosophical declarations of the will and fundamental values of the sovereign.[7] Judges inevitably draw upon philosophical beliefs in the interpretation of public law, even when claiming a fierce attachment to a so-called legal objectivity.[8] But a momentous difference exists between a jurist applying her or his personal philosophical and ideological values to a legal analysis (including one with constitutional implications), and the ability to make a distinct connection between those invoked principles and the particular history, culture, and developing credo of a politically defined community.

The relationship between state constitutional development and political culture has not been overlooked by legal scholars. However, much of that consideration appears to accept the basic liberal democratic foundation of that tradition and emphasize, instead, aspects that seem to be more closely related to political behavior and competition, rather than more foundational philosophical

ideas.[9] These sources are vital to state constitutional analysis. Nonetheless, the approach of traditional political theory offers insights that may prove to be especially useful, given the ultimate nature and purpose of constitutions, in general.

This book will stress those jurisprudential examples that offer that link, especially when it is made consciously and demonstrably. That condition often reduces the analysis to selective precedents and jurisprudential evidence which may not always provide, ultimately, a comprehensively conclusive case. Yet that analysis will offer meaningful insights that are indispensable to the consideration of whether or not state constitutions truly offer a distinctive source for American public law. That goal, itself, should be sufficiently laudable to warrant the propositions offered within these chapters, even if their main success lies in provoking further debate and analysis.

Shaping American Public Law

State judiciaries and their respective constitutional traditions had not been particularly prominent, historically, in shaping American public law. Federal courts, invoking the United States Constitution, gradually had become (since the adoption of the Fourteen Amendment of the United States Constitution, the rise of the interventionist state, and the reaction of the Warren Court to the challenges of the Civil Rights movement) both the most visible venue and most manifest source for addressing most American constitutional issues during much of the country's constitutional history, especially concerning the critical area of civil rights and liberties.[10] However, that trend shifted during the period of the Burger and, especially, Rehnquist Courts, providing opportunities for state governments and their respective constitutions to become increasingly significant in many areas of public policy and individual constitutional protections.[11]

Cases and Opinions—Independent State Grounds

A significant example of this opportunity was articulated within the 1982 United States Supreme Court case of *Michigan vs. Long*.[12] The Michigan Supreme Court overturned a conviction for possession of marijuana (as the result of a search of the defendant's vehicle), largely upon the basis of an interpretation of the Fourth Amendment to the United States Constitution, especially as provided by the United States Supreme Court decisions in *Terry vs. Ohio*[13] and *South Dakota vs. Opperman*.[14] However, the defendant noted that the state high court also mentioned independent state constitutional grounds for reversing his conviction, and he asserted a contention that the federal high court should not challenge that distinct, state-level guarantee.[15] But the United States Supreme Court's majority opinion, in this case, determined that the Michigan Supreme Court relied, primarily, upon federal constitutional provisions and precedents for

making its decision, which it regarded as providing insufficient grounds for reversing the initial conviction. Otherwise, the opinion of the court asserted, a reversal based upon independent state constitutional doctrines and civil liberties guarantees could legitimately have been applied as a different legal source, derived from a separate constitutional tradition and its distinctive values.[16]

> This *ad hoc* method of dealing with cases that involve possible adequate and independent grounds is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved. . . .
>
> [If we find] clearly and expressly that [a ruling] is alternatively based on *bona fide* separate, adequate, and independent grounds, we, of course, will not undertake to review the decision. . . . We believe that such an approach will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law.[17]

Justice John Paul Stevens dissented from this outcome that reinstated the original conviction. Nonetheless, his opinion reinforced the essential reasoning adopted by the majority opinion regarding the relevance of a separate state constitutional jurisprudence. That reasoning recognized the important role of the constitutional jurisprudence of the various states to promote the diversity of the several American polities and their fundamental legal and judicial traditions, especially in defense of the interests of individual citizens.

> And I am confident that all members of the Court agree that there is a vital interest in the sound management of scarce federal judicial resources. They are fortified by my belief that a policy of judicial restraint—one that allows other decisional bodies to have the last word in legal interpretation until it is truly necessary for this Court to intervene—enables this Court to make its most effective contribution to our federal system of government. . . .
>
> In this case the State of Michigan has arrested one of its citizens and the Michigan Supreme Court has decided to turn him loose. The respondent is a United States citizen as well as a Michigan citizen, but since there is no claim that he has been mistreated by the State of Michigan, the final outcome of the state processes offended no federal interest whatever. Michigan simply provided greater protection to one of its citizens than some other State might provide or, indeed, than this Court might require throughout the country.[18]

The ability of states to apply more stringent constitutional standards, in defense of individual rights and liberties, than the United States Constitution provides would be expressed through cases such as *Pruneyard Shopping Center vs. Robins*.[19] The extension of a separate standard for free expression protections, under the California Constitution, for petitioners who wanted to use a shopping center as their venue of public expression, despite objections made upon the basis of a private property claim, affirmed this principle of independent

state grounds. It became, as Justice William J. Brennan Jr., concluded, ". . . part of a very healthy trend of affording state constitutional provisions a more expansive interpretation than this Court has given to the Federal Constitution."[20]

Constitutional Standards

However, state governments are not allowed to impose a constitutional standard grounded upon just any ideological basis. ARTICLE 4, SECTIONS 1 and 4, of the United States Constitution also have provided, in this respect, implications for the issue of judicial federalism. The "full faith and credit" clause established a strong position for the federal judiciary as a guardian of "uniform application" of law and constitutional standards among the states. However, that clause merely assures a mutual recognition of basic protections, especially concerning administrative matters.[21] A potentially more significant concept is enshrined within ART. 4, SEC. 4 of the United States Constitution, stating that "[t]he United States government shall guarantee to every state in the Union a Republican form of Government."[22] However, this "guaranty clause" has not been used by the federal courts as a means of stipulating that states conform to a particular type of government, either institutionally or philosophically. The courts have treated those ideological challenges as constituting "political questions" that are, if enforceable, matters for the popularly elected branches of the federal government to address.

The social norms and the legal, economic, and political institutions of American society reflect the seventeenth-century liberalism of an emerging mercantile system. It was embraced by people who consciously rejected the hierarchical sense of universal order, and the accompanying political controls, that feudalism had imposed upon a decentralized Europe. Its central focus was placed upon the individual person, rather than upon an organic and stratified collectivity within which structure each person played a designated role. Therefore, its emphasis was upon those values that supported individualism, including the concepts of freedom and autonomy.[23] But this emerging ideology was stimulated by a profound economic development; the dominance of an agrarian economy that produced medieval feudalism (with its emphasis upon the aristocratic control of land) was displaced by the rise of towns and their system of artisans, laborers, merchants, investors, and other preindustrial activity.[24]

Autonomy

Peoples' destinies could be established through their own efforts, rather than through the accident of birth; each person was, potentially, a self-contained economic unit. Liberalism articulated the belief in this system. It emphasized the value of personal "autonomy," through which all persons, when allowed to act through an absence of external sources of interference and coercion (including

government and other persons), and the simultaneous provision of the basic tools that are necessary for accomplishing these goals, could control not only their social and physical environment, but also their own capacity to make decisions within that environment.[25] Autonomy, with its dual emphasis upon being "left alone" and a capacity to determine one's own destiny, became, as Gerald Dworkin explains, a defining principle of liberal ideological and legal traditions.

> Suppose we think of liberty as being, roughly, the ability of a person to do what she wants, to have (significant) options that are not closed or made less eligible by the actions of other agents. Then the typical ways of interfering with the liberty of an agent (coercion and force) seem also to interfere with her autonomy (thought of, for the moment, as a power of self-determination). If we force a Jehovah's Witness to have a blood transfusion, this not only is a direct interference with this liberty, but also a violation of his ability to determine for himself what kinds of medical treatment are acceptable to him. . . .
>
> But autonomy cannot be identical to liberty for, when we deceive a patient, we are also interfering with her autonomy. Deception is not a way of restricting liberty. The person who, to use Locke's example, is put into a cell and convinced that all the doors are locked (when, in fact, one is left unlocked) is free to leave the cell. But because he cannot—given his information—avail himself of this opportunity, his ability to do what he wishes is limited. Self-determination can be limited in other ways than by interferences with liberty.[26]

The resources utilized in support of this individual effort, whether assuming the form of goods, services, or a medium of exchange, have provided the basis for this economic system. These resources could include the things that people own, as well as the labor that they produce, and they could be identified by the universal label of "property." This label came to refer to an ideological value, rather than merely a medium of exchange, since everything that could be associated with the individual participant within this system could be categorized as "property." Therefore, all persons could be defined in terms of property, and this definition could be extended to their work, the items that they owned, the ideas that they formulated, and the beliefs that they pursued.[27]

The people who inhabited this part of North America prior to the arrival of Europeans possessed and exercised different beliefs and values that contrasted distinctly with all ideological thought of the period. The various aboriginal peoples of this land were diverse, and so were the "political" systems under which they lived.[28] Nonetheless, among the different native peoples (to whom the Europeans applied the misidentifying label of "Indian"), there have existed certain shared principles and values that continue to be shared among them as they struggle for cultural survival.[29]

Native Peoples

Native peoples have developed a holistic approach to their cultural and natural environment; they perceive their existence in terms of the entire community. Legal customs, traditions, and institutions of native peoples within North America have reflected these principles; a consensus of the community (especially through functional group and kinship ties), rather than the authority of a ruler or the delegated consent of an electoral majority, provides the basis for law, policies, and actions.[30] This spirit of consensus, cooperation, and balancing the needs of the entire community served as an inspiration for early American colonists from European countries. Although they did not adopt the specific principles and practices of the native inhabitants whom they encountered, the spirit of this way of life may have inspired, indirectly, the colonists in their own struggles for survival and coexistence as they created their own unique laws, customs, and political systems.[31]

Immigrant Values

However, it was liberal beliefs that were embraced generally by those immigrants who colonized that part of the continent that became the United States of America. These values also were applied to the legal, social, economic, and political institutions that they created. They remained the guiding force behind these institutions, even though they were subject to the scrutiny and control (though at a considerable distance) of an imperial government that did not necessarily share these values—at least, not with the same fervor, nor with the same willingness to discard the conservative remnants of a feudal system that was regarded, still, with fondness by a hierarchically oriented ruling elite.[32] The American interpretation of the liberal tradition was predominantly libertarian in nature, stressing an atomistic vision of society, within which individual liberty became more highly prized than the moral and political virtues of collective stability, security, and order.[33]

Creation of a "Higher Law"

The most prominent source for articulating this liberal influence upon American constitutional development and political thought was John Locke, especially, his *Second Treatise of Government*. Locke used the philosophical device of the "social contract" to illustrate the significance, and practical application, of the fundamental values of property, individualism, liberty, and autonomy, and it became a model for American constitutionalists.[34] It became the basis for the creation of a "higher law" of American jurisprudence that would guide the country's political and legal evolution, and its libertarian values would remain relatively unquestioned and assume the image of an objective and "natural" system of law and government.[35] Charles Mullett has described this form of

justification that would influence, profoundly, the manner in which Americans (including the country's political and judicial elites) would perceive their constitutional heritage.

> In his second Treatise Locke was concerned with the true end of government. In order the better to discover that, he felt it necessary to begin with man in a state of nature controlled by natural law. For him the state of nature was one of equality and liberty, where no man could invade the rights of his neighbor or exercise absolute power over another except by violating the law of nature. Nevertheless, violations did occur and in order to prevent them civil government was instituted, yet this government itself had to conform to the law of nature if it was to receive the obedience of subjects. Among the rights guaranteed by natural law were life, liberty, property, and equality, and the true end of political society and government was to see that these rights were not infringed. While the legislative power was the supreme authority in the government it should not be arbitrary to the extent of detracting from man's liberty, taking his property without his consent, or giving power over him to some one else. These limits were placed upon government by the law of God and nature, and when transgressed, government ceased to be instituted of God and nature and became a tyranny and usurpation. Then by the same law which controls all government the people could exercise the right of revolution.[36]

Hartz's "Fragment Theory"

Louis Hartz offered a sweeping theory regarding the establishment, evolution, and dominance of libertarian values throughout American culture and ideology. He applied his "fragment theory" to the history of "new societies" that were established through colonial settlement and, in making that connection, he concluded that the United States was the product of ideas and values that dominated seventeenth-century England, especially among religious dissenters and the rising "middle class" of merchants, artisans, and entrepreneurs.[37] This analysis has been criticized because of its flawed attempt to provide a theory that is overbroad and simplistic in its desire to impose a uniform explanation for the development of diverse societies and cultures throughout the world.[38] This theory also has been criticized for using insufficient, and often selective, evidence (especially historical accounts) in support of it.[39] But it also offers a compelling insight into the sort of issues that define modern constitutionalism, especially within countries such as the United States. Therefore, the central premise of the Hartzian model has been accepted widely, despite its defects.[40]

Republican *Versus* Liberal Beliefs

However, some scholars have claimed that the basic values of colonial Americans were informed by republican, rather than strictly liberal, beliefs. These

observations have been cited as being particularly applicable to the New England colonies, where the Puritan tradition continued to evoke the principles of a religiously inspired republican government which shaped the English Commonwealth that was established by Oliver Cromwell.[41] These republican values were articulated by eminent authorities such as English political theorist, James Harrington, English poet, John Milton, and republic political theorist, Algernon Sydney.[42] Seventeenth-century republicans also accepted fundamental assumptions regarding personal freedom, autonomy, individualism, and a right to possess property that constitute the core values of the liberal tradition. But they differed from more libertarian liberal theorists by emphasizing the need for the state to promote the exercise of "civic virtue" among all members of society.

The precise nature of this virtue could vary, but it would conform to accepted standards of moral behavior and participation in public institutions that would promote the common interests of the community.[43] This republican sentiment promoted resistance to British imperial rule over the American colonies, especially since that governance did not conform to the moral, political, and economic aspirations of Americans. But it also replaced, arguably, both an overriding preoccupation with property as *the* central value of American society and expectations that individual persons should enjoy complete freedom regarding private behavior and the choice of whether or not to engage in public participation with the belief that the American Revolution was waged in support of this community-based ideal of "civic virtue."[44]

The most conspicuous of these republican influences upon the development of the American ideological tradition was the revolutionary pamphleteers who adopted the pseudonym (in honor of that Roman defender of republican values) of "Cato." These writings exhorted the American colonists to resist tyranny and replace it with a political community in which freedom and virtuous participation would coexist.

> In arbitrary countries, it is publick *[sic]* spirit to be blind slaves to the blind will of the prince, and to slaughter or be slaughtered for him at his pleasure: But in Protestant free countries, publick spirit is another thing; it is to combat force and delusion; it is to reconcile the true interests of the governed and governors; it is to expose impostors, and to resist oppressors; it is to maintain the people in liberty, plenty, ease, and security.
>
> This is publick spirit; which contains in it every laudable passion, and takes in parents, kindred, friends, neighbors, and every thing dear to mankind; it is the highest virtue, and contains in it almost all others; steadfastness to good purposes, fidelity to one's trust, resolution in difficulties, defiance of danger, contempt of death, and impartial benevolence to all mankind. It is a passion to promote universal good, with personal pain, loss, and peril: It is one man's care for many, and the concern of every man for all.[45]

However, even these republican sentiments accepted the most basic of liberal principles, including a high regard for individual freedom and the protection (though not to the exclusion of other principles) of property, even though they emphasized competing values of positive participation and behavior, as well.[46] Furthermore, a wider, and well-established, body of scholarly literature continues to identify the fundamental values of seventeenth-century liberalism as providing the dominant influence upon American social, political, economic, and legal development.[47] This influence would become even more apparent during the years during, and following, the adoption of the United States Constitution, and it would be reinforced throughout the history of the political and judicial development of that American constitutional tradition.

Lockean Liberalism

The parameters of this Lockean liberalism and its conception of rights and liberties became the basis for a constitutional tradition that a preponderance of Americans could share. However, the United States Constitution addressed this ideological influence only at a very general level. The most basic tenets of this ideological tradition could find broad acceptance throughout the former American colonies, including republicans and Hobbesian classic conservatives. But regional variations in demographic, climatic, cultural, and economic terms were considerable. So, a shared interpretation of the liberal basis of American constitutional law could exist only in terms of its most essential framework. Most Americans could accept, therefore, the validity of certain basic libertarian principles, but a more considered interpretation could not find such ready agreement.[48]

The true nature of the ideological tradition that British colonists brought with them to the American colonies was more complex and varied than that assessment suggests. Profound differences could be observed, in this respect, among the different regions of the American colonies, especially by the early part of the eighteenth century. A simple characterization of these regional differences portrays the northern colonies as recipients of religious dissenters and mercantile entrepreneurs, the middle colonies as recipients of traders and tolerant freethinkers, and the southern colonies as recipients of Anglican planters and other agrarian laborers. That assessment does not offer a complete, or entirely true, portrait of the composition and orientation of these colonies, but it does reflect certain basic differences that did contribute to the development of distinctive regional variation of American federalism and the American liberal tradition.[49]

Ironically, the agrarian economy of the American Deep South would produce a culture that arguably was much more libertarian regarding governmental economic policy than its northern counterpart, where the process of industrialization would create an economic and cultural climate that would be more conducive to the role of governmental authority and the restrictions that it could impose upon the marketplace. On the other hand, the desire to preserve the

South's unique economic environment would influence a cultural acceptance of the role of the state as a preserver of the culture of a particular political community, while northern industrialization would contribute to the successful development of a capitalist economy within that region that would motivate many of its people to adopt *laissez-faire* values regarding the concept of individual liberty.[50] Two political figures from the early history of the United States, in particular, would articulate these fundamental differences of governmental policy orientation and ideological perspective.

Jeffersonian and Hamiltonian Perspectives

Thomas Jefferson emphasized a political philosophy that strongly reflected the influence of a Lockean perspective. He was eager to limit the scope and power of all levels of government, but particularly at the federal level. Alexander Hamilton emphasized a political philosophy that encouraged the active participation of government in support of society's economic (especially its emerging industrial) infrastructure, while maintaining basic liberal values and commitments. Their perspectives were similar, though, regarding a fundamental understanding of the nature and ideological value of "property."

However, Hamilton and his political and ideological supporters (including the members of the loosely defined Federalist Party) were especially concerned with the need to promote those property interests that could advance the economic development and prosperity of the country most effectively, including investors, entrepreneurs, and other economic elites. Jefferson and his supporters (including the members of the emerging Democratic-Republican Party) believed that such an orientation would threaten the property interests of the vast majority of citizens, including farmers and workers. Therefore, they embraced an ideological perspective that promoted a decentralized federalism, within which smaller and more local units of government (which were more familiar with, and could be more easily controlled by, the citizens of a particular state, city, or town) would be responsible for promoting and protecting the property interests of their respective citizens.[51] This approach contrasted sharply with the Hamiltonian focus upon a strongly centralized federalism that would coordinate, facilitate, and assist the process of building an integrated national economic system that would increase prosperity generally and eventually advance, indirectly, the property interests of all citizens, including farmers and industrial workers.[52]

Madison's Interpretation

James Madison offered an ideological interpretation that reconciled, in some ways, these fundamental differences. He agreed with Hamilton upon the need to create a republican government at the national level that could promote the interests of the country as a whole.[53] However, he agreed with Jefferson's concerns regarding

individual liberties and the need to protect the interests of all citizens against the potential abuses of a political and economic elite. Furthermore, he appeared to emphasize an understanding of "property" which reflected a more abstract definition of it that arguably was more consistent with the original Lockean vision. This interpretation recognized the economic motivations behind this concept, but it also acknowledged the fact that "property" could be understood as representing a broader idea than mere economic commodities.[54]

Emergence of a Constitutional Process

The Bill of Rights that emerged from the American constitutional process reflected the Jeffersonian ideal, especially since it was created with the deliberate intention of restricting the power of the federal government, while leaving state governments free to develop their own protections of rights and liberties that could be based upon the varying predilections of their respective political communities.[55] But Madison also shared Hamilton's fondness for the creation of republican institutions on a national scale. He expressed the belief that a large and diverse republic could permit the expression of the popular will, and the protection of their rights and interests, without undermining the interests of economic and political elites who provide the talent and resources that are necessary for financial prosperity and societal success. He argued that such a union would incorporate a diverse population that would not permit the control and manipulation of governmental institutions on behalf of a single social, economic, or regional interest. Political institutions that provided for the division of the basic responsibilities of government (essentially, those powers that are related to the legislative creation, executive enforcement, and judicial interpretation of laws) into a "separation of powers," as proposed by continental liberal philosophers (such as Montesquieu)[56] within the context of a country that was as large and diverse as the United States, would provide the key to that success.[57]

However, basic ideological tensions continued to influence the evolution of American liberal democracy. Regional tensions among the largely industrial North, the largely agrarian South, and the emerging West exacerbated these tensions. An increasing popularity of populist sentiments that reflected many, but not all, of these American values contributed to the rise of a political and ideological development that became known as "Jacksonian Democracy." The precise parameters of this loosely used term are ambiguous, but it included support of expanded suffrage, a reduction of government restrictions on the possession and use of property (including the human property of slaves), assistance for economic (including agrarian pioneer) initiatives and western expansion, and the promotion of evolving liberal notions of individual "equality" and social egalitarianism. The imposition of particular expressions of private morality (especially as connected with the Second Great Awakening among religious evangelicals and the Puritan legacy of the colonial North) upon unwilling members of society was

opposed, strongly. Opposition to an expanded definition of the public realm at the expense of the private citizen, also found expression within this movement.[58]

Jacksonian Democracy

Jacksonian Democracy seems to have reflected strong libertarian and decentralist tendencies that have existed throughout American society (including many parts of the North), but it also revealed profound inconsistencies within that belief system that have plagued the development of liberal democracy throughout American history. The definition of citizenship may have been expanded beyond the limits of specific property qualifications, but it remained strongly restricted to men of European descent. It rejected class distinctions and privileges, but it also encouraged a populist response to government that could endanger basic political and economic institutions, including, ironically, those judicial institutions that were created in order to protect the civil rights and liberties of all citizens, regardless of their relative level of affluence. It sought to limit governmental institutions that benefited economic elites, but it failed to promote the creation of institutional protections preventing the economic abuses of those same, unfettered economic elites against their employees and customers.[59]

These contradictions would be addressed violently during the American Civil War. The victory of the Union forces over the Confederate States of America made it possible for the industrial North to impose its ideological vision upon the defeated South.[60] The most significant resulting constitutional change was the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments. It was the Fourteenth Amendment, in particular (especially within SEC. 1), that provided the basis for the judicial imposition of those ideological values that had motivated much of the Union effort during the Civil War. This capacity was provided especially through the extension of "due process" protections and the "privileges and immunities" of all American citizens against the actions of all American governments.

These fundamental principles tended to be limited to the most basic tenets of liberal democracy, particularly from a Lockean perspective. This libertarian approach is revealed most effectively within those cases that addressed the issue of governmental intervention in, and regulation of, the economic marketplace. Members of the United States Supreme Court, in particular, tended to support a *laissez-faire* economic perspective which complemented this political libertarian position,[61] and this support was reflected within a series of constitutional cases that occurred during the late nineteenth and early twentieth centuries.[62]

Cases and Opinions

The seminal precedent that defined this judicial era was the 1904 United States Supreme Court case of *Lochner vs. New York*. The New York Legislature attempted

to limit the number of working hours of bakeries and other businesses, in response to concerns regarding health conditions and the overworking of exploited workers. A majority of the Supreme Court declared that this legislation was unconstitutional, despite the fact that it did not violate any specific provision that could be found within the United States Constitution. Justice Rufus W. Peckham claimed that these laws violated an unenumerated, yet fundamental, liberty (especially as implied by the Fourteenth Amendment) of unfettered contract between private parties, such as an employer and employee.

> It seems to us that the real object and purpose [of these labor statutes] were simply to regulate The hours of labor between The master and his employés (all being men, *sui juris*), in a private business. . . . Under such circumstances The freedom of master and employé to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.[63]

A largely unstated assumption of this opinion is that this "freedom of contract" acts as a means of defending a liberal economic order that is regarded as being so fundamentally correct and necessary for ensuring the general welfare of American society that it might be considered to be "natural," which word is used repeatedly within this majority opinion.[64] However, although the dissenting justices acknowledged that such an unwritten principle, which guided the broad economic participation of American society, also might reflect an important manifestation of the philosophical basis of the American constitutional tradition, they challenged the judicial assertion that the presence of this principle guaranteed an inalienable "freedom of contract." For example, Justice John M. Harlan insisted that a fundamental liberty of this nature is not, necessarily, an absolute one.

> Speaking generally, the State in the exercise of its powers may not unduly interfere with the right of the citizen to enter into contracts that may be necessary and essential in the enjoyment of the inherent rights belonging to everyone, among which rights is the right "to be in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation."[65]

Justice Harlan was not adverse to the idea of a "higher law" that reflected basic, American ideological values, but he believed that its application should be bounded by certain definable limits.

> Granting then that there is a liberty of contract which cannot be violated even under sanction of direct legislative enactment, but assuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as the State may reasonable prescribe for the common good and the well-being of society, what are the conditions under which the judiciary may declare such regu-

> lations to be in excess of legislative authority and void? Upon this point there is no room for dispute; for, the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power.[66]

This opinion would remain a minority one among American jurists for more than forty years, and this conflict represented a major ideological transition within American society. Justice Oliver Wendell Holmes Jr., in his famous dissenting opinion in *Lochner*, correctly noted that "[t]his case is decided upon an economic theory which a large part of the country does not entertain."[67] The United States industrialized rapidly during the latter nineteenth, and early twentieth centuries. This economic transformation resulted in vastly increased prosperity for some, but not all, Americans. The exploitation of workers, the weakening of competition through the creation of commercial monopolies, a growing disregard for basic standards of health and safety, contributed to a reinterpretation of the proper role of government within a liberal democracy and a weakening of the traditionally strong American adherence to the libertarian principles of a *laissez-faire* economic system.[68] This reinterpretation was aided by John Stuart Mill's articulation of the "harm principle."[69] The role of a government in protecting society from physical harm (for example, against foreign invaders or domestic violent criminals) was accepted readily. But Mill also suggested that this principle could be applied against the damaging effects that certain types of economic conduct could impose upon members of society.

> Again, trade is a social act. Whoever undertakes to sell any description of goods to the public, does what affects the interest of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society. . . . Restrictions on trade, or on production for purposes of trade, are indeed restraints; and all restraint, *qua* restraint, is an evil: but the restraints in question affect only that part of conduct which society is competent to restrain, and are wrong solely because they do not really produce the results which it is desired to produce by them. As the principle of individual liberty is not involved in the doctrine of Free Trade, so neither is it in most of the questions which arise respecting the limits of that doctrine; as, for example, what amount of public control is admissible for the prevention of fraud by adulteration; how far sanitary precautions, or arrangements to protect workpeople employed in dangerous occupations, should be enforced on employers. Such questions involve considerations of liberty, only in so far as leaving people to themselves is always better, cæteris paribus, than controlling them: but that they may be legitimately controlled for these ends is in principle undeniable.[70]

This perspective made it possible to argue that unfettered business and industry that threatened the overall stability of an economy (such as through the creation of a monopoly) or exploited and victimized workers (such as through

the imposition of long work hours and low wages during a time of high unemployment) also constitutes a condition of "harm" against which a government should react.[71]

Pragmatists

A specific response to the general belief that a government could, and should, intervene actively throughout the public realm came from the adherents of a philosophical school who became known as "pragmatists." They adopted a decidedly empirical approach to social issues; the appropriateness of certain political actions should be measured, they contended, upon the basis of its benefit to the believer, and they can be conveyed to ordinary people through the use of instrumental (and, thus, approachable and practical) philosophical definitions of politically and legally relevant terms. Therefore, government intervention should be based upon experimentation and the practical results of policies that are implemented for the purpose of alleviating personal suffering or advancing the general welfare of society. The overall goals of pragmatism as a political theory resemble, therefore, the general premises of utilitarian thought.[72]

Pragmatism has been associated particularly with the ideas and writings of American thinkers such as Charles Sanders Peirce and William James.[73] It offered an alternative to a rigidly abstract interpretation of liberal democracy and the limitations that this theory imposes upon political authority, and it made possible the introduction of an "interventionist," or "reform" liberalism as an alternative to the traditional American reliance upon libertarian liberal views and policies.[74] The writings of William James illustrate this relationship between the ultimate goals of liberal democracy and the practical means that should be employed in order to achieve those abstract, ideological goals.

> The pragmatist clings to facts and concreteness, observes truth at its work in particular cases, and generalizes. Truth, for him, becomes a class-name for all sorts of definite working values in experience. For the rationalist it remains a pure abstraction, to the bare name of which we must defer. When the pragmatist undertakes to show in detail just *why* we must defer, the rationalist is unable to understand the concretes from which his own abstraction is taken. He accuses us of *denying* truth; whereas we have only sought to trace exactly why people follow it and always ought to follow it.[75]

Therefore, despite the acknowledged libertarian orientation of the American constitutional tradition, great pressure was placed upon the "third branch of government" to abandon the *laissez-faire* absolutism of the unwritten "liberty of contract that had become the overriding theme of the so-called Lochner era of American constitutional jurisprudence.[76] This pressure, the specific political threats of President Franklin D. Roosevelt, and the influence of recent judicial appoint-

ments, was intended to induce the United States Supreme Court to accept an increasingly activist interpretation of federal authority under the "interstate commerce clause"[77] and a relatively interventionist interpretation of the liberty of contract.[78] But the persistence of assumptions regarding a relatively rigid defense of economic freedom in support of that "freedom" continued to be revealed within those decisions of the American court system (especially at its apex) that appeared to be hostile to the New Deal policies and legislation of Congress and the Roosevelt Administration.[79] The majority opinion of Chief Justice Charles Evans Hughes in the 1935 case of *Schechter Poultry Corp. vs. United States* (which invalidated certain federal regulations regarding the poultry industry) provides an example of this interpretation.

> The Government also makes the point that efforts to enact state legislation establishing high labor standards have been impeded by the belief that unless similar action is taken generally, commerce will be diverted from the States adopting such standards, and that this fear of diversion has led to demands for federal legislation on the subject of wages and hours. The apparent implication is that the federal authority under the commerce clause should be deemed to extend to the establishment of rules to govern wages and hours in intrastate trade and industry generally throughout the country, thus overriding the authority of the States to deal with domestic problems arising from labor conditions in their internal commerce.
>
> It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it.[80]

Supreme Court Cases and Opinions

The 1936 case of *United States vs. Butler, et al*. affirmed this approach. The Supreme Court held that the Agricultural Adjustment Act of 1933, which provided for federal taxes in support of a federal agricultural subsidy program, was unconstitutional because it imposed coercive interference with the economic autonomy of citizens who operate within this commercial sector, as Chief Justice Hughes emphasized within his majority opinion.

> The Government asserts that whatever might be said against the validity of the plan [Adjustment Act] if compulsory, it is constitutionally sound because the end is accomplished by voluntary co-operation. . . . The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold benefits is the power to coerce or destroy. . . . The result may well be financial ruin. The coercive purpose and intent of the statute is not obscured by the fact that it has not been perfectly successful.[81]

However, the majority opinion that is found within the 1937 case of *West Coast Hotel Co. vs. Parrish, et al.* illustrates the ideological shift which the members of the Supreme Court appeared to accept. This modification of the previous libertarian perspective of these same jurists parallels the general acceptance of the rudimentary values of an increasingly interventionist liberalism throughout American society. Chief Justice Hughes illustrates this adaptation within his majority opinion that upheld the claim of a hotel employee to receive the full benefit of federal minimum wage laws, despite the private contract that she had reached with her employer that stipulated a lower rate of payment. Both the experimental testing of liberal principles, as advocated by pragmatists, and a basic application of the "harm principle" to economic matters, as advocated by John Stuart Mill, evidently influenced this opinion and the broader social values that it reflects.

> [T]he violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. . . . The liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.
>
> This essential limitation of liberty in general governs freedom of contract in particular.[82]

Particular emphasis should be placed upon the word "essential" as Chief Justice Hughes employed it. It is the basic, and widely accepted, outlines of liberal democratic thought that the Supreme Court has defended throughout American constitutional history. Therefore, when the approach adopted in *West Coast Hotel* was applied again, it was the basic nature of the public marketplace, under the terms of the social contract, that the Supreme Court really seemed to defend. The Supreme Court's majority opinion in the 1937 case of *National Labor Relations Board vs. Jones and Laughlin Steel Corp.* (written, again, by Chief Justice Hughes) upheld more than the government's authority to protect employees and their associations; it defended the most rudimentary feature of a liberal economy and its society.

> Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

> That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority.[83]

The *essential* values of liberal democracy have been repeated throughout the judicial history of the United States. This overwhelming tendency can be noted within most, if not all, American constitutional cases, especially the ones that focus upon individual rights and liberties. Chief Justice Earl Warren summarized this historical emphasis within his landmark opinion, for a unanimous United States Supreme Court, in the 1954 case of *Brown vs. Board of Education of Topeka, Kansas*, which invalidated segregation laws as violating the equal protection clause of the Fourteenth Amendment to the United States Constitution. He wanted to ensure that the rights and liberties of Americans clearly were grounded within a tradition of liberal notions of "[r]ights belonging to citizens by virtue of their very citizenship, including personal security, personal liberty, and private property."[84] Foremost among these principles is the autonomy that allows a person to compete within the social order and marketplace of which, by virtue of the "social contract," they are part. This acknowledgment provided the central focus for Chief Justice Warren's opinion.

> Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[85]

Even the precedent that this case overturned, the 1896 case of *Plessey vs. Fergusson*, articulated the doctrine of "separate but equal" public accommodations in terms of libertarian values; it defended the concept of equal access to public resources and the "marketplace," while contending, simultaneously, that the forming of specific "associations" should remain matters for autonomous decision making.[86] In fact, civil rights cases generally have included discussions of the essential values that inform the American constitutional tradition. These expositions of American political and constitutional thought can be found within the jurisprudence of every important clause and amendment of the United States Constitution (regardless of the ultimate position that a court adopts), from the warrant requirement[87] to due process guarantees,[88] from the separation of church and state[89] to compensation for a public "taking" of private property,[90] from the freedom of speech[91] to protections from "cruel and unusual punishment,"[92] from

the guarantee of defense counsel[93] to the protection against self-incrimination.[94] It would be tedious and highly impractical to produce examples from all of these categories, yet they all would offer insights into the Lockean bias (as modified by historical developments and modified by utilitarian, pragmatist, and "reform" liberal thinkers) that has influenced, most significantly, the development of American constitutional law.[95]

However, one area of American civil rights and liberties jurisprudence, in general, and one case, in particular, offers, arguably, an especially explicit consideration of the ideological basis of the United States and the jurisprudential consequences of that foundation. The 1965 case of *Griswold vs. Connecticut* resulted in one of the most pivotal and influential judicial decisions in American constitutional history. This case resulted from an appeal of a conviction of a physician and a birth control official who were convicted, under a Connecticut statute, for distributing contraceptives to married couples. The appellants claimed that their convictions constituted an unwarranted interference with a professional relationship between themselves and married couples who sought their counsel and assistance. In fact, the appellants were asserting that the government of Connecticut had violated the constitutionally protected liberty of themselves and these couples from unwarranted government interference into personal and private marital affairs.[96]

The United States Supreme Court overturned the convictions upon the basis of a violation of an unwritten "right to privacy." Justice William O. Douglas' opinion declared that this right is implied by various amendments of the United States Constitution (especially in their references to "liberty" and their allusion to "zones of privacy"), including the protection of "unenumerated rights" that can be found within the Ninth Amendment of the United States Constitution.

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. . . . Such a law [The Connecticut statute] cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the areas of protected freedoms."[97]

Justice Douglas was restrained in his application of a "higher law" doctrine to this issue, but Justice Arthur J. Goldberg, within his concurring opinion, applied the Ninth Amendment more directly to it and considered the underlying basis for the entire American political tradition and its relationship to this particular controversy. He evaluated, in essence, the ideological justification of American constitutionalism as a whole, and discovered, from that evaluation, the philosophical assumptions that bind this tradition to the society that it defines and serves.

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to The "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at The base of all our civil and political institutions.' " "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society."
>
> I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating "from the totality of the constitutional scheme under which we live."[98]

Justice Goldberg, within his dissenting opinion, did not repudiate the notion that the United States Constitution is grounded upon fundamental ideological principles. But he challenged the judicial method for defining those ideological values.

> My Brother GOLDBERG has adopted the recent discovery that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this court thinks violates "fundamental principles of liberty and justice," or is contrary to the "traditions and [collective] conscience of our people." He also states, without proof satisfactory to me, that in making decisions on this basis judges will not consider "their personal and private notions." One may ask how they can avoid considering them. Our Court certainly has no machinery with which to take a Gallup Poll. And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in The "[collective] conscience of our people."[99]

A "Right to Privacy"

Justice Hugo L. Black made a valid point when he referred to the vague and indirect association that his colleagues appeared to make between a claimed "right to privacy" and the fundamental values that inform the American constitutional tradition. However, these references also reveal a difficulty which many jurists experience in relation to this approach to constitutional jurisprudence. This sort of difficulty can be reinforced through the misuse of references to a "natural law" tradition as a source of American constitutional values and norms.[100] Nonetheless, an exploration of these ideas is essential for the judicial interpretation of rights and liberties to remain relevant to the society, and its ideals, that a constitution, such as the American one, was created to serve. This point is suggested very strongly by Russell Hittinger.

> The law of privacy is the focal point of contemporary natural rights theory. It represents a fascinating and unsettling chapter in the American judicial use of the

> concept of natural law. That it proves eclectic and vague is not surprising, since this has always been the story with natural law theory in America. Arguably, the hybrid and vague character is as much a strength as a weakness. Terms like lifestyle, self-defining decisions, and autonomy are really no different from terms like liberty or equality—at least in the sense that the values or ideals signified therein always outstrip precise legal formulation. What is different about the latter-day fundamental values, however, is the level of abstraction at which they are posited. Although there was some effort in *Griswold* to connect privacy to the blackletter of the Constitution, to judicial precedent, and to the tradition and conscience of the people, since *Eisenstadt [vs. Baird*, 1972] there has been no conspicuous effort to contextualize the fundamental values polarized around the right of privacy. One cannot, after all, have a mere portion of autonomy. Since, as I have shown, autonomy functions as a right to be free of unchosen social, cultural, political, legal, and moral "givens," the right of autonomy cannot, by definition, be exercised within the ordinary social and political world. The right of autonomy is more absolute and resistant to positive law than anything posited in the way of rights to property and contract during the *Lochner* era.[101]

However, as Richard A. Posner has noted, this jurisprudential approach can be undermined through the misunderstood or misinformed application of philosophical principles by judges whose perspective is not only subjective, but also confused and the result of an inadequate knowledge and appreciation of this aspect of constitutional law.

> [T]he Supreme Court, some constitutional scholars, and now a distinguished economist concur in regarding privacy as a synonym for liberty or autonomy. We already have perfectly good words—liberty and autonomy and freedom—to describe the interest in being allowed to do what one wants without interference. We should not define privacy to mean the same thing and thereby obscure its other meanings.[102]

But, since modern constitutions are, in fact, philosophical declarations of the fundamental beliefs of a society, the right to privacy provides a crucial link between the positivist approach to rights and liberties and the essential values that define American liberal democracy. Privacy, in this context, relates directly to the basic liberal values of liberty and autonomy, without which concepts a liberal system cannot function. Thus, Justice Black, in his majority opinion within the seminal 1973 abortion case of *Roe vs. Wade* (which decision invalidated laws that restrict access to abortions), also associated a woman's control of her own, physical "property" (that is, her body) with the autonomy that the right to privacy provides to all recognized "persons" within American society. Despite its significance for women and the notice that it received from feminist legal scholars, this opinion was based, again, upon the most fundamental of libertarian principles.

> This right to privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. . . . All these are factors the woman and her responsible physician necessarily will consider in consultation.[103]

A constitution cannot uphold liberal democratic values while denying one of its most essential (indeed, one of its defining) values. However, it is first necessary to provide a consistent and lucid definition of these values and their relationship to the overall ideological system of which they are components, and this problem is exacerbated by the large size and vast diversity of the United States. This problem favors a response that provides ideological definitions that are minimal in their scope; these definitions can be applied to different variations of the liberal democratic tradition. This fact is important, since liberal democracy provides a few core values that are malleable and subject to wide difference of interpretation, depending upon the culture and experiences of those persons and political communities who apply those ideological principles to themselves. Therefore, the United States Constitution often has been regarded as providing, especially within the area of civil rights and liberties, only minimal guarantees that a libertarian society confers upon itself through its "social contract."

Demographic Diversity

The demographic diversity of the United States also prompted the development of additional variations upon American political thought reflecting the unique experience of groups that traditionally have not been dominant. The factor of race, especially regarding African-Americans and the fact that they were, as a people, treated as "property" rather than as "persons," poses profound challenges to the liberal democratic assumptions of American society and its constitutional heritage. Despite the abolition of slavery, many, if not most, African-Americans remained part of an economic underclass throughout the decades that have followed the American Civil War and Reconstruction period. Racial discrimination reinforced the oppressive economic and social condition of African-Americans and frequently limited them to sectors of the work force that echoed aspects of the economic exploitation of slavery.[104]

African-American activists have addressed this condition through different approaches. The values expressed in documents like the Emancipation Proclamation and the Fourteenth Amendment to the United States Constitution reflect, broadly, the goal of racial integration within American society. However, the

specific values that are expressed within these documents are derived from egalitarian principles of liberal democracy, rather than the specific experience and values of African-American heritage. The Civil Rights movement of the 1950s and 1960s, and continuing struggles for racial justice, serve as a reminder of the way that the reality of race continues to challenge the underlying assumptions of American liberal egalitarianism.

This challenge to the assumptions of American liberal democracy have not been embraced directly by most jurists. However, its potential influence may be strong, especially because of the growing interest, throughout American society, in the consequences of pluralism and diversity and the need for tolerance in response to that experience. This subject demands further consideration within the American constitutional tradition. Nonetheless, its role in defining the broader parameters of American political and legal (especially constitutional) thought remains unclear.[105]

Feminist Thought

Similar distinctions can be made in terms of the development of American feminist thought. The difference that gender makes has not been accepted for much of the history of American political thought, but its influence upon the evolution of that tradition during the late twentieth century has been significant. The various approaches to feminist thought also have not yet found their way directly into American constitutional jurisprudence, but its potential influence also may prove to be, suitably, significant.[106]

Constitutional responses to the goals of women within American society have not, necessarily, reflected feminist challenges to prevailing liberal democratic norms or the failure of those norms to be gender inclusive. The Nineteenth Amendment recognized women's voting rights, but upon the basis of expanding concepts of equality and the liberal definition of "personhood," and not in response to a wider recognition of gender bias. A truly inclusive result has not, necessarily, occurred in this respect, although these gains are consistent with many "liberal feminist" goals. American courts have tended to invoke a formal "gender neutral" strategy in response to relevant constitutional controversies that ignores other matters related to gender inclusion and its relationship to true gender equality. Therefore, the true significance of feminist legal thought upon the development of American constitutionalism has yet to be fully experienced, despite some gains that American women may have made through the promotion of traditional liberal democratic values.

Evolution of American Political Thought

The evolution of American political thought parallels the development of American constitutionalism. This relationship is a necessary one, since constitutions

are legal documents only in terms of their ability to reflect the fundamental principle of the legal and political systems that they define. In that sense, constitutions express the pre-Socratic concept of *archē*, or "first principles," from which all other legal and political principles and values must be derived.[107] The dominant ideology of a society can be both expressed through, and shaped by, its constitution. Clearly, that experience has guided the development of the American constitutional tradition.

However, a society as large and diverse as the United States will experience difficulties in identifying a clear, concise, and unified ideological vision. Liberal democracy provides a broad, ideological "umbrella" that can embrace such diversity, but only by permitting a considerable diversity of variations upon that broad and malleable philosophical theme. Therefore, conflicts of constitutional interpretation necessarily abound within the American experience, with the struggle between libertarian and republican interpretations being the most conspicuous example of this conflict of ideas. Consistency, in this respect, must remain allusive.

But states provide regional variations upon this larger theme that possibly can be expressed in more consistent terms. Cases such as *Michigan vs. Long* provided a particularly strong prompting for states to consider, increasingly, the relevance of their state constitutional traditions, especially within the realm of civil rights and liberties.[108] It is this expression that the subsequent chapters of this book will address. Certain states offer a clearer indication of these differences than other ones, and this book will focus upon prime examples of them. The best examples are representative of a regional tradition, a relatively homogeneous society, or a unique history and heritage, including such states as Alaska, Georgia, and Vermont.[109] All of them share the fundamental assumptions and values of the liberal democratic tradition, as well as a basic appreciation of the need to conform to the guarantee (provided by the federal constitution) of providing their respective societies with a "republican form of government."

Conclusions

One last, important point should be made concerning these state constitutional chapters. This sort of judicial analysis often fails to produce the sort of "smoking gun" that can make a highly overt link between state constitutional jurisprudence and a particular political culture. But the fact that these historical and philosophical relationships frequently are subtle does not make them any less real. Furthermore, these influences often are responsible for the establishment of an institutional foundation that was established early within a state's political history which, because of that establishment, persists, regardless of the fact that these institutional values invariable are subject, over time, to the ideological challenges of specific jurists and, even, the fluxuating perspectives of migrating populations. Nonetheless, the evidence and analysis of these chapters offers

interpretive approaches that cannot be judged to be irrelevant simply because of the specific disagreements of certain judicial elites or the occasional failures of these elites to make an explicit acknowledgement of the highly philosophical consequences of constitutional development.

Certainly, these state constitutions and the United States Constitution reflect the institutions of a liberal democracy. This ideological tradition is a very broad and malleable one, as noted by the competition between "libertarian" and "republican" interpretations of American liberal democracy throughout the history of federal jurisprudence.[110] It is these distinctions and variations that provide the true insights into the philosophical and constitutional mosaic that is, ultimately, American society.[111] This book offers eight case studies of these general themes of variation and diversity that define, comprehensively, the American constitutional tradition.

Chapter 2

Alaska

Frontier Autonomy

The Alaskan Image

The Alaskan experience is, in some ways, a unique one within the American context. Alaska became the "last frontier" in the process of territorial expansion. That status has prompted a romantic image of "rugged individualism" in the absence of the constraints normally imposed by the state—an image that is similar to the positive theoretical construct of a "state of nature," as posited by John Locke.[1] That image remains a popular one among Alaskans, generally, as well as among many other Americans. It was an image that was retained by those delegates who debated and drafted the Alaska Constitution at a convention held at the University of Alaska, Fairbanks, in 1955 and 1956.

Of course, this image neglects many aspects of the human origins of this region. The aboriginal inhabitants of Alaska continue to maintain a meaningful presence there; approximately one-fifth of the population of the state are descended from the native peoples who migrated to this region thousands of years ago. The popular (and official) designation of Alaska as the "last frontier" state ignores the fact that, for many of its inhabitants, it never represented a "frontier"; that designation is derived from a classic European vision of expansion, rather than an aboriginal vision of an inclosive sense of "place." The dominance of one vision over another offers a crucial philosophical basis for Alaska's modern constitutional tradition.

Native Peoples

The native peoples of Alaska include the Aleut of the southwest area (including the Aleutian Peninsula), the Haida, Tlingit, and Tsimshian peoples of the southeast, and the Athatascans of the interior. The best known native people of this region are the Inuit, who dominate the far north. All of these peoples share a

sense of connection to the land and its resources, especially since they traditionally have been dependent upon them. This relationship has engendered a sense of respect for the surrounding physical environment that is reflected in values which seek to take no more from these resources than is necessary for survival and which also seeks to establish a condition of "harmony." This condition is achieved between people and nature, as well as among people; survival and prosperity are shared goals and experiences, so a collective identity precedes an individual one. A claim to privacy, especially among the Inuit people, is regarded as a selfish and destructive attitude, since it weakens the mutual support that provides the foundation for the community, promotes deprivation of its needed resources, threatens its prosperity and survival, disrupts its general harmony, and undermines its collective identity.[2]

European Values

The European approach towards life in Alaska has been a very different one, and the values upon which this approach is based have been imposed upon its modern political, economic, legal, and constitutional systems. Traditionally, Europeans have regarded the physical universe as an entity that was created specifically in support of humanity.[3] An Aristotelian approach to this issue would conclude that the ultimate *telos* of all earthly things is the sustenance and aggrandizement of the human condition—[4]a conclusion that would be reinforced by a Thomistic articulation of an ordered, hierarchical universe.[5] Western cosmological myths have provided a theological confirmation of this perspective; according to the authors of the Book of Genesis, all plants, animals, and other entities within the Garden of Eden were created (with one notable exception) explicitly so that men and women could use them in order to fulfill their individual needs and desires.[6] Therefore, the physical world, and all of its resources, continue to be regarded by Western peoples as existing so that humans can exploit them for their own, self-defined purposes.[7]

Alaska offered a frontier of unclaimed resources that could be used in support of the fulfillment of a European sense of "destiny." The aboriginal sense of "connection" with the land was supplanted by a European sense of acquisition.[8] This Eurocentric perspective was reinforced by the value of "possessive individualism" that provided a foundation for the emergence of liberalism and the economic system which this ideology supports. The products of nature belong to those persons who acquire and develop them through their labor; an acorn remains part of nature until someone picks it up and consumes it. In that way, the acorn becomes "property," in the sense that all things connected to the individual person can be defined as being "property" and, thus, exclusively owned by that person.[9] Contrary to the experience of Europeans who came to Hawaii, the explorers, traders, miners, hunters, trappers, fishers, and settlers who came to Alaska ignored and overwhelmed this region with the values of oppor-

tunity, acquisition, development, and the enjoyment of the efforts of "rugged individualism."[10]

Libertarian Spirit

The Lockean liberalism that has been cited often in connection with the overall development of American political thought does not reflect an exclusively libertarian variation of that ideological tradition, despite some popular perceptions to the contrary.[11] Yet the fiercely individualistic, entrepreneurial, and independent attitudes and behaviors that have been associated, traditionally, with those explorers, miners, trappers, settlers, and other adventurers who migrated to, and, eventually, dominated Alaska (principally from the "lower 48"), understandably appear to reflect that libertarian spirit of the American experience. The writings of John Stuart Mill offer a more appropriate insight into this value system, despite the fact that his utilitarian roots might not be identified readily with the autonomous spirit of Alaskan settlement.[12] His articulation of the "harm principle" asserted that the only legitimate role of government was derived from the delegated duty of the state to protect society from demonstrable threats to its security, stability, or safety. Otherwise, the discretion of the individual person, especially regarding private, rather than civic matters remained supreme.[13] His definitive declaration upon this subject, which he offered in his classic treatise, *On Liberty*, seems to be particularly suited to the libertarian image of the Alaskan society, and the legal tradition which it created, that emerged during the nineteenth and twentieth centuries.

> The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. . . . The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[14]

Objectivism

But an American source for expressing these principles offers, arguably, a perspective that is more relevant to the Alaskan experience. Ayn Rand was not, strictly speaking, a libertarian. However, the philosophical system which she developed and disseminated throughout American society, called "objectivism," offered a profound epistemological and ethical structure that many libertarians

would use to articulate, and defend, their own stress upon liberty as the most important ideological value.[15] Objectivism provides a means for understanding the "objective" world of physical phenomena and deriving, from it, a moral code that makes it possible for individual persons to achieve true autonomy. As masters of their fate and the environment within which they exist, people can fulfill their true potential. Therefore, objectivists argue that the interference of the state on behalf of collective goals and values, whether benign or aggressive, damages the human spirit by undermining human autonomy.[16] Ayn Rand's most acclaimed novel, *Atlas Shrugged*, expresses that belief through the main characters (especially the enigmatic John Galt), who are powerful industrialists who reject the gradual elimination of capitalism by refusing to participate in that centralizing social, cultural, political, and economic process (which has dominated the American society of the near future) in favor of "statism." This power of choice is expressed most forcefully by one of the protagonists, Ragnar Danneskjöld, in defending his self-interested act of hoarding gold.

> If my fellow men believe that the force of the combined tonnage of their muscles is a practical means to rule me—let them learn the outcome of a contest in which there's nothing but brute force on one side, and force ruled by a mind, on the other. Even John [Galt] grants me that in our age I had the moral right to choose the course I've chosen. I am doing just what he is doing—only in my own way. He is withdrawing man's spirit from the looters, I'm withdrawing the products of man's spirit. He is depriving them of reason, I'm depriving them of wealth. He is draining the soul of the world, I'm draining its body. His is the lesson they have to learn, only I'm impatient and I'm hastening their scholastic progress. But, like John, I'm simply complying with their moral code and refusing to grant them a double standard at my expense.[17]

It is not surprising that Ayn Rand would favor the principle of strong individual rights and liberties, nor is it surprising that her defense of this political principle would resemble, very closely, the conventional libertarian position on this institution.[18] However, she did not regard rights as ends in themselves but, rather, as means for achieving a society that is dedicated to the ethical pursuit of self-defined individual autonomy and fulfillment through such economic and social instruments as undiluted capitalism.

> Rights are a moral concept—the concept that provides a logical transition from the principles guiding an individual's actions to the principles guiding his relationship with others—the concept that preserves and protects individual morality in a social context—the link between the moral code of man and the legal code of society, between ethics and politics. *Individual rights are the means of subordinating society to moral law*.[19]

Imposition of Western Values

This imposition of Western values upon Alaska is reflected by the earliest history of European contact with this region. The aboriginal population of this region has been estimated to have been over seventy thousand prior to the seventeenth century. That figure would be reduced to less than half that number by the beginning of the nineteenth century, due to the catastrophic effects of European diseases, alterations to the environment and economic relations, violent conflicts, and (especially in relation to the Aleut people) consciously genocidal policies.[20] This region may have been sighted, and even visited, by Portuguese and Spanish explorers during the sixteenth century,[21] but the first meaningful introduction of Europeans was the result of Russian expansion during the eighteenth century.

Russian Territorial Expansion

Czar Peter the Great's policy of westernization included efforts in favor of territorial expansion. His emphasis was upon expansion westward, towards Europe, but it did not neglect Asia and the Pacific. He commissioned a Danish explorer, Vitus Bering, to lay claim to lands in the Arctic Ocean and far northern Pacific Ocean areas, as well as to survey and map sea routes, there. Bering's discovery of a channel between Asia and North America included an appraisal of the region that would become Alaska, and various Russian explorers and traders began to make incursions inland and along the surrounding islands. These efforts were sporadic until the 1740s, when Czarina Catherine the Great, as an extension of her efforts to consolidate Russian imperial possession over Siberia, encouraged the establishment of permanent settlements throughout this region that had been claimed as part of the Russian Empire.[22]

The most notable Russian settlement of this period was the one that was established at Sitka by Alexei Chirikof, in 1741. Other settlements followed this one, especially during, and after, the 1760s, culminating with the establishment of a colony on Kodiak Island by Grigory Shelekov, in 1784. Other European powers challenged Russian hegemony over the region, including Spanish incursions during the middle of the 1770s, the explorations of Captain James Cook on behalf of Great Britain in 1778, and the later activities of Jean François de Galaup, Comte de la Pérouse, on behalf of France. Nonetheless, Russia remained economically dominant in Alaska, while the Tlingit people led the native inhabitants in resisting this European activity, especially during a period of particularly aggressive resistance, between 1799 and 1804.[23]

This Russian exploitation of the region's resources was unregulated, and led to long-term problems that would continue to plague Alaska throughout its modern history. The depletion of these resources, conflicts with native peoples, internal trade disputes among settlers, and other problems compelled the

Russian imperial government of Czar Paul I to charter the Russian-American Company under Alexander Baranov in 1799. He served as governor of Alaska until 1819, and he established outposts at Old Sitka in 1799, and New Archangel in 1804.[24] The company, under Baranov's rule, imposed order upon this hitherto unrestrained, and often irresponsible, series of commercial enterprises within the region. The Russian-American Company provided a structure that allowed these sparsely populated settlements to function, effectively. Simultaneously, Russian Orthodox missionaries offered spiritual and cultural leadership, especially under the guidance of Father Innokentry Veniaminoff, who later became Archbishop of Alaska. The efficient reorganization of Alaska under Baranov became especially important, since the highest number of Russian settlers, during the eighteenth and nineteenth centuries, fell well short of one thousand, while its lowest number may have been as little as four hundred.[25]

Conflicts—Russian Settlers *vs* Native Inhabitants

In addition to the conflict between Russian settlers and native inhabitants, other European powers renewed their active interest in the region. In particular, British explorers made their presence felt, including figures such as Sir John Franklin and George Vancouver. The expansion of the British Empire in North America placed pressure upon the Russians, while external commercial interest was expressed through such agents as the Western Union Telegraph Company, especially during the middle of the nineteenth century. Internally, the Tlingit people maintained strong pressure against the Russians, including the destruction of settlements at Sitka in 1804, and the Glory of Russia (near present Yakutat), which invoked an equally strong Russian response. A tense coexistence was imposed by Russian imperial naval and military forces during the early nineteenth century, but the British imperial response increased at this time, especially with the establishment of trading posts at Fort Yukon, Fort Taku, and Fort Wrangell by the Hudson Bay Company. Treaties that were reached between the Russian colonial government and the Hudson Bay Company helped to alleviate tensions, as did treaties among Russia, the United States, and the United Kingdom concerning Alaska that were negotiated and approved in 1824 and 1825. But marginal economic returns from these small Russian settlements, the continued tense relations with the Tlingit and other native peoples, pressure from the British Empire in North America (as well as pressure in Europe), and the debt that resulted from the Crimean War prompted a desire by the imperial Russian government to sell its colonial interests in North America.[26]

Russian officials addressed the United States Government concerning a possible sale of Alaska as early as 1859, but the latter country's sectional crisis and approach of the American Civil War postponed any serious consideration of such an offer for several years. But the Russians persisted in their proposal, particularly because of their fear that another Crimean conflict with the British

could result in a British invasion of Alaska. Some American officials also were concerned about possible British expansion in North America, including William H. Seward, who became secretary of state under the administration of President Abraham Lincoln and continued in that capacity, following Lincoln's assassination, in the post-Civil War administration of President Andrew Johnson. Seward's interest in Alaska was, therefore, primarily strategic, but he also recognized the commercial potential of the region. Therefore, he was receptive to the overtures of the Russian Minister to the United States, Baron Edouard de Stoeckl; the two diplomats reached an agreement concerning the cession of Alaska, which they signed on March 30, 1867.[27]

Treaty Opposition

American opposition to the treaty that Seward and de Stoeckl negotiated was based primarily upon the perception that Alaska was not a commercially viable territory and its administration and defense would stretch American resources prohibitively. Congressional opposition was particularly profound, but Seward convinced sufficient members of the United States Senate not only of its strategic value (especially in relation to the recent political consolidation of part of British North America into the Dominion of Canada on July 1, 1867), but also its economic potential to justify the remarkably low payment price of $7,200,000.00 that the treaty specified. The Senate ratified the treaty, and the formal transfer of Alaska from the Russian Empire to the United States occurred on October 18, 1967 at Sitka.[28]

Nonetheless, successive American administrations appeared to be uninterested in providing effective internal administration for the new territory. Congress delegated, by default, responsibility for the legal governance of Alaska to the executive branch. This task was assigned to the War Department, the Treasury Department, and the Department of the Navy, respectively, during the next seventeen years. This delegation of responsibility reflected the emphasis that American administrations placed upon Alaska as a source for military, naval, and economic exploitation, including limited regulation of fishing and seal hunting. Civil governance, including the creation and management of a legal system, was a relatively unimportant territorial consideration. Therefore, the administration of justice became, largely, a matter of local or, even, individual initiative. A tradition of physical independence and self-reliance was augmented by this lack of political control, and this experience provided a profound influence upon the beliefs, values, and expectations of the people who would continue to inhabit Alaska.[29]

Individual Initiative

The initiative of individual settlers, such as Reverend Sheldon Jackson, partially filled this void. He was a Presbyterian missionary who ministered to native

peoples throughout Alaska and defended their interests against the unscrupulous practices of aggressive traders, miners, trappers, and other nonnative settlers and explorers. He served in this capacity until 1885, when he was appointed Alaskan Commissioner of Education by the federal government, in recognition of his work in this area throughout the region. He served in that capacity until his death in 1909; he became a model for Alaskans of individual initiative in local government, education, and social work. His introduction of reindeer as domestic herds, in 1891, and his campaign for fairness and honest treatment among all Alaskans bridged a gap between intensified individualism and effective social action (which he termed his "fight for the soul" of Alaska) that has remained a feature of Alaskan society, politics, and the value system upon which they are based.[30]

This sort of individual initiative largely remained the basis of Alaska's minimal political, legal, and administrative presence until the early twentieth century. Nonetheless, the increasing interest in, and migration to, this new territory convinced many politicians that some form of governmental system needed to be established for Alaska. Congress formally established a judicial and civil district for Alaska on May 17, 1884 that would be based upon the general laws of the state of Oregon. This state was chosen as a convenient model because it was believed that its history as a frontier community of the northwestern region of the United States would provide an applicable example that Alaska could emulate. The Organic Act of 1884 only provided a minimal framework of law and governance; little real control was exerted over Alaskans throughout the remainder of the nineteenth century, and the application of laws according to the example of the common law tradition and Oregon statutes was left to the discretion of any local officials who may have been selected by their respective communities.[31]

John H. Kinkead, a Republican politician from Nevada, was appointed to be the district governor by President Chester A. Arthur in 1884, but he supervised only a few territorial (including two district judicial) officials, and this management was both distant and superficial to the majority of Alaska's inhabitants. Congress would not draft and establish formal civil, administrative, and civil codes for Alaska until 1899, and this process would not be completed until the next year. Simultaneously, Congress began to provide for more specific political control and guidance of the territory. This renewed interest resulted from the increased economic and demographic importance of the region. Fishing and seal hunting enlarged the commercial potential of Alaska, especially in terms of natural resources, while the population grew dramatically from less than four thousand in 1890 to approximately thirty thousand five hundred in 1900, when Juneau was established as the territorial capital. However, the most important reason for this expansion and the accompanying increase in American concern for Alaska's governance was the discovery of gold in this region, during the 1890s.[32]

Gold Discovered

Alaskan history has been dominated by the migrations of trappers, miners, explorers, traders, and other entrepreneurs who dared to confront the territory's harsh climate and untamed wilderness with the necessary attitudes of determination and self-reliance. However, the most notable event in the development of Alaska's self-image occurred as a result of the discovery of gold in that region and the neighboring Yukon Territory of Canada, during the middle and late 1890s. Gold was discovered, first, in the Klondike Valley of the Yukon in 1896. Prospectors on their way to these gold fields passed through Alaskan towns, especially in the panhandle area of southeast Alaska. Settlements that offered supplies, transportation, and other services for these adventurers benefited enormously from this activity. Skagway and Valdez, in particular, grew enormously in size and prosperity. By the time that gold was discovered on Alaskan soil (in Nome in 1899) a support infrastructure already had been established within Alaska that could accommodate the economic boon the discovery brought to the region. Some of the gold towns that arose during this period outlived their immediate purpose and became thriving, permanent communities, such as Fairbanks. These towns initially contended with a lack of police protection, poor sanitation, disease, and general disorder. However, they also nurtured an image of Alaska as a land of opportunity, freedom, adventure, and a place where merit and effort could succeed in the absence of artificial social and political constraints. Many prospectors failed to become rich from their ventures, but the image of Alaska as a place where people could fulfill their dreams, unfettered by civil restraint, endured.[33]

The Expression of Alaskan Image

This image of Alaska was given expression within American popular culture through the writings of poets, journalists, novelists, and other literary figures. The most prominent of these literary figures was the famous author and adventurist, Jack London. He drew upon personal experiences in Alaska, and his affection for it and the values that he found and embraced there, as the foundation for his most famous novel, *The Call of the Wild*. The main protagonist is a dog named Buck who is kidnapped from his pleasant domestic existence in California and sold into service for dog sleds during the Alaskan gold rush. His transformation from domesticity to a condition in which he reverts to the wild freedom and autonomous strength of his nondomestic ancestors serves as an allegory of the basic nature of humanity that London appeared to discover, embrace, and extoll in Alaska.[34] Buck's relationship with the hunter, John Thornton (who saved him from death as part of a cruelly led and doomed dog team), offers a parallel examination of the nobility and virtue that this freedom of the Alaskan frontier offered. It poses a quintessential profile of the fundamental image that has been popularized and espoused within modern Alaskan society.

> John Thornton asked little of man or nature. He was unafraid of the wild. With a handful of salt and a rifle he could plunge into the wilderness and fare wherever he pleased and as long as he pleased. Being in no haste, Indian fashion, he hunted his dinner in the course of the day's travel; and if he failed to find it, like the Indians, he kept on traveling, secure in the knowledge that sooner or later he would come to it. So, on this great journey into the East, straight meat was the bill of fare, ammunition and tools principally made up the load on the sled, and the time-card was drawn upon the limitless future.
>
> To Buck, it was boundless delight, this hunting, fishing, and indefinite wandering through strange places. For weeks at a time they would hold on steadily, day after day; and for weeks upon end they would camp, here and there, the dogs loafing and the men burning holes through frozen muck and gravel and washing countless pans of dirt by the heat of the fire. Sometimes they went hungry, sometimes they feasted riotously, all according to the abundance of game and the fortune of hunting. Summer arrived, and dogs and men packed on their backs, rafted across blue mountain lakes, and descended or ascended unknown rivers in slender boats whipsawed from the standing forest.[35]

This popular image, and the values associated with it, seemed to congeal during this period of explosive growth and initial development within Alaska. However, in addition to the romantic literary heritage of the Klondike gold rush, there arose a specific political heritage that would influence Alaskan attitudes towards the purpose, functioning, and limitations of government.

> In the absence of a formal government structure, the miners of Juneau and the interior, like their counterparts in western America, drafted their own form of frontier democracy known as the miners' code. In their initial meetings they decided upon the boundaries for their mining district, drew up the rules for the staking of claims, and elected an official, known as the recorder, to register the site staked out by each man. They then prescribed the rules of conduct for the community: fines for minor offenses, banishment for stealing, and hanging for murder. A court composed of the miners themselves would sit in judgment and mete out the penalties.[36]

Frontier Democracy

In the absence of such conditions and requirements, the members of this "frontier democracy" could reasonably expect to be "left alone" to their own efforts and devices. These expectations prompted demands among Alaskan communities for greater political autonomy in the form of "home rule."[37] This episode of Alaskan history became a central image that has been embraced by the state's residents as well as historians.

> Of course, it is possible to show that the predominance of urban conditions and familiar kinds of employment do not prevent the development of a unique char-

> acter. That, at least, is what residents feel and express often enough. A perusal of the letters published in the *Alaska Magazine* supports that belief. In a recent issue, a writer insisted that "only here can one feel like and be an individual."[38]

This Alaskan "character," which is based upon such fundamental values as "independence," "freedom," "self-reliance," and the capacity to make personal choices, has been accepted widely among Alaskans and the political elites of that society, including, presumably, the framers of the Alaska Constitution. Even though certain prominent historians have made convincing, and well-documented arguments for the purpose of debunking this overarching image, they have done so in response to the overwhelmingly popular effect that it has had upon the psyche and belief system of Alaskan society as a whole. Whether or not this interpretation is entirely accurate, it has affected that society and the way in which it understands the liberal democratic tradition that guides its legal and constitutional development.

Settlers and the United States Government

Many settlers left Alaska after the gold rush ended, but many others remained, and migration to the region increased, spurred by promises of commercial opportunity and individual freedom of activity. The population doubled to more than sixty thousand during the first decade of the twentieth century, and the local economy continued to flourish. The United States government began to provide a more active presence within the territory, which prompted many residents to demand greater representation at the federal level and greater political autonomy at the territorial level. The federal government acceded to one of these demands when Alaskans elected their first congressional representative, Democrat Frank H. Waskey, in 1906. The other demand was addressed in 1912, when Congress enacted (through, in part, the efforts of Alaskan federal district Judge James Wickersham) the Organic Act of Alaska. This act replaced the relatively loose district administration of Alaska with a formal territorial government. It provided Alaska with a territorial legislature and elected governor, as well as a structured judiciary that continued to apply principles of individual autonomy and responsibility in support of practical interpretations of the law as based upon federal statutes, common law, and Oregon precepts. However, rulings that addressed the fundamental nature of law within Alaska were made subject to federal overrule, and appellate rulings were reviewed, generally, by federal courts. This trend was consistent with the veto authority that the federal government retained over the decisions and actions of the other branches of Alaskan government.[39]

Still, much of Alaska's growth and development as a community proceeded without impediment by the distant federal government. Mining and fishing expanded, and the territory enjoyed years of prosperity throughout its sparsely

populated domain. Federal interest in Alaska increased dramatically as a result of World War II. The conflict in the Pacific made Alaska strategically important to American defense, and military and naval installations were built or improved throughout the territory, especially in the vicinity of Anchorage, Fairbanks, Dutch Harbor, Nome, Annette, Adak, and Kodiak. The Japanese occupation of Attu and Kiska, though a diversionary move in support of the later attack on Midway Island, aroused American concern, especially since they were the only parts of North America occupied by Axis forces during the war. Therefore, the American government increased its defensive presence within Alaska during, and after, World War II, resulting in the rebuilding and standardization of the Alaskan Railroad (which was built, originally, in 1923), continued construction of installations (especially by the United States Air Force), and the construction of the Alaska Highway. This process was especially significant, because it made Alaska more accessible than ever to commerce (including tourism) and migration. Alaska's traditional isolation was eroded, and, with that erosion, political and legal pressures grew.[40]

"Rugged Individualism"

Alaskans, in general, feared a lack of political, economic, and personal freedom, as well as the reduction of the territory to a "colonial" status. Ironically, this fear was shared by inhabitants who both supported and opposed plans to admit Alaska to the federal union as a state. However, the argument that statehood would offer the best means for protecting Alaskan autonomy eventually dominated popular opinion in Alaska, and the activities of "shadow" senators and representatives, such as William Egan, Ralph J. Rivers, and, especially, Ernest Gruening were instrumental in convincing Congress to support Alaska's political ambitions. Many proposals and bills before Congress in support of Alaskan statehood had been initiated since 1916, but the movement of the late 1950s was particularly effective not only because of the growing awareness of Alaska's growing position within the United States but, also, because of the astute political decision to draft and adopt a proposed state constitution that would be consistent with American institutional and legal values, in anticipation of eventual statehood. Delegates throughout the territory were elected and dispatched to the University of Alaska at College, near Fairbanks, where the process of constitutional negotiation, drafting, and adoption took place.[41]

These delegates were aware of the traditionally weak and distant character of the territorial government to which most Alaskans had grown accustomed, while they also were determined to create a well-structured and effective government that could meet the challenges that would be confronted by a state government. They also were aware of the need to draft a document that would be acceptable to the American public, in general, and the United States Congress, in particular. The delegates understood, for example, that it was impera-

tive that the Alaska Constitution include an explicit guarantee of certain fundamental civil rights and liberties. However, they also approached this issue from a uniquely Alaskan perspective, since "Alaska's constitution was written by territorial residents who reflected the unique political aspirations and experience of Alaskans."[42]

Successive Alaskan governments have encouraged the growth of economic opportunity in tourism, traditional industries, and the development of natural resources. Therefore, these administrations have discouraged regulation and emphasized entrepreneurial freedom and initiative, although a high regard for environmental protection of Alaskan air, water, and land remains a political priority within the state, and the legitimate demands of native peoples who continue to provide a relatively high proportion of Alaska's population (including the Tlingit and Inuit peoples) continue to challenge its spirit of unrestrained individualism. The discovery of oil, in 1968, offered an example of this approach, while passage of the Alaska Lands Bill in 1980, also demonstrated the concern for protection of the state, its people, and its resources from the demonstrable harm that economic activity can impose. Foreign capital, rapid increases in population, and concerns about limited resources have challenged the traditional Alaska approach to politics, economics, and the legal and judicial institutions that support and protect them. However, the spirit of "frontier autonomy" and "rugged individualism" continues to be embraced by residents and immigrants who are attracted by that almost mythical image of Alaska.[43]

The Alaskan Judicial System

The Alaskan judicial system has had occasions during which its participants have dwelt upon the relationship between constitutional issues and the specific ideological values upon which they are based. Nonetheless, these episodes, though significant, have been relatively infrequent. The presence and influence of any ideological system usually is taken for granted simply because its dominance is so pervasive, and that trend is particularly true within American society and, especially, among American jurists. However, although differences between Alaskan and general American visions of those values often are, essentially, a matter of degree, and not of substance, those subtle differences have assumed a perceived importance among Alaskan jurists which has prompted important precedents and the development of an Alaskan constitutional jurisprudence in this area.

Cases and Opinions

Perhaps the most notable of these precedents involves an unlikely source of constitutional conflict. In the 1972 case of *Breese vs. Smith*, the defendant was a junior high school student who was expelled when he refused to shorten the

length of his hair. An appeal of this school board action was heard by the Supreme Court of Alaska, which overturned that decision upon a broad interpretation of the state constitution and its underlying values, especially as outlined in the first section of that document.

> This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.[44]

That construction, and its own interpretation of the "character" of Alaskan society and its people, led the Alaska Supreme Court to declare the relevance of a particular state constitutional jurisprudence that exceeded the minimal requirements provided by its federal counterpart.

> While some of the terms of article I, section 1 [of the Alaska Constitution] parallel the language of various federal provisions, we have repeatedly held that this court is not obliged to interpret our constitution in the same manner as the Supreme Court of the United States has construed parallel provisions of the Federal Constitution. Thus, in the case at bar, although sound analysis requires that we look to the various federal precedents that have interpreted provisions of the federal constitution that parallel Alaska's constitution, we are not necessarily limited by those precedents in expounding upon Alaska's constitution.[45]

Therefore, the court contemplated the meaning of the term "liberty" as it is understood within the cultural and historical context of Alaskan society. The court contended that an Alaskan understanding of this concept is, arguably, broader than it is for American society, as a whole, to the extent that even a student's choice of hairstyle could be included within it. It might have appeared to have been a minor incident to some observers, but the court considered to be reflective of a larger, and very profound, principle of justice.

> Hairstyles have been the subject of great variety and individual taste and have traditionally been left to personal decision; they are the manifestations of our diverse and numerous individual personalities. The United States of America, and Alaska in particular, reflect a pluralistic society, grounded upon such basic values as the preservation of maximum individual choice, protection of minority sentiments, and appreciation for divergent lifestyles. The specter of governmental control of the physical appearances of private citizens, young and old, is antithetical to a free society, contrary to our notions of a government of limited powers, and repugnant to the concept of personal liberty. . . . Whatever else "liberty" may mean as used in article I, section 1 of the Alaska constitution, we hold that the term at least encompasses the fundamental personal right

> of students in our public schools to select their own individual hairstyles without governmental direction.[46]

Ravin vs. State of Alaska—"Right to Privacy"

In the 1975 case of *Ravin vs. State of Alaska*, the defendant, Irwin Ravin, challenged his conviction for possession of marijuana upon the basis of a violation of his right to privacy. Ravin contended that his right to privacy superseded the authority of the police to enforce the relevant statute, because his actions posed no harm to other persons or to society, in general. Therefore, he argued, there was a lack of "compelling interest" that would have justified such a state intrusion into his guaranteed "zone of privacy." His arguments were supported by expert testimony, which insisted that the inclusion of marijuana as a "dangerous drug" under the relevant statute was illegitimate, especially since alcohol and tobacco were not included within that designation.

The Alaska Supreme Court accepted Ravin's challenge and overturned his conviction. It did so, primarily, upon the basis of ART. 1, SEC. 22 of the Alaska Constitution which, unlike its federal counterpart, explicitly recognizes the existence of a "right to privacy," although Ravin also invoked the federal interpretation of that right as first expressed in the 1965 case of *Griswold vs. Connecticut*.[47]

> The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.[48]

The Supreme Court's emphasis upon the state amendment was significant, since it encompassed, from the court's perspective, a broader and more stringently protected guarantee than that its federal counterpart, as emphasized by Chief Justice Jay A. Rabinowitz's majority opinion.[49]

> The privacy amendment to the Alaska Constitution was intended to give recognition and protection to the home. Such a reading is consonant with the character of life in Alaska. Our territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.[50]

Justice Robert Boochever, in his concurring opinion, specifically reiterated that point.

> Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that the right is broader in scope than that of the Federal Constitution. As such, it includes not only activities within the home and values associated with the home,

> but also the right to be left alone and to do as one pleases as long as the activity does not infringe on the rights of others. Thus, the decision whether to ingest food, beverages or other substances comes within the purview of that right to privacy.[51]

There are two concepts that are invoked by the Alaska Supreme Court within this case that are fundamental to a broader appreciation of the "dominant ideology" of Alaskan society: "autonomy" and "harm." The first concept is a fundamental tenet of liberal democracy that addresses the need of individual citizens for personal control and self-expression, particularly against the invasive actions of government. The second concept invokes the circumstances under which a government may, on behalf of society, legitimately restrict the freedom and invade the autonomy of the individual citizen.

"Frontier Autonomy"

Chief Justice Rabinowitz expressed an interesting claim regarding Alaskan society. The notion that Alaskans adhere to a more rigorously defined and held concept of autonomy than the same concept that is found elsewhere in American society was treated, here, as a defining feature of Alaska's constitutional jurisprudence. This "frontier autonomy" is not inconsistent, by any means, with the liberal democratic tradition; indeed, it reflects a libertarian interpretation of that tradition which provided an ideological basis for the American Revolution. However, the contrast provided by this claimed Alaskan perspective offers a challenge to a conventional judicial understanding and application of privacy as a civil liberty. The "right to privacy" is more stringently protected by Alaskan courts than by their federal counterparts, because Alaskan residents, supposedly, embrace the values of liberty and autonomy (which form the basis for a modern "right" to privacy) more stringently than do other Americans.

A Higher Threshold of "Harm"

If that claim is accurate, it imposes, consequently, a higher threshold of "harm" which must be demonstrated by agents of the Alaskan government in order to justify an invasion, and a restriction, of individual privacy. Of course, the "harm principle" has been, in some form, an established part of the legal and political systems of all truly liberal democratic societies.[52] However, in this case the state was required to overcome the demonstrable claims of the defendant that marijuana, while not being, necessarily, a physically healthy item, fails to pose a danger to the person who is ingesting it that is sufficiently harmful to warrant a police invasion of the privacy of that person's home. The court did accept an argument that, since the use of marijuana may impair the motor skills of persons who operate motor vehicles on public roads (and are, thus, a potential danger to other motorists), the police may search a private automobile for signs of that

use. But the court was unwilling to extend that argument.

> However, given the relative insignificance of marijuana consumption as a health problem in our society at present, we do not believe that the potential harm generated by drivers under the influence of marijuana, standing alone, creates a close and substantial relationship between the public welfare and control of ingestion of marijuana or possession of it in the home for personal use. Thus, we conclude that no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home has been shown. The privacy of the individual's home cannot be breached absent a persuasive showing of a close and substantial relationship of the intrusion to a legitimate governmental interest. Here, mere scientific doubts will not suffice. The state must demonstrate a need based on proof that the public health or welfare will in fact suffer if the controls are not applied.[53]

A Heightened Level of Scrutiny

Alaska's judicial system has imposed a heightened level of scrutiny upon governmental powers that confront individual rights and liberties. In other words, the authority of the sovereign must relate not only to "harm," but to evident and *demonstrable* harm. That criteria was articulated with the establishment of the "sliding scale" approach to the interpretation of the equal protection clause of the Alaska Constitution.[54] The significance of this approach was demonstrated within the 1990 Alaska Court of Appeal decision of *Bernhard F. Maeckle vs. State of Alaska*. The plaintiff had been convicted of serving as a hunting guide and taking game without a license, which imposed, in part, felony sanctions upon him. He argued that he should have been punished under a misdemeanor; the felony conviction was, he argued, excessive and, consequently, discriminatory and a violation of his equal protection rights.[55]

Chief Judge Alexander O. Bryner ruled, on behalf of a unanimous court, that Maeckle's conviction and sentence should be upheld, although recent statutory changes to sentencing in this area should be reconsidered by the lower court. However, despite the fact that Maeckle's claim was denied, the Court of Appeal exhibited its preoccupation with the maintenance of a higher standard for Alaska's constitutional tradition regarding the restrictions that are imposed upon the authority of the state, especially in consideration of precedents that repeatedly affirmed the broader interpretation of individual rights protections that the Alaska Constitution provides, such as the 1984 Alaska Supreme Court case of *Stiegel vs. State of Alaska*.[56] Chief Judge Bryner's opinion subjected this statute to a strong scrutiny that is consistent with the overall tone of Alaska constitutionalism. He was careful to raise this standard before concluding that its purpose was legitimate, its application was fair, and no substantive violation of individual rights and liberties had occurred.

> For purposes of deciding Maeckle's claim, we need consider only the Alaska Constitution, since our supreme court has interpreted Alaska's equal protection and due process clauses more broadly than the federal courts have construed parallel provisions of the United States Constitution. To determine the validity of a statute challenged under Alaska's equal protection clause, we apply a trivalent standard, harmonizing conflicts between individual and governmental interests by balancing the significance of the individual right that has been infringed, the legitimacy and importance of the state's regulatory purpose, and the efficacy of the challenged enactment as a vehicle for carrying out that purpose. As the impacted individual interest increases in importance, Alaska's Constitution demands a proportionally more compelling state purpose and an increasingly closer link between that purpose and the statutory means chosen to effectuate it.[57]

Petty Offenses

The pivotal precedent which firmly established this expansive interpretation of Alaska's constitutional jurisprudence is the 1970 case of *Baker vs. City of Fairbanks*. In that case, a man was charged with assault under a city ordinance. He was convicted of the offense without the benefit of a jury, which was not provided because the crime was regarded as a "petty" one and because persons charged under city ordinances traditionally were not accorded jury trials. Baker's conviction was overturned by the Alaska Supreme Court, even though it was argued that the Sixth Amendment of the United States Constitution (as applied to the states through the Fourteenth Amendment) was interpreted as not requiring a jury trial for "petty offenses," particularly by the United States Supreme Court in the 1968 case of *Duncan vs. Louisiana*.[58] The Alaskan court's decision to overturn the conviction was based upon a determination that Alaskan tradition and values demanded more stringent protections in this area that must not be limited by more parochial federal values.

> While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage. We need not stand by idly and impassively, waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law.[59]

This ruling overturned the previous deference that the Alaska Supreme Court had shown towards federal interpretations of the rights and liberties that

were guaranteed by both the federal and state constitutions, especially as declared during that court's second session in the 1960 case of *Louis W. Knudsen vs. City of Anchorage*.[60] The court applied originalist and constructionist approaches within that case to interpret the recently adopted Alaska Constitution as reflecting, in many instances, the fundamental values of its federal counterpart. The unanimous opinion of Chief Justice Buell A. Nesbett cited, in particular, opinions expressed during the deliberations of the Alaskan constitutional convention in support of that argument.[61] Therefore, the court argued that clauses within the state document that appeared to be textually similar to clauses in the federal document should defer to federal interpretation and not expand the scope of the civil rights and liberties that they protected.[62]

A Right to Jury Trial

Baker vs. City of Fairbanks prompted the court's decision to limit judicial discretion in matters of criminal contempt citations in the 1971 case of *State of Alaska vs. Browder*, in which a person was sentenced to six months imprisonment for contempt of court by a municipal judge without the benefit of a trial by jury.[63] Again, the Alaska Supreme Court emphasized the theme of limited government when it curtailed the discretion of members of the judicial branch of the state, particularly when that power had the potential to become nearly "despotic."[64] Justice Rabinowitz cited, on behalf of all of his colleagues, ART. 1, SEC. 1, 7, and 11 of the Alaska Constitution, which guarantees, respectively, equal protection of the law, general due process rights, and the right to counsel.

> This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State. . . .
>
> No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed. . . .
>
> In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption is great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[65]

This articulation of the guarantee of a jury trial was emphasized, in particular, by Justice Rabinowitz as a central tenet of these general due process

guarantees that are found within these sections of the Alaska Constitution and embraced within Alaskan society, especially as this tenet had been interpreted previously in *Baker*.

> *Baker* presaged our right to jury trial holding in the case at bar. . . . Alaska's constitutional provision relating to the right of jury trial was interpreted to mean that in any criminal prosecution an accused, upon demand, is entitled to a jury trial. We defined the category "criminal" prosecution as "including any offense a direct penalty for which may be incarceration in a jail or penal institution." In reaching this construction, we expressly held that contemporary social values, rather than historical categorizations, should determine whether a prosecution is criminal for purposes of the right to a jury trial. . . .
>
> *Baker* is bottomed on our belief that the right to jury trial holds a central position in the framework of American justice, and our further belief as to the primacy which must be accorded to the accused's right to a fair trial against considerations of convenience or expediency to the state.[66]

Justice Rabinowitz then extended the reasoning that this precedent offered to the facts of that particular case and determined that contempt of court also was affected by that state constitutional protection. His opinion revealed, in this respect, the libertarian interpretation of the authority of all branches of government that characterized the Alaskan constitutional tradition.

> We therefore think that Judge Lewis's [court of appeal] ruling that Browder was entitled to a jury trial under Alaska's Constitution on the question of whether he was guilty of contumacious conduct should be affirmed. In our view, this holding is in harmony with the rationale of Baker and is reflective of the central position we believe the right to jury trial holds in our system of criminal justice. We think fundamental fairness requires that no one individual should be permitted to act as prosecutor, trier of fact, and judge in the same proceeding. Neither reason nor logic has persuaded us that this anomalous summary power to imprison for contempt is to be found "within the intention and spirit of our local constitutional language." Rather, we find that a right to a jury trial in a direct criminal contempt situation is "necessary for the kind of civilized life and ordered liberty which is at the core of our [Alaskan] constitutional heritage." We therefore hold that Browder is entitled to a jury trial on the question of whether he committed a criminal contempt. We further hold that under article I, section 11 of Alaska's Constitution Browder is entitled to have the assistance of counsel in defense of this charge.[67]

Landmark Cases and Opinions

Baker vs. City of Fairbanks has been the most pivotal precedent in terms of establishing an elevated influence of a specific tradition of Alaskan beliefs and values, but it has been complemented by other landmark cases, including the 1969 case of *Gordon H. Roberts vs. State of Alaska*, which expanded protections

regarding the admissibility of evidence confiscated from prisoners.[68] Gordon Roberts was compelled to give handwriting samples while he awaited trial in confinement, without the advice or support of counsel. This evidence was used to convict him of forging checks, despite the objection that it violated his freedom against self-incrimination and his right to counsel.[69] The conviction was appealed to the Alaska Supreme Court, which overturned Roberts' conviction and ordered a new trial.

Justice George F. Boney's opinion for the majority of the Alaska Supreme Court justified this decision upon the basis of guarantees provided by the Alaska Constitution that are stronger, he argued, than the guarantees provided by the United States Constitution. This opinion also reversed the earlier conclusion that had been reached in the 1960 case of *Knudsen vs. State of Alaska*. Justice Boney offered the familiar argument regarding the superior nature of the claims of an individual defendant against the desire of the state and federal governments to protect society from the crimes that he allegedly committed.[70] However, he offered a further justification for this opinion that addressed the basic relationship between public officials and private citizens. Justice Boney admonished the "unethical" behavior of state and federal police and argued that this action posed a particularly serious threat to the fundamental duty of the state to the citizens it serves. He offered an interesting variation upon the theme of limited government that remains a dominant focus of the libertarian variation of the liberal democratic tradition.

> We are influenced in reaching this conclusion by the dubious ethical character of the government's action in dealing directly with the accused after counsel had been appointed. Any questions of coercion and impropriety could easily have been avoided by obtaining counsel's consent to taking the exemplars. Ordinarily attorneys should not communicate or negotiate with parties represented by counsel. They may not do through intermediaries what they may not do directly. The district attorney should comply with the ethical standards generally applicable to attorneys. While we do not now hold that the United States and Alaska Constitutions necessarily protect those accused of crime against breaches of professional ethics, this court will not eagerly adopt controversial constitutional interpretations which would encourage unethical behavior.[71]

The dissenting opinions of Chief Justice Buell A. Nesbett and Justice John H. Dimond found this particular argument to be especially objectionable, since they believed that the unethical behavior of government officials does not, by itself, constitute a constitutional violation, even though such behavior is disturbing and should be discouraged. They also objected to the overturning of the central premise of *Knudson* because of their belief in the deference to federal standards of constitutional protections when they parallel state protections.[72] Nonetheless, the majority opinion prevailed and established a precedent that was

consistent with the broad libertarian spirit that has emerged within the Alaska constitutional tradition.

The 1981 case of *State of Alaska vs. Wilder S. Rice and Cessna Finance Corp.* (regarding the expansion of due process protections concerning cases involving confiscation of property used for the purposes of perpetrating an offense) also received scrutiny by the Alaska Supreme Court upon the basis of this essential interpretation of the state's constitutional tradition.[73] Chief Justice Rabinowitz provided an opinion on behalf of all of his Alaska Supreme Court colleagues. He focused, particularly, upon the issue of intent regarding the punishment of people who did not actually commit a crime. It provided another way of emphasizing the theme of protecting individual persons against the power of the state, even when the motives of the state in protecting the legitimate interests of society are, otherwise, justifiable or, even, laudable.[74]

Conclusion

The relationship between specific Alaskan ideological and cultural values has tended to be more implicitly understood than explicitly discussed and declared. Nonetheless, the presence of this influence has been (as it has been within the federal constitutional tradition) unmistakable. One of the characteristics of a dominant ideology is the fact that its values are so pervasive that they generally are taken for granted, even by experienced jurists. That influence frequently remains explicitly unacknowledged within the Alaskan judicial system, but its implicit presence is as significant and persistent as it is unmistakable.[75] The Alaska Constitution is a document that is grounded upon libertarian principles that are more firmly rooted and represented within Alaskan society and its political, legal, and economic institutions than they are within the rest of American society. The concept of "frontier autonomy" is advanced within Alaska's legal and judicial systems; the nature of liberal democracy is self-consciously identified within that state, and its values are expressed beyond the level of popular culture and historical folklore.

Chapter 3

California

Diverse Microcosm

Diversity of American Society

The largest American states are more likely to reflect the diversity of American society as a whole than are other states. Generally, these states become large because of their extensive, convenient, and productive geography.[1] That fact places such states at a natural crossroads for foreign immigrants or internal migrants. It tends to promote conditions, especially in terms of environmental and resource factors, that stimulate economic growth and prosperity. It also allows sufficient room for the growth of population that makes these states, ultimately, large and diverse. Finally, because of their tendency to be found at geographical crossroads, the population of these states tend to be mobile and transient, thereby lacking a sense of generational, or even relatively short-term, continuity.

States such as New York, Texas, Pennsylvania, Illinois, and Florida are included within this category. These states are, in some respects, microcosms of the broader American society, although they do not mirror it, uniformly. For example, Texas has a demographic composition that includes a relatively large proportion of people of Latino descent, including recent immigrants from Mexico, or the children and grandchildren of these immigrants. However, even within those states that share a frontier with Mexico, the influence of an immigrant Mexican population has been more than offset by the internal migration of other Americans, especially people who are descended from Western European immigrants.[2] Therefore, the cultural and ideological values of Europe, in general, and Great Britain, in particular, has dominated the political, legal, and constitutional development of these states. In fact, given the demographic volatility of these states, these principles and values have provided a catalyst in terms of establishing a sense of uniformity within this development; Anglo-American liberalism

has served as a "lowest common denominator" in this respect, as reinforced by the political and legal institutions that have been created through the process of the establishment of statehood.[3]

California's Reflection of American Diversity

California is typical of this trend among the largest states of the American union. Its population is large, diverse, and relatively transient. Its institutions have been dominated, however, by the same Western European (and, particularly, Anglo-Saxon) heritage that has persisted as the dominant cultural and ideological influence of American society as a whole. Its history is, in many ways, unique, but it is not inconsistent, in many important respects, with the history of the United States, especially in economic, social, and even popular cultural respects.[4] An examination of the state's historical development (with a particular emphasis upon its legal and constitutional development) offers a good perspective upon this comparison and its effect upon the ideological values that dominate this state, its constitution, and the nation of which it is a part.

The considerable geographical area that constitutes the present state of California was sparsely settled for thousands of years. Nonetheless, the native population prospered within certain centers of that area, especially before the sixteenth century. However, when European explorers arrived, this population began a period of steady decline. The best lands were systematically confiscated, generally without compensation. In addition to this deprivation (which made basic survival, let alone prosperity, for these aboriginal peoples extremely difficult) they suffered from the introduction of diseases of European origin, to which they lacked antigen resistance. Official and unofficial persecution also contributed to the steady decline in well being and population among the native peoples, until they became impoverished and their population became only a small fraction of its level prior to the arrival of the outsiders. Therefore, the influence of their culture and ideas was, and remains, largely ignored by modern Californian society.[5]

Spanish Influence

Juan Rodriguez Cabrillo explored the coast of California, as part of a Spanish expedition, in 1542. However, the Spanish did not pursue this initial contact, and explorers from other countries also showed an interest in the area. Sir Francis Drake landed on the coast of California in 1579 while he refitted his pirate ship, the *Golden Hind.* He promptly claimed possession of it on behalf of Queen Elizabeth I of England, and he named it *Nova Albion*. Despite this incursion, the Spanish felt that there was no threat to its colonies to the south, and so California remained largely ignored—although Sebastián Vizcaíno did conduct a detailed exploration of the area surrounding Monterey Bay in 1602 with the intention of founding a future colony there. Still, despite other sporadic visits from navi-

gators and treasure seekers, active Spanish settlement of the region was deferred for another sixty years. The threat of increased economic and military activity within the region on the part of Russian and British traders and explorers convinced the Spanish government that the possession of California was relevant to the stability and security of New Spain, especially the region that now is Mexico. Furthermore, the need for additional ports for Spanish galleons en route to, and from, the Phillippines also spurred Spanish imperial interest in the region.[6]

The administrators of New Spain, with the support of King Charles III, took advantage of the missionary zeal of Franciscan priests and brothers for the purpose of establishing a permanent presence within the region. Father Junípero Serra established the Alta California Mission at the site of the present city of San Diego in 1769. This action was part of a broader colonization effort that was led, under the direction of the Inspector General of New Spain, José de Gálvez, by the military commander, Gaspar de Portolá. It involved two separate land expeditions and two separate sea expeditions, and it led to the exploration of the San Francisco Bay area and the eventual establishment of a colony at Monterey Bay in 1770.[7]

In 1776, Captain Juan Bautista de Anza led an expedition from Monterey to San Francisco Bay, where he established the colony of Yerba Buena. This action began the process of consolidation of Spanish authority over the region and the formal establishment of the province of Alta (or, in English, Upper) California. This process included the imposition of Spanish imperial institutions throughout the new province, of which three were most significant: missions, presidios, and pueblos.[8]

Missions, *Presidios* and *Pueblos*

The twenty-three missions of the province, which fell under the religious authority of the Order of St. Francis and the general authority of the Roman Catholic Church (but remained under the secular authority of His Most Catholic Majesty and his provincial authorities), were located within one day's journey of each other. They were designed to convert the dwindling native population to Christianity, but they served the more important function of cultural centers where European farming methods also were promulgated. The four *presidios* provided a military presence for the purpose of protecting the province and enforcing colonial rule. The three *pueblos* provided communities for the centralization of social and economic activity among the colonists of the province. However, despite this formal establishment, the actual effectiveness of this presence remained relatively slight, and its influence was not particularly strong.[9]

This lack of influence was due largely to the underpopulation of the province, both in terms of Spanish colonists and aboriginal inhabitants. It was reflected within the practical functioning of the legal system, which was dominated by the presence and role of the magistrates, or "*alcaldes*." These officials applied a

mixture of traditional Spanish civilian and military law, but their interpretive authority was invested so completely within their personal discretion that they did not necessarily reflect the complete institution that they represented. In any event, the promotion of a judicial system for Upper California, while it was part of the larger Spanish imperial system, remained relevant primarily for the Spanish colonists. Other immigrants did not necessarily invest the system with a similar set of fundamental legal values.[10]

The "Americanization" of Upper California

Americans began arriving in Upper California during the early nineteenth century. Their arrival was part of a growing interest in the economic possibilities that this region offered. Soon, the Spanish population represented a minority of the province. Nonetheless, when the Mexican Revolution of 1820 proved to be successful, the residents of Upper California declined the opportunity to separate from the attachment to a distant government. The province had not been involved in that revolution, but it demonstrated that its residents did not harbor a particular aversion to it when the provincial government, with local support, formally declared allegiance to the new Republic of Mexico in 1822. The Mexican government rewarded this loyalty by continuing the earlier policy of redistributing former Franciscan lands among petitioning residents through the creation of grants, called "*ranchos*."[11]

The *ranchos* became the central focus of the Upper Californian economy. Farming and the raising of livestock attracted most immigrants who sought economic opportunity, and most of them were Americans. These immigrants had first noticed this region through reports of the activities of fur trappers and New England whalers. Although they were not the only people who were attracted to the area (a Russian colony was established at Fort Ross in 1812), they quickly became the dominant force within the growing province. American residents overwhelmed the population of Spanish descent, so that, despite the persistence of Spanish political and legal institutions within the province, the values of the growing United States began to dominate its overall development. That trend was not unique to Upper California; it had occurred within other parts of North America where a former Spanish colony had become largely displaced by a migrating American presence, such as Florida, Texas, those territories that would become Utah and the American Southwest, as well as (although to a lesser extent) Louisiana.[12]

Nineteenth-century Values

These American immigrants brought with them the beliefs and values of a nineteenth-century American society that was expanding geographically and economically. They were an early manifestation of the movement that became

popularized in 1845 by the editor of the *United States Magazine and Democratic Review*, John L. O'Sullivan, under the slogan of Manifest Destiny. This slogan represented a belief that Americans, especially of Anglo-Saxon descent, were preordained to expand their civilization, its ideological values, and its institutions (including legal and constitutional institutions) throughout the continent of North America. This belief was spurred by certain vague, but still potent, Puritan beliefs that had been inherited from European Calvinism. The growing success and prosperity of the United States was proof of God's favor; Americans were, in other words, part of the "elected" members of humanity. They were God's "chosen people" who were destined for salvation, which was indicated, in turn, by their continual expansion throughout, and dominance of, the continent and everyone within it.[13] It was a theme that was echoed by the populist owner of the *New York Tribune*, Horace Greeley, especially when he urged the construction of a transcontinental railroad in connection with his own visit to the American West, culminating in a tour of the new state of California.

> Men and bretheren! let us resolve to have a railroad to the Pacific—to have it soon. It will add more to the strength and wealth of our country than would the acquisition of a dozen Cubas. It will prove a bond of union not easily broken, and a new spring to our national industry, propserity, and wealth. It will call new manufactures into existence, and increase the demand for the products of those already existing. It will open new vistas to national and to individual aspiration, and crush our filibusterism by giving a new and wholesome direction to the public mind.[14]

This attitude motivated many, if not all, of the nineteenth-century American immigrants to California. But the underlying ideological impetus behind this movement was one that dominated American society throughout its history. It was one that was particularly prevalent among the residents of the northeastern region of the United States, and it was these people (especially from New England, New York, and Pennsylvania) who comprised the bulk of this American immigration to the Mexican province of Upper California, especially during the period of rapid expansion which occurred during the middle of the nineteenth century.[15]

This ideological source was the "classical" interpretation of liberal democracy that dominated the northern part of the United States and, following the Reconstruction era, gradually dominated American society as a whole. It is an ideological tradition that developed in response to the rise of a seventeenth-century mercantile economy and, eventually, modern capitalism. It explained and justified the relationship of the individual member of society to the economic relations that bind that society together. Those persons who seek the freedom to choose their own path to economic opportunity find, within this ideological tradition, a foundation in support of their purposes. It was that foundation upon which American migrants to the western reaches of North America based their

expectations regarding the role of government within that process. It was the same foundation that guided those American migrants to Upper California who sought economic opportunity there.

> California, land of promise! For centuries California has beckoned to people who journey there to find gold, fame, health or adventure. The riches of California have been a siren song for many. Yet through the years so many immigrants have earned rich rewards that its promises carry the ring of conviction. As a result, all over the globe millions who do not know the name of any other American state regard California with wistful awe.[16]

Liberal values that underlie that theme of individual opportunity evolved during this period of the nineteenth century. One of the most effective articulations of this ideological development came from the great British reformer and philosopher, John Stuart Mill. His comments emanated from a European setting, but their application to the prevailing beliefs of American society were particularly accurate.

> The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties or the moral coercion of public opinion. That principle is that sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forebear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[17]

Economic Prosperity or the Doctrine of "Free Trade"

This articulation also reflected the prevailing beliefs of the emerging Californian society, especially in terms of the overriding theme of relative political freedom in support of the pursuit of economic prosperity. The provincial governments of Upper California, which were distant from central Mexican authority, dominated

by Americans (especially from the northeastern United States), marginal to the lives of most residents, and apparently minimalist in their approach to governance (especially in economic matters, in which they focused mainly upon the granting and basic external regulation of the *ranchos* and other enterprises), was acceptable to these immigrant residents because it met their ideological expectations regarding the legitimate limits and role of government.[18]

> Again, trade is a social act. Whoever undertakes to sell any description of goods to the public does what affects the interest of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society. . . . But it is now recognized, though not till after a long struggle, that both the cheapness and the good quality of commodities are most effectually provided for by leaving the producers and sellers perfectly free, under the sole check of equal freedom to the buyers for supplying themselves elsewhere. This is the so-called doctrine of "free trade," which rests on grounds different from, though equally solid with, the principle of individual liberty asserted in this essay.[19]

These American migrants were entrepreneurs who went to Upper California in order to seek their fortune. Fur traders, among the first of whom were the members of an 1826 expedition to San Gabriel that was led by Jebediah Strong Smith, initiated this era of rapid economic migration. Soon they were joined by pioneers who came to this region in order to engage in farming, mining, trading, and other endeavors. The economic possibilities that the region offered motivated the United States government to send military exploration expeditions there, three of which were led, during the early 1840s, by the colorful army officer, Captain John Frémont. This activity, and the rapid expansion of the American population of the province, stimulated Mexican concern.[20]

The response of previous Mexican governments to the administration of Upper California had been relatively restrained. However, this growing American presence there, coupled with the perception of internal political problems within Mexico (especially in terms of other provinces that were dominated by American immigrants, particularly Texas) and an external threat posed by the expansionist United States, prompted an attempt by Mexico to diminish the American presence within Upper California and to strengthen its own military and administrative hold upon the province. Many American immigrant residents of Upper California were arrested upon the basis of being suspected revolutionaries. The Mexican military presence within the province was strengthened slightly, and the powers of the military governor there were increased. The Mexican government, under its military leader, President Santa Anna, actively discouraged foreign migration to that province, which culminated in an aborted attempt, in 1843, to expel formally all Americans from Upper California.[21]

This policy was regarded by the American immigrant population of Upper California as being a direct threat, both to its economic prosperity and its political

liberty. During the middle of the 1840s, even after the Mexican government relented its previously strident policy regarding this distant province, Upper California's residents continued to believe that an imposition of coercive measures and a general expulsion of American immigrants was imminent. They noted that Texas, which also had become dominated by American migrants and shared similar patterns of economic and political development with Upper California, had experienced a similar conflict with the Mexican government which led to a successful revolution, followed by a concerted, but failed, attempt by Mexico to crush that revolt.[22]

Therefore, in 1846, a group of prominent American settlers led a revolt against Mexican rule. They were inspired, in part, by the fact that the United States and Mexico recently had declared war upon each other, primarily as a result of the conflict over the admission of the former Mexican province, and later Republic of, Texas to the American union. They also took advantage of the fact that Captain Frémont was commanding an army unit that still was conducting an expedition within the province and compelled the relatively small Mexican military presence there to surrender. On June 14, 1846 they captured General Mariano Vallejo, who was commandante general of Upper California, at Sonoma; they forced him to recognize the newly declared Republic of California.

A New Republic

This new republic was led, however, by only an *ad hoc* revolutionary government that lacked a formal structure, as well as a constitution. Shortly after the proclamation of the establishment of this republic, additional American military and naval forces invaded the province as part of a campaign of the Mexican-American War. This movement was so swift that by August 1846 all of the major communities of California had been occupied, and the embryonic government of the Republic of California was displaced by American military rule, first under Commodore John Sloat and then under Commodore Robert Stockton. Martial law formally was declared to be in effect and would remain that way until an American territorial government could be established.[23]

Many Americans within California always had sought eventual union with the United States, although other residents expressed a preference for the establishment of a truly independent state along the Pacific Ocean, possibly including the Oregon Territory to the north. But the United States Congress was indecisive about the issue. Northern politicians feared that the formal annexation of the lands that had been conquered from Mexico during the war might upset the compromises over slavery that had depended upon the balance of federal representation between "free" and "slave" states. Furthermore, California was a distant territory that would be difficult to protect and integrate into the American federal system. Therefore, petitions from Californians for formal territorial status or statehood were unanswered, even after the Treaty of Guadalupe Hidalgo

not only successfully concluded the Mexican-American War early in 1848, but also confirmed American sovereignty over the conquered Mexican provinces.[24]

During this period the military governors of the region continued to employ the forms of the Mexican legal and judicial systems, provided that they did not contradict the United States Constitution. In fact, all Californians were regarded as enjoying the same rights and privileges as citizens of the United States. The central feature of the Californian judicial system remained the office of the *alcaldes*, but it no longer was guided by the civil law system that Mexico had inherited from Spain or even by formally trained jurists. Originally a recorder of deeds, the *alcaldes'* central role regarding land ownership enhanced that position, making the *alcaldes*, ultimately, a dominnat legal position of this period of California history.[25] Many of the *alcaldes* adapted principles of the American common law system within their rulings, while other *alcaldes* substituted their own judgment for conventional legal rules and reasoning.[26]

These magistrates now were predominantly Americans, so they naturally applied American standards to the administration of law within California. However, the entire legal system, as well as the political structure of the territory, was tenuous. The residents of California wanted a permanent system in its place. They were frustrated by congressional delays regarding the region's ultimate status, as well as the continued presence of martial law as the only source of political authority. Resolutions were adopted by many communities in 1848 and 1849 that called for a constitutional convention for the purpose of placing a detailed proposal for a territorial or state government for California before Congress. The military governor of California, General Bennett Riley, responded to these demands by issuing a proclamation on June 3, 1849 for such a convention to convene on the first day of September of that year.[27]

After six weeks, this convention produced a draft constitution that reflected directly the influence of the ideological values and principles of American society, in general, and the northern states, in particular. Although this document differed from the constitutional schemes of the federal government and the different states regarding certain specific points, it did not differ substantively from the general principles of American society. Variations within the document generally reflected specific economic or social conditions of that time within California. In particular, the concept of "limited government" was asserted with a distinctive emphasis.

> On the whole, they [the delegates to the state convention] opted for a modification of the "pioneer model" of vesting the legislature with plenary authority. Their faith in the legislature was limited, for they forbade it from enacting special legislation for private benefit or to enact legislation dealing with certain subjects. Thus, the legislature was forbidden to grant divorces (ART. IV, SEC. 26), establish lotteries (ART. IV, SEC. 27), charter corporations specially (ART. IV, SEC. 30), establish banks (other than as pure specie depository institutions)(ART. IV, SEC. 34–35) or permit

> corporate shareholders to evade personal liability for corporate debts (ART. IV, SEC. 36). . . .
>
> On the other hand, the convention opted for annual legislative sessions. Although William Gwin, an ambitious forty-four-year-old former one-term congressman from Mississippi, argued for biennial sessions on the grounds of economy and libertarian philosophy, the convention preferred annual sessions, showing faith in the legislature's ability and willingness to correct its errors.[28]

An even more significant similarity was expressed through the decision, on the part of the convention, to guarantee individual civil rights and liberties. This decision reflected both the widespread adherence to the conventional American approach towards the nature of liberal democratic values, as well as an affirmation of the general antebellum American belief (although it was defended most stringently by southern states) in the role of state governments, generally, as the proper guardians of the rights and privileges of citizens, especially since they were perceived as being controlled more directly by the "people."

> Like the thirty other state constitutions then in existence, the 1840 Constitution [of California] contains a Declaration of Rights. Significantly, it was the first substantive item of business for the convention. The committee to draft a bill of rights quickly presented a sixteen-section list, with nine based upon or verbatim copies of New York's 1846 Constitution, and seven copied from or modeled after the 1846 Iowa Constitution. The list was modified when Shannon of Sacramento proposed the inclusion of two sections that survive today. The first was a straightforward embrace of natural law: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness." The second was a ringing affirmation of popular sovereignty: "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people; and they have the right at all times, to alter or reform the same whenever the public good may require it." Both were adopted quickly.[29]

Principles of Liberalism

The principles of liberalism, as inherited from its seventeenth-century origins and advanced during the American Revolution and within the United States Constitution, formed the ultimate basis for this constitutional course of action on the part of these Californian delegates. These principles were expressed throughout the proceedings of the convention, but perhaps not as succinctly as they were when William Gwin spoke on behalf of constitutional provisions that were designed to limit government interference in, or control of, businesses and corporate entities, including banks. In particular, he opposed the existence of public or corporate banks. However, his sentiments revealed a much broader defense

of the economic assumptions upon which laissez-faire capitalism, and its ideological foundations within the liberal tradition, ultimately were based.

> It is folly to create associations for the deposit of gold and silver. . . . Let us guard against infringing on the rights of the people, by legalizing the association of capital to war upon labor. This is the only country on the globe where labor has the complete control of capital. If there are to be banks in the country, let us have private bankers, who, if they abuse the confidence of the people, can be punished by the law, indicted and put in the penitentiary.[30]

This draft constitution was adopted by the convention and submitted to a referendum among California's eligible voters. It was approved overwhelmingly by the electorate in November 1849, and it was forwarded to Congress, which finally approved it and admitted California, as a "free" state, to the American union on September 9, 1850.[31]

Sources of Constitutional Concern

Although it worked well, the California Constitution could not anticipate all of the needs and concerns of this quickly growing state. Therefore, within thirty years of its adoption, there were demands for changes within the document. Furthermore, racism had become a major motivating force within Californian politics and society. While, on the east coast of the country, racism primarily assumed the form of discrimination against African-Americans (despite the victory of the Union during the American Civil War and the aggressive policy of Reconstruction which followed that war), on the west coast it assumed the form of antipathy towards Asian-Americans, especially recent Chinese immigrants who performed manual and service sector labor functions and who were perceived to be an economic threat to the European-American population of the state.[32]

Another source of political and constitutional concern was the growing economic dominance of railroad corporations. The fact that this industry was managed through corporations was a special source of tension that had influenced the constitutional convention of 1849 to include clauses such as ART. 4, SEC. 36, which held shareholders to be liable for corporate debts, since, it was believed, businessmen could evade individual responsibility for their collective actions. However, the perception that corporations, in general, and railroads, in particular, were actually, or potentially, monopolistic and destructive of the interests of working people and the free market system became one of the strongest motivating factors behind the calling of a new state constitutional convention for California in 1878.[33]

The belief that it was proper for a government to interfere with certain economic practices had become increasingly acceptable throughout American society, especially as a result of industrial growth and the idealism that spurred

the policies of federal Reconstruction. An "interventionist" strain of liberalism had been accepted within the American judicial system as well as within American society in general. Such intervention was acceptable, however, only in response to "harm," and then it must be as limited as possible. This principle had been articulated by eighteenth- and nineteenth-century utilitarian reformers such as James Mill and Jeremy Bentham, and it was increasingly reflected within American constitutionalism.

Utilitarianism

Utilitarianism was a philosophical movement that was developed in response to political, legal, and social practices of the eighteenth century that appeared to violate certain liberal expectations regarding the proper role of government, particular within the development of public policy. The principal advocates of this philosophical system, especially Bentham, responded to excesses of political coercion (such as the passage and enactment of the infamous "black acts") with the development of the principle of "utility." This principle was predicated upon certain expectations: everyone is obligated morally to promote the greatest happiness of the greatest number of people; human nature dictates that every person pursues the overriding interest of securing pleasure and avoiding pain; the goodness or badness of an action can be judged only in terms of its consequences, and not its intentions; governments are delegated the responsibility, on behalf of all society, of securing its greatest happiness, and they can interfere with individual liberty only if that liberty negatively affects the happiness of the majority of society's members.

This approach contradicted the *laissez-faire* assumptions of "classic" liberal thought, which regarded any interference with economic liberty as a violation of basic moral principles. According to utilitarian thought, governments are obliged to interfere with, and regulate, individual economic interests in such a way that, while they should be restrained from undermining the pleasure principle of those persons who seek to increase their property (and thus their happiness) in this way, they also should provide for the general "pleasure" of society, especially in the areas of public safety, health, and the capacity of all members of society to pursue their own conception of "good." This movement, and the call for general and specific political and legal reforms that motivated it, occurred during the period of the American Revolution and the creation and early judicial development of the United States Constitution. It is reasonable to assume, therefore, that the ideas of utilitarian reformers like Bentham influenced American jurisprudence indirectly as profoundly as they influenced British jurisprudence directly.[34]

> Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to

> determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire: but in reality he will remain subject to it all the while. The *principle of utility* recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and law. . . .
>
> By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness.[35]

Enactment of Legal Process

During the early nineteenth century, a disciple of the utilitarian school of liberal thought, John Austin, would apply these principles to the study and enactment of the legal process. His advocacy of a "scientific" approach to legal positivism through the application of this pain/pleasure formula would influence the subsequent development of law throughout the Western world, and particularly within common law systems such as found within England and the United States.

> According to the theory of utility, the science of Ethics or Deontology (or the science of Law and Morality, as they should be, or ought to be) is one of the sciences which rest upon observation and induction. The science has been formed, through a long succession of ages, by many and separate contributions from many and separate discoverers. . . .
>
> In short, if a system of law and morality were exactly fashioned to utility, all its constituent rules might be known by all or most. But all the numerous reasons, upon which this system would rest, could scarcely be compassed by any: while most must limit their inquiries to a few of the most numerous reasons; or, without an attempt to examine the reasons, must receive the whole of the rules from the teaching and example of others.[36]

For example, when the State of Massachusetts decided to incorporate a company that would build and maintain a toll-free bridge across the Charles River, this act was challenged by the owners and operators of a toll bridge near the site of the new structure (which had been granted, previously, an exclusive charter for the purpose of operating a toll bridge across that same river) upon the basis of a violation of the company's property rights. The United States Supreme Court rejected this challenge during an appeal of a state court ruling in favor of the Massachusetts legislature in the 1837 case of *Charles River Bridge Co. vs. Warren Bridge Company*. Chief Justice Roger Taney delivered a majority opinion for the court that clearly supported the fundamental ideological values which this action of the Massachusetts legislature represented.

> [T]he object and end of all government is to promote the happiness and prosperity of the community by which it is established, and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active and enterprising, continually advancing in numbers and wealth; new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people. A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. . . . The continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform, transferred to the hands of privileged corporations. . . . While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation.[37]

California Judicial System

The California Supreme Court echoed this sentiment within the 1918 case of *J. C. Allen, et al. vs. Railroad Commission of California*. The plaintiff in this case challenged a ruling of the commission regarding his water company upon the basis of a lack of jurisdiction on the part of the commission generally, as well as over water contracts that had not been dedicated to public use, specifically. The opinion of the court that was delivered by Justice Lucien Shaw found in favor of the plaintiff. However, this ruling also upheld the authority of the state legislature to regulate (through delegated agencies) private property and contracts if they affect the "public interest." The California Supreme Court based its ruling upon ART. 1, SEC. 10 of the California Constitution, which was regarded as reflecting and upholding the same fundamental values as ART. 1, SEC. 10 (via the Fourteenth Amendment) of the United States Constitution. The ideological defense that had been offered within *Charles River Bridge Company vs. Warren Bridge Company* at the federal level reverberated within this seminal precedent of California jurisprudence.

> In its broadest sense everything upon which man bestows labor for purposes other than those for the benefit of his immediate family is impressed with a public use. No occupation can escape it, no merchant can avoid it, no professional man can deny it. As an illustrative type one may instance the butcher. He deals with the public; he invites and is urgent that the public should deal with him. The character of his business is such that under the police power of the state it may well be subject to regulation, and in many places and instances is so regulated. . . . But these regulatory powers are not called into exercise because the butcher has devoted his property to public service so as to make it a public utility. He still has the unquestioned right to fix his prices; he still has the unquestioned right to say that he will or will not contract with any member of the public. What differentiates

> all such activities from a true public utility is this, and this only: That the devotion to public use must be of such a character that the public generally, or that part of it which has been served and which has accepted the service, has the right to demand that the service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable charges. Public use, then, means the use by the public and by every individual member of it, as a legal right.[38]

Likewise, the California judicial system, early within its history, established an interpretation of the freedom of contract that consciously mirrored the traditional approach and impetus of its federal counterpart. The 1858 case of *Robinson vs. Magee* focused upon an act of the California legislature which required preexisting creditors of Calaveras County (which was about to be reorganized and divided in order to create the new state political unit of Amador County) to register their warrants against the county government prior to a certain date, or else their claims would be forfeited. The holder of one of these claims (in this case, for back payment of salary) contested the constitutionality of that law, and the California Supreme Court agreed. However, in this seminal precedent, the court invoked the fundamental values and principles of American society and its constitutional tradition in support of the plaintiff's claim, which, Justice Peter Hardeman Burnett noted on behalf of a unanimous court, are identical to the fundamental values and principles of Californian society and its constitutional tradition, as well.

State Constitutional Tradition

Furthermore, this precedent is significant because it provided an early, interpretive source for California jurists to understand the underlying, ultimate basis for their own state constitutional tradition. The association of California's fundamental values with American ones was made consciously by the California Supreme Court, and it reflected a lack of variation between the ideological traditions of the United States and California that has been indicated by the culture, politics, economy, and history of that state and its society.

> The constitution of the United States provides that "no state shall pass any law impairing the obligation of contracts." The same provision in substance is contained in the constitution of this state.
>
> It must be conceded that the intention of the constitution was to secure great practical result. It is equally true that this provision was intended to protect individuals. The powers of government among savage tribes of men are mainly exerted to protect the particular community against other opposing communities. Individual rights are mostly left to individual protection. Wrongs are redressed by the person injured or by his relatives. But among civilized nations, the leading intent of government is to regulate and protect the rights of the individual. The individual surrenders up the natural rights or self-protection, and in consideration of this

> surrender he receives the protection of the state. Whatever the state, therefore, binds itself to do, or not to do, must be observed. If the constitution of the state (as, for example, that of Great Britain) merely distributes and classifies, but does not limit, the powers of government, the state can only exercise the discretion given. It is therefore the peculiar glory of our constitution that a single individual can successfully resist the claims of the whole community when he is in the right.[39]

Delegate Objectives

The delegates who attended California's constitutional convention of 1878 were infused with these ideals and values, as well as with less noble objectives that were derived from immediate economic concerns and the manipulation of racist sentiment to identify a "scape goat" for the state's financial concerns and the problems that California's workers experienced during the latter part of the nineteenth century. In particular, the delegates sought to control the growing power of railroads and other corporate interests through a specific constitutional commitment to public regulation of this aspect of the economy. ARTICLE 12 was amended in order to achieve that purpose. SECTION 21 of that article prohibited railroads from discrimination in its rates, while SEC. 20 prevented railroads from raising rates without the consent of an elected state railroad commission that was created by SEC. 22 of that article. They also sought to control Chinese immigration and undermine the status of Chinese residents of the state through the adoption of ART. 19, although most of it was later declared judicially to be violative of both the Fourteenth Amendment to the United States Constitution and the exclusive authority of the federal government within the area of immigration and foreign policy.[40]

Other new constitutional provisions also provided for taxation and land reform, protections for women who participate within the private sector, and further restrictions upon the powers of the state legislature, especially over local lawmaking.[41] Perhaps the most interesting constitutional change which the convention drafted was the adoption of ART. 1, SEC. 24. This clause stated simply that the California Constitution offered a separate source for the judicial guarantee of civil rights and liberties that could provide greater protection than offered by the United States Constitution. It reflected the traditional belief that states historically have been, and could continue to be, a more direct and stringent guardian of the rights and privileges of individual citizens, as well as a proud declaration of the strength of California's libertarian tradition. It appears to have been regarded, at the time, as a primarily declaratory clause; it would prove to be more controversial, as well as more indicative of Californian beliefs and values, than originally anticipated.

On May 7, 1879, the proposed constitution was approved by the voters of California, although by a narrower margin than had approved the 1849 California Constitution. It also revealed political variations among different areas of the

state; urban areas appeared to dislike this new constitution, while rural areas approved of it. This urban/rural distinction parallels similar patterns found throughout the United States. It does not reflect, necessarily, fundamental difference in ideological perspective; it tends to indicate the different emphases that can result from the effect of economic influence—in this case, a different reaction regarding the need for corporate regulation.

Progressive Movements

California experienced a progressive movement during the late nineteenth and early twentieth centuries that was similar to the larger movement that influenced American society, especially during the presidency of Theodore Roosevelt. It permanently altered popular perceptions regarding the proper social and economic role of government. The acceptance of an interventionist government expanded the role and authority of government, undermining many libertarian assumptions, at least regarding the marketplace. But it also resulted in a greater attraction for the expansion of individual civil rights and liberties protections. This approach reflected, again, a similar trend within the larger American society.[42]

Part of the impetus associated with the emergence of these progressive policies was the arrival of a new source of immigration to California, this time from within the United States. A series of droughts, throughout the Great Plains, during the Great Depression years of the 1930s prompted a mass migration, especially from the farm lands of Oklahoma, which became known as the Dust Bowl. These migrants sought not only to escape an intolerable environmental and economic condition, but were lured to a promise of social and economic opportunity in California, where they went, in large numbers, seeking agrarian employment and a "new life." Again, this episode was unique in its particulars, but not in the general American theme that it reflected. It was part of the American dream, prompted by liberal notions of individual opportunity. It also revealed the problems inherent within such a liberal democratic society, especially in terms of economic disparity and exploitation, as these Oakies displaced the equally exploited labor force of Mexcian immigrants to California, eventually prompting further progressive reforms of the California political system within the broader spirit of the American New Deal.[43]

John Steinbeck expressed this spirit very persuasively within his classic novel, *The Grapes of Wrath*. It captured both the entrepreneurial sense of possibility and the desperation that can accompany a property based economic and philosophical system—both sentiments providing a comment upon the popular image of California that has been reflected through its culture, society, political institutions, and legal and constitutional norms.

> Once California belonged to Mexico and its land to Mexicans; and a horde of tattered feverish Americans poured in. And such was their hunger for land that they

took the land—stole Sutter's land, Guerrero's land, took the grants and broke them up and growled and quarreled over them, those frantic hungry men; and they guarded with guns the land they had stolen. They put up houses and barns, they turned the earth and planted crops. And these things were possession, and possession was ownership. . . .

Then, with time, the squatters were no longer squatters, but owners, and their children grew up and had children on the land. And the hunger was gone from them, the feral hunger, the gnawing, tearing hunger for land, for water and earth and the good sky over it, and the green thrusting grass, for the swelling roots. They had these things so completely that they did not know about them any more. They had no more the stomach-tearing lust for a rich acre and a shining blade to plow it. . . . These things were lost, and crops were reckoned in dollars, and land was valued by principal plus interest, and crops were bought and sold before they were planted.[44]

Referendum Vote of June 1982

However, during the latter part of the twentieth century, Californians also experienced a period of "conservative" retrenchment, particularly in the wake of state Supreme Court decisions that expanded the scope of certain civil rights at the perceived expense of other citizens, especially the victims of crime. This trend was part of a larger attempt to decrease the size and scope of state government, reduce government intervention in the economy, promote a particular vision of social morality, especially within communities, and a willingness to advance public safety and security concerns, even at the expense of individual civil rights and liberties. The campaign for welfare reform, during the 1970s, was, from a policy perspective, a typical example of this trend.[45] A similar change in political climate would be experienced at the national level, during this same approximate period.[46] Such concerns led to the adoption of ART. 1, SEC. 28 to the California Constitution through a referendum vote in June 1982, under the title of the *Victims' Bill of Rights.* This section reflected a growing public concern with a rising crime rate and the perception that the state courts had become "soft" regarding their treatment of criminals.[47] It also reflected a similar, and more widespread, impression within American society.

The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime . . . is a matter of grave statewide concern.

The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses . . . but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance. . . .

To accomplish these goals, broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are neces-

> sary and proper as deterrents to criminal behavior and to serious disruption of people's lives.[48]

An even more indicative amendment to the California Constitution was the change to ART. 1, SEC. 24 of that constitution that was introduced through the electoral measure of proposition 115, SEC. 3 in 1990. The addition (which is now this section's second paragraph) represents a controversy regarding the scope of the rights of accused and convicted persons that exists at both the federal and California state levels. It is a popular attitude that also was responsible for the *Victims' Bill of Rights,* and it mirrors a general American conflict of attitudes within this area.

> Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.
>
> In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.
>
> This declaration of rights may not be construed to impair or deny others retained by the people.[49]

Cases and Opinions

Search and Seizure

The California Supreme Court ruled (within the 1990 decision of *Raven vs. Deukmajian*) that the part of this amended section was invalid upon the basis of a technicality regarding the proper method for making substantive, as opposed to revisionary, changes to the California Constitution. However, despite the political conflict which motivated this controversy, the use of this section, as well as its earlier incarnations, generally did not result in a radical departure from the federal approach towards the interpretations of the nature and scope of civil rights and liberties, including those of accused persons.

One of the most cited examples of this California jurisprudence is the 1975 case of *People of California vs. Michael Brisendine*. The appellant argued that the evidence presented during his trial for possession of marijuana should have been suppressed because it had been seized as the result of an illegal

search. The California Supreme Court acknowledged that its previous decisions allowed for the possibility that the California Constitution could impose "higher standards on searches and seizures than required by the Federal Constitution," even if the state courts adhered to federal standards in this, or other, areas of civil rights and liberties.[50]

The California high court did decide to overturn the conviction upon the basis of ART. 1, SEC. 13 of the California Constitution. The court concluded that, despite the almost identical language of this section when compared with that of the Fourth Amendment of the United States Constitution, a "higher standard" still could be derived from it.

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.[51]

But the court's reasoning still appeared to be based upon a strict construction of the state provision in comparison with the federal version, even though a vague appeal was made to an interpretive authority that extended beyond a mere textual analysis. Justice Stanley Mosk's majority opinion devoted much of its attention to a general defense of the prerogatives of state constitutions, citing especially the examples of Hawaii and Massachusetts, which also had applied a more stringent standard of certain rights and liberties in connection with criminal cases.[52] Justice Mosk felt confident in expressing the court's interpretation of ART. 1, SEC. 13 only after the general assertion regarding state constitutions had been made.

> The foregoing cases illustrate the incontrovertible conclusion that the California Constitution is, and always has been, a document of independent force. Any other result would contradict not only the most fundamental principle of federalism, but also the historic bases of state charters. It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse. . . .
>
> We need not further extend this opinion to trace to their remote origins the historical roots of state constitutional provisions. Yet we have no doubt that such inquiry would confirm our view of the matter. The federal Constitution was designed to guard the states as sovereignties against potential abuses of centralized government; state charters, however, were conceived as the first and at one time the only line of protection of the individual against the excesses of local officials. Thus, in determining that California citizens are entitled to greater protection under the California Constitution against unreasonable searches and seizures than that required by the United States Constitution, we are embarking on no revolutionary course. Rather

> we are simply reaffirming a basic principle of federalism—that the nation as a whole is composed of distinct geographical and political entities bound together by a fundamental federal law but nonetheless independently responsible for safeguarding the rights of their citizens.[53]

There was no consideration, within this decision, to the effect that the history and culture of California might have had upon this interpretation. Instead, this line of reasoning seemed to be based upon an extension of the same fundamental values and principles that guided American constitutional development. This extension apparently was based upon the belief that state constitutions generally were expected to provide more stringent protections for the rights and liberties of citizens—a theme that was explored in detail within the majority opinion, especially regarding the first American states.[54] Justice Edmond W. Burke alluded to that fact within his dissenting opinion. He denied that their was any substantial evidence of the presence of a "higher standard" of this specific sort within the California constitutional tradition; in fact, the section that was cited had been deliberately drafted in 1849 as a replication of the Fourth Amendment of the United States Constitution.[55]

This case is representative of the general problem that is encountered in terms of an assessment of the dominant ideological tradition that guides California and its constitutional history. There is an absence of specific references to the underlying sources for the ideals upon which these interpretations are based. Instead, there appears to be an unstated assumption that the fundamental beliefs of California society essentially are the same as the rest of American society. The California Supreme Court declined the opportunity to adhere to the federal standards regarding search and seizures (allowing "full body searches" of arrested persons, regardless of the offense or likelihood of actual incarceration) that had been established by the United States Supreme Court within the 1973 case of *United States vs. Robinson*[56] and the 1973 case of *Gustafson vs. State of Florida*.[57] But the reason for adopting a different standard was a matter of degree, and not a matter of a substantively different interpretation of the liberal democracy.

This extension of federal principles for creating a higher civil rights standard within California is illustrated, again, within the 1975 "search and seizure case of *People of California vs. Randolph Lee Longwill*, in which a full body search of a person arrested for reckless driving produced no weapon, but did produce a small quantity of marijuana. Justice Mosk reiterated his previous defense of state constitutional jurisprudence within his majority opinion of the California Supreme Court that overturned the appellant's drug possession conviction.

> In their opposition to the brief filed by *amici curiae* the People argue that our ability to adopt a higher standard under the California Declaration of Rights (Cal.

> Const., ART. 1) than that set forth by the United States Supreme Court as a matter of federal constitutional law can be exercised only in "limited circumstances." It is further argued that "it is essential that this court clearly delineate the criteria which govern the question of when [former] article I, section 19 will serve as an independent state ground for adoption of a more stringent standard than that announced by the United States Supreme Court."
>
> This argument presupposes that on issues of individual rights we sit as no more than an intermediate appellate tribunal . . . On the contrary, in the area of fundamental civil liberties—which includes not only freedom from unlawful search and seizure but all protections of the California Declaration of Rights—we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter. In such constitutional adjudication, our first referent is California law and the full panoply of rights Californians have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental civil rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less protection than is guaranteed by California law. . . .
>
> In our view such rule strikes a proper balance between the needs of law enforcement and the rights of the California citizen, [*sic*] and equally serves the salutary purpose of safeguarding the officer and the security of the jail facility.[58]

Once again, there is no reference to the fundamental source for this "higher standards," nor is there an indication that the appellant offered one. Instead, there appears to be an assumption of a similar value system which guides both federal and California law in this respect; the difference in interpretation is no different between the federal and state levels than it is between, for example, the Warren Court and the Burger or Rehnquist Courts within recent United States constitutional history. The difference becomes a matter of degree, not one of substantive values. The language that Justice Mosk applies to *Brisendine* and *Longwill* provides a good indication of this approach, especially in terms of his desire to balance the needs of police with the rights of citizens—a theme that has been repeated (with varying results) at the federal level throughout its jurisprudential annals.

The California Supreme Court has displayed the approach within other cases that have addressed the rights of the accused, including cases that were decided prior to *Brisendine* and which interpreted the state constitution as offering a standard of protection against unlawful searches and seizures that was less stringent than the federal standard. The 1968 case of *People of California vs. Ted Steven Chimel* offers an example of a standard that was based upon fundamental considerations which subsequently were echoed at the federal level, although the interpretation of those values ultimately differed between the two levels of the judicial branch of government.

The appellant was challenging his conviction for the theft of a coin shop. He contended that the police exceeded the authority of their arrest warrant by searching, in addition to the room within which they apprehended him, his entire house, where they found evidence that was instrumental to the final trial verdict. The state argued that the search of his entire house and the seizure of this evidence was "incidental" to his arrest and, therefore, constitutionally acceptable under the standards that had been established by the United States Supreme Court through its decision within the 1950 case of *United States vs. Rabinowitz*. The California Supreme Court rejected the appellant's argument that this action violated the California Constitution, since, it declared, this document was consistent with its federal counterpart in this respect.[59] The majority opinion of Justice Matthew Tobriner affirmed the verdict of the trial court upon the basis of considerations that replicated the federal approach to this sort of constitutional subject.

> To sum up the main issue of this case, we do not believe that the search, which occurred incident to an arrest based upon probable cause, should be invalidated solely because of reliance upon a defective warrant. If we were to rule otherwise, we would not only prevent the introduction of entirely proper evidence but also discourage officers from first presenting to a magistrate the evidence upon which they could later rely in establishing probable cause to justify an arrest and incidental search and seizure. Officers would very likely eschew the warrant that could both fall of its own weight and bring down with it the structure of an otherwise impeccable search and seizure.[60]

However, the United States Supreme Court overturned this decision upon the basis of the Fourth Amendment to the United States Constitution. Justice Potter Stewart accepted the criteria of balancing "harm" with "rights" that the California high court used, but not the final conclusion.

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. . . . And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. . . . There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control". . . .
>
> There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. . . .
>
> It is argued in the present case that it is "reasonable" to search a man's house when he is arrested in it. But that argument is founded on little more than a subjective view

> regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests.[61]

Once again, it was not the fundamental values, but the degree to which they could be extended under certain circumstances, that was the basis for the disagreement between the federal and California high courts. The difficulty of establishing the precise line between "harm" and "rights" has been addressed by modern liberal legal theorists within the tradition of utilitarians such as John Austin and John Stuart Mill.[62] A further difficulty arises with the consideration of the relationship between legal commands and perceptions of moral purposes, especially in terms of the motivations and desires of both the individual subject of the laws and the community that wishes to express certain moral beliefs and values.[63] This case reveals that dilemma within the context of a Californian society wanting to promote its own sense of well-being and the safety of its property, in conflict with the private autonomy demanded by an individual member of that community.[64] It is indicative of the conventional American and Western themes which emanate from the state constitutional tradition, and the comments of H. L. A. Hart upon this general subject are representative of this modern ideological enigma.

> Moral rules impose obligations and withdraw certain areas of conduct from the free option of the individual to do as he likes. Just as a legal system obviously contains elements closely connected with the simple case of orders backed by threats, so equally obviously it contains elements closely connected with certain aspects of morality. In both cases alike there is a difficulty in identifying precisely the relationship and a temptation to see in the obviously close connection an identity. Not only do law and morals share a vocabulary so that there are both legal and moral obligations, duties, and rights; but all municipal legal systems reproduce the substance of certain fundamental moral requirements.[65]

Freedom of Expression and Religion

Similar considerations have been expressed regarding judicial interpretations of the freedom of expression and the free exercise of religion. The 1979 case of *Michael Robins, et al. vs. Pruneyard Shopping Center, et al.* addressed the extent to which a privately owned shopping center could be compelled to accept the activities of persons who solicit signatures on a petition. The extent to which the California Constitution exceeds the protections provided by the United States Constitution within this area was explored through a constructionist comparison of the two documents, rather than an evaluation of the fundamental values that support them, that was provided by the majority opinion of Justice Frnak C. Newman.

> No California statute prescribes that shopping center owners provide public forums. But article I, section 2 of the state Constitution reads: "Every person may

> freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Though the framers could have adopted the words of the federal Bill of Rights they chose not to do so. . . . Special protections thus accorded speech are marked in this court's opinions.[66]

This reliance upon the construction of the constitutional documents appears to supplant a more detailed consideration of those aspects of Californian society, especially in terms of its distinctive culture and history, that may have shaped an ideological heritage that differs from the broad ideological heritage of American society as a whole.

A similar approach was employed by the California Supreme Court within the 1989 case of *Shirley Brown vs. Kelly Broadcasting Company, et al.* A television news program made allegations regarding a contractor that were demonstrably false. The contractor filed suit for slander, negligence, and malice. The trial court issued a summary judgment in favor of the defendants upon the basis of SEC. 47, subdivision 3 of the California Civil Code, which provides a privilege to communicate information, provided that the broadcaster and the recipients share an interest in this information, and the information is communicated without malice.[67] Both the California Court of Appeals and the California Supreme Court ruled that the trial court was mistaken in applying this section to the defendants. Furthermore, the high court refused to accept the argument of the defendants that this report constituted constitutionally protected speech. Justice David N. Eagleson's opinion for a unanimous court emphasized, in particular, the California Constitution in this respect.

> Defendants contend a showing of malice is appropriate as a matter of policy under the California Constitution. They rely on observations by California courts that the California Constitution provides greater protection than its federal counterpart for freedom of speech and the press. . . .
>
> Article I, section 2, subdivision (a) of the California Constitution states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." This provision makes clear that the right to speech is not unfettered and reflects a considered determination that the individual's interest in reputation is worthy of constitutional protection. The federal Constitution, by contrast, contains no express provision imposing responsibility for abuse of the right of free speech. This difference refutes defendants' policy argument that our state Constitution weighs in favor of a standard of fault higher than that required under the federal Constitution.[68]

The constitutional protection of religious exercise also reveals this Californian approach. The difference between the First Amendment of the United States Constitution and ART. 1, SEC. 4 of the California Constitution can be attributed

more to the specificity of the latter clause's construction than to a fundamental difference of values.

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this State; and no person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of this State.[69]

The California Supreme Court addressed this difference between the two constitutions and their respective protection of the free exercise of religion within the 1964 case of *People of California vs. Jack Woody, et al.* Police officers arrested members of the Navajo nation who were participating in a religious ceremony that included the consumption of peyote, which was listed as a controlled substance under SEC. 11,500 of the California Health and Safety Code. Although he addressed himself directly to the protections provided by the First Amendment of the United States Constitution, Justice Tobriner included, within that analysis, a parallel consideration of the protections provided by ART. 1, SEC. 4 of the California Constitution. His indirect reliance upon the Californian constitutional tradition, although it was mentioned,[70] remained implied, especially since the majority opinion relied almost exclusively upon federal precedents for the purpose of establishing *stare decisis* guidance.[71] Ultimately, the California high court identified the California constitutional tradition only in terms of providing an apparently identical source of fundamental values that the American constitutional tradition offered in its role as a superior judicial authority.

> We have weighed the competing values represented in this case on the symbolic scale of constitutionality. On the one side we have placed the weight of freedom of religion as protected by the First Amendment; on the other, the weight of the state's "compelling interest." Since the use of peyote incorporates the essence of the religious expression, the first weight is heavy. Yet the use of peyote presents only slight danger to the state and to the enforcement of its laws; the second weight is relatively light. The scale tips in favor of the constitutional protection.
>
> We know that some will urge that it is more important to subserve the rigorous enforcement of the narcotics laws than to carve out of them an exception for a few believers in a strange faith. . . . On the other hand, the right to free religious expression embodies a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty.[72]

"Justice as Fairness"

This emphasis upon the breadth and diversity of society is a significant one. It reveals an image of the political community that is as applicable to California as it is to the United States as a whole. It is an emphasis that is relevant to large states generally, because they have tended to share in this pluralist experience more readily than have the smaller and more homogeneous states of the American union. Therefore, the protection of that diversity and the individual expression of it assumes a paramount importance, although it is an importance that must be balanced against the legitimate authority of the state to protect society from harm. It is a belief that has been expressed, within the context of his larger theory of "justice as fairness," by the prominent and influential late-twentieth-century American philosopher, John Rawls. He concludes that this tolerance of private moral and religious beliefs and practices is inherently necessary for any society (such as the United States) that seeks to achieve a meaningful condition of "justice" as part of a renewed understanding of the "social contract," which he labels as the "original position" of society that can be established through use of a technique that he calls the "veil of ignorance."

> Liberty of conscience is limited, everyone agrees, by the common interest in public order and security. This limitation itself is readily derivable from the contract point of view. First of all, acceptance of this limitation does not imply that public interests are in any sense superior to moral and religious interests; nor does it require that government view religious matters as things indifferent or claim the right to suppress philosophical beliefs whenever they conflict with affairs of state. The government has no authority to render associations either legitimate or illegitimate any more than it has this authority in regard to art and science. These matters are simply not within its competence as defied by a just constitution. Rather, given the principles of justice, the state must be understood as the association consisting of equal citizens. It does not concern itself with philosophical and religious doctrine but regulates individuals' pursuit of their moral and spiritual interests in accordance with principles to which they themselves would agree in an initial situation of equality. By exercising its power in this way the government acts as the citizens' agent and satisfies the demands of their public conception of justice.[73]

A Different Position

The United States Supreme Court would assume a different position regarding the use of peyote for religious purposes a quarter century later within the 1990 case of *Employment Division, Department of Human Resources of Oregon vs. Alfred Smith*. Justice Antonin Scalia, within his majority opinion for a divided court, ruled that a compelling state interest in preventing the harm associated with the use of narcotics could outweigh certain religious freedoms. Although

his final conclusion differed from the one that Justice Tobriner offered in the similar case of 1964, the fundamental principles and values that Justice Scalia employed in 1990 for reaching that conclusion remained (as it did for Justice Harry Blackmun's dissenting opinion) essentially the same. This balancing of "harm" against "rights" became the central consideration of this issue, even within the narrow constructions of Justice Scalia's opinion.

> Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.[74]

Since the wording of ART. 1, SEC. 4 of the California Constitution is more specific than the wording of the First Amendment of the United States Constitution, it is not surprising that California courts (despite the California Supreme Court's ruling in *People vs. Woody*) would regard the federal standard regarding the protection of the free exercise of religion as a higher one, even if the assumptions underlying both constitutional provisions are similar.[75] This sentiment was expressed within the 1989 California Court of Appeals case of *California Board of Medical Quality Assurance v. Arthur Andrews, et al.* The appellants contested a lower court ruling that upheld an injunction against the Religious School of Natural Hygiene which prohibited it from engaging in certain medical practices. Judge Capaccioli's opinion for a unanimous court rejected a claim of protection under the freedom of religion clauses of both the federal and state constitutions, citing familiar, basic principles in support of that conclusion.[76]

> Protection of religious belief against secular interference has been peculiarly the province of Constitutions in our political history; this protection is rooted in the 18th century philosophy of separation of church and state, which the establishment and free exercise clauses of the First Amendment reflect. . . . Interpretation of the constitutional guaranty is fundamentally the responsibility of the judiciary, particularly of the United States Supreme Court. . . . One does not expect to find in a general statute, much less in a narrow exemption from medical licensing provisions, a different, independent guarantee of religious freedom, over and above that already inherent in the structure of our government, set out in the Bill of Rights, and interpreted and applied by the judiciary. Had the Legislature [of California] intended to confer such unusual protection in so peculiar a fashion as by the route of an exemption statute in the Medical Practice Act, surely it would have left some trace of that intention. The most reasonable deduction from the absence of any

such trace is that the exemption statute is no more than a reflection and acknowledgment of constitutional doctrine.

The California Constitution does not confer greater protection upon religious practices than does the federal Constitution and in fact provides less protection: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace of safety of the State . . ." (Cal. Const., ART. I, SEC. 4.) Arguably an exemption from the licensing law for dangerous religious practices violates this constitutional provision, since such activities are inconsistent with the safety of the state in presenting a threat to the health of its inhabitants.[77]

Conclusion and Evaluation

The California judicial system appears to have been less introspective than other states in terms of an evaluation of a uniquely Californian constitutional culture. References to different standards of constitutional protection of individual rights and liberties or of the powers of state government generally have rested upon an examination of the construction of the relevant constitutional provisions, rather than a consideration of the ideological, political, economic, or social context within which they have been created, shaped, and interpreted. When such considerations have been made, they have focused upon either the general context of American society and its prevailing ideological values or upon values within California society that appear to reflect the broad heritage of the United States.

California and other large states are, perhaps, more representative of the dominant ideology of American society than are many of the smaller states. The image of California as the ultimate "land of opportunity" arguably provides an amplification of the comprehensive image of the American Dream that has influenced American history, especially in terms of its physical and economic expansion and success. A similar pattern of social, political, economic, legal, and, especially, constitutional development also can be found in other large states, particularly ones such as New York, Florida, and Texas. This pattern does not negate the significance of large states in state constitutional studies, but it does suggest the greater difficulty of finding a constitutional legacy, political culture, and legal heritage that are truly distinctive, especially compared to the broader American tradition. California appears to be a typical example, in this respect.

Chapter 4

Georgia

Southern Republicanism

Southern states have exhibited, since colonial times, a culture that is markedly different from the rest of the United States. The legends and mystique that surround the Old South have contributed to that image, although often in misleading ways. The legal and constitutional implications of this cultural heritage are profound. The legacy of slavery, segregation, modern agrarian fiefdoms, and patriarchal state power have given way to a balance between state interests and the rights and liberties of citizens which, in turn, reflects the values of a modern, liberal, and industrialized society that distinguishes American society and its constitutional system, as a whole. However, southern states still are not quite like other regions of the country, either in political, social, ideological, or cultural terms, and this difference can be noted within the legal and constitutional heritage that they possess.

Georgian Society

Georgia offers a conspicuous example of this southern trend, especially in terms of the continuity of the underlying beliefs and values that have guided its state constitutional heritage, despite the great changes that have been imposed upon this society, throughout its history. Georgian society is a recipient of a legacy that can be traced back to the English Civil War and the ideological, as well as the military, battles that marked this political and religious struggle. This inheritance is one that Georgia shares with its neighboring southern states, particularly the ones that also had been part of the original thirteen colonies. Therefore, many of the fundamental beliefs and values that have shaped Georgia's constitutional history are applicable to states such as Virginia and the Carolinas. They also are applicable, however, to other states of the Deep South that do not share this colonial past, including Alabama, Mississippi, Arkansas, and Tennessee.

This association is appropriate, especially since these states have shared a demographic, geographic, and economic development that was responsible for the perpetuation of those seventeenth-century ideological visions that have provided the foundation for the institutions and principles of both the "old" and the "modern" South.

Colonial Foundation

But Georgia, arguably, is especially representative of this region of the United States. It is a relatively large state that combines a colonial foundation, an *antebellum* social and economic development, a resistance to Reconstruction policies, a perpetuation of a hierarchical agrarian economic system, a demographic portrait, and a romanticized self-image (one that has been promoted through its art and literature) in a manner that reflects the overall history and development of the region. Furthermore, its prominent position within that region (which is characterized by its nickname of the Empire State of the South), especially in terms of the twentieth-century growth and diversification of its economy, its increased urbanization, and the gradual breakdown of its historically homogeneous ethnic profile, contribute to its representativeness. Therefore, Georgia's legal and constitutional development is one that shares important characterizations with other southern states. There are, of course, aspects of the Georgian constitutional tradition that may differ, in their specifics, from the traditions of neighboring states. But in terms of the general character, tone, implementation, and, especially, the ideological motivations and guidance that make constitutions into the paramount institutional expression of a political community, Georgia remains typical of this most striking American region.[1]

A popular, though simplistic, image of the colonial south and the southern states that succeeded it is one that connects this region to its seventeenth-century political origins. In particular, there has existed a tendency to associate colonial America, in general, with the opposing forces of the English Civil War. That conflict pitted the defenders of royal absolutism, the established Anglican Church, and the landed, agrarian interests of the aristocracy against the defenders of republican principles, parliamentary government, the ascendancy of dissenting Protestant sects and beliefs (especially that English version of Calvinism that sought to "purify" the Church of England and which, subsequently, became known as "Puritanism"), and the rising mercantile economic class.[2]

Cavaliers

The royalist partisans (popularly known as "cavaliers") suffered defeat and the eventual execution of their leader, King Charles I, at the hands of the parliamentarians (often labeled as Roundheads, because of their unadorned hairstyles), who were led by the brilliant military commander and, later, dominating political ruler,

Oliver Cromwell. Many of the defeated cavalier partisans consequently were stripped of their autonomy and possessions and left England as political and economic refugees. Many of these refugees sought a sort of asylum within the English colonies of the New World, particularly those colonies that had resulted from private ventures and that were controlled, at best, only marginally by the English government in London. However, Cromwell's death, the inability of his son, Richard, to perpetuate the "commonwealth" government that he had established and, eventually, controlled, and the return of royalist authority under King Charles II (with the cooperation of a Parliament that retained many of the political and economic gains that it had won as a result of the English Civil War), shifted the overall advantage, once again. Many of the now politically defeated Puritan Roundheads also sought refuge within England's embryonic empire in North America. These patterns of emigration did not represent the entirety of this theme of colonial settlement; the demographic composition of this migration included a diverse representation of English society. However, these leading participants of the English Civil War did provide the basis for a political and economic elite of this New World that would dominate these settlements and shape the public institutions (including the laws) of these emerging societies.[3]

Therefore, the popular image of a colonial American that was dominated by cavaliers, Roundheads, and their descendants possesses a great deal of validity, despite the oversimplification that frequently has been imposed upon an evaluation of its true significance. The promoters of this image further have specified that the cavaliers migrated to the southern colonies, while the Roundheads settled in the North, which fact also is (essentially, though not entirely) true.[4] It is an image that has been noted, and even promoted, by popular historians and analyzed and elaborated through more rigorous, scholarly works. Thus, the team of the philosopher, Will Durant, and his wife, Ariel, made a passing comment upon the long-term significance of this historical migration.

> To meet the expenses of [the victorious parliamentarian] government, and the arrears of pay due to the army, the Rump [Parliament] levied taxes as lavishly as the late King. It proposed to confiscate the property of all who had borne arms for [King] Charles [I]. . . . Many young nobles, facing impoverishment in England, migrated to American and founded aristocratic families like the Washingtons, the Randolphs, the Madisons, the Lees. . . . [Thus t]he American Civil War renewed the English Civil War by pitting the descendants of English aristocrats in the South against the descendants of English Puritans in the North.[5]

The journalist and popular historian, Alistair Cooke, expressed this image in an equally colorful way. He noted that an account of the hardships faced by New England immigrants, by the Puritan chronicler William Bradford, seemed to express a sentiment that reflected these fundamental differences within the early, regional development of colonial America.

> A moving story from a man deeply moved, and in its drastically popular form it has moved three centuries of Americans and Britons to believe in the powerful myth that the South was settled by aristocrats and wealthy idlers who puzzlingly turned into Thomas Jefferson, whereas New England was founded by simple holy men who built a boat and cast themselves on the mercy of God—and somehow turned into Calvin Coolidge.[6]

Agrarian Foundations

This belief reveals a more specific reality regarding the American Deep South, in general, and a state like Georgia, in particular. It is a reality that initially was grounded upon the agrarian foundations of the economy of the colonial South. The early trend towards the establishment of trading centers along the Atlantic coast quickly yielded to the granting of land titles for the purpose of cultivation. English joint-stock companies provided the initial financial support that made possible this sort of colonial experiment. The Colony of Virginia was backed by the London Company, which received a royal charter to engage in such colonial ventures in 1600. New World colonies had become more than places to find and gather raw materials and other resources; they were self-sustaining businesses that adhered to the principles of a mercantile economic system. They offered opportunities for individual, as well as national, advancement and achievement. They represented the spirit, if not yet the precise substance, of early liberal economic, social, and political principles.

> The migration [to the southern colonies of America] drew on all parts of America and on all classes. The few gentlemen who came usually found life on the edge of a forest too rude and soon returned home, but many of their younger sons, who could expect little in the way of inheritance or preferment at home, came and stayed. They generally arrived with enough money to purchase cleared land and enough prestige to step into positions of power. . . . The indentured system, a variation of the medieval apprenticeship pattern, was viewed in the seventeenth century as a reasonable way of settling the colonies with people who had the will and energy to come but lacked the money.[7]

A Rising Mercantile Elite

The fortunes of the English aristocracy were restored along with the monarchy, but the fundamental principles and values of the rising mercantile elite ultimately prevailed. Historical parallels were divined between modern England and the republican period of ancient Rome, where the values of honor, discipline, family cohesiveness and obedience, and duty to the community were expressed through the legendary actions and orations of Appius Claudius, Scipio Africanus Major, Tiberius Gracchus, Cicero, and Cato the Elder.[8] The modern English

incarnation of these republican sentiments had been motivated largely by economic practices that already were responsible for English prosperity by the beginning of the seventeenth century.[9] They defended a political and legal system that would promote an economic order based upon merit and equal competition. The seventeenth-century republican political theorist James Harrington articulated these beliefs for his generation, including those Englishmen who migrated to the New World in pursuit of them. The emphasis upon a collective will, rather than privileged and powerful individual ones (including those that used a claim to "rights" as a method of subverting the will of the polity), motivated his definition of a "commonwealth" that was based upon a Roman ideal that may, or may never, have existed.

> Government, to define it *de jure*, or according unto ancient prudence, is an art whereby a civil society of men is instituted and preserved upon the foundation of common right and interest, or (to follow Aristotle and Livy) it is an empire of laws, and not of men.
>
> And government, to define it *de facto*, or according unto modern prudence, is an art whereby some man or some few men subject a city or a nation, and rule it according unto his or their private interest, which, because the laws in such cases are made according to the interest of a man or some few families, may be said to be an empire of men and not of laws.
>
> Hereby it is plain, whether in an empire of laws and not of men, as a commonwealth, or in an empire of men and not of laws, as monarchy:
>
> First, that law must equally proceed from will, that is either from the will of the whole people, as in a commonwealth, from the will of one man, as in absolute, or from the will of a few men, as in regulated monarchy.
>
> Secondly, that will, whether of one or more or all, is not presumed to be, much less to act, without a mover.
>
> Thirdly, that the mover of will is interest.
>
> Fourthly, that interests also being of one, of more or of all, those of one man or a few men, where laws are made accordingly, being more private than comes duly up unto law (the nature whereof lieth not in partiality but in justice) may be called the empire of men and not of laws; and that of the whole people, coming up to the public interest (which is none other than common right and justice, excluding all partiality or private interest), may be truly called the empire of laws and not of men.[10]

That economic dominance would continue to grow throughout that century, despite the political fact of the Restoration. It led republican political theorists, like Algernon Sydney, to equate "virtue" with "equality," since the imposition of "positive" freedom would lead to a society in which full participation by all would be possible, so that true merit would emerge victorious.[11] Therefore, the theoretical writings of republicans such as Algernon Sydney ultimately prevailed, in spite of his failure as a revolutionary and execution for high treason.[12]

Yet, there was much truth in the popular image that the southern colonies of colonial America were dominated by representatives of the aristocratic class of English society. The economic development of Virginia and other southern colonies reflected, in many respect, a fundamental perspective that still survived its feudal origins, at least among these former cavaliers who now formed much of this colonial elite. It is a perspective that was most forcefully represented by the structure of the plantation system that became the nucleus of the economy of the Old South. This development was instrumental, according to Alan Gallay, in the formation of the fundamental values of southern states, including Georgia. "Slavery, the plantation system, the centrality of race, the importance of family, the legacy of violence, and the prominence of evangelical religion—characteristics that define a Southern way of life—all were in various stages of development in the colonial era."[13] It is important to stress that the system that developed was as firmly rooted within the democratic tradition as any other American state. But the semblance of a patriarchal, though still popular, structure of republicanism also became a feature of the emerging political and legal systems of southern states like Georgia.[14] That political community often was willing to defer to an elite who could guide their pursuit for a virtuous and prosperous society.

> The anonymous essayists who strode forth each election eve exhorting voters couched their arguments in condescending tones, reminding readers of their duty to choose the "right" men for office. Writers warned against electing "public defaulters," men of "infamous publick or private report," or "adventurers or renegades." . . .
>
> The deferential nature of Georgia society and, consequently, of its politics as well, meant that most of the state's qualified voters voluntarily permitted a relatively small but versatile "elite" to exercise power at the state and local (county) level. "Factions," . . . held a central position in political life. . . . While it would be convenient to describe this factionalism as a continuous struggle for supremacy between the democratic upcountry and the aristocratic low country . . . to do so would be to ignore the importance of local squabbles in determining the complexion of certain legislative delegations and to overlook the significance of personality clashes among public figures.[15]

Therefore, southern American colonies reflected the English transition from a feudal, agrarian society to a mercantile, liberal society. The result of this transition was a mixture of classical conservative and traditional liberal values throughout the American South. This transition was especially apparent within colonial Virginia, where the House of Burgesses represented a dominant economic class that had achieved that position through merit, rather than heredity. This class system included a small number of relatively large landowners who occupied a position within the social hierarchy that ranked above both a larger

class of yeomen laborers and, at the bottom of the social system, a considerable class of indentured servants. While this specific stratification was originally most applicable to Virginia, it was relevant to all of the southern American colonies.[16]

Georgia as a Colony—James E. Oglethorpe

Georgia was the last of these colonies to be established. King Charles II originally had included this territory within the parameters of the English proprietorship of Carolina, but King George II made a grant of this land to a group of British trustees in 1732. One of these trustees, General James E. Oglethorpe, traveled to Georgia with the first colonists and emerged as the functional leader of the colony. He established the colony as a philanthropic exercise, especially in terms of providing a refuge for former prisoners, the poor, and persecuted persons, generally. He also was tasked with the responsibility for military operations against the Spanish colony of Florida.[17]

Oglethorpe established a high moral tone for the life of Georgia that would influence its later history. German-speaking Protestants, who had been persecuted in their native lands, led a migration of religious and secular refugees from many parts of Europe, as well as all of the national regions of Great Britain. Tolerance was encouraged, landholdings were limited in size and widely distributed, rum and slaves were prohibited, and colonial industries were promoted.[18] These practices were consistent, Oglethorpe believed, with the republican virtues of the classical age and the positive spirit of a generous polity that this age invoked for this new society that he was attempting to cultivate.

> The thinking of the Misfortunes of others, and giving Succour to the afflicted, even before they ask, is the most glorious action that can be performed by a mere human Creature; and if we consider this as flowing from the Christian Motive Charity, it meets with a Reward even in this Life, and secures a present internal Happiness, by the Assurance of a perpetual one hereafter.
>
> Separate from the greater Motive of a future Reward, things are so ordered by Nature, that as *Philanthropia*, or the Love of Mankind, prevails more or less, the State flourishes or declines. In the Time of *Scipio* the *African*, the whole *Roman* People had a noble Tenderness for the Miseries of others. . . . A City so sensible of what was right, so touched with the Miseries of the Fellow-Creatures, could not fail of Success; they were worthy of the Empire of the World, and they soon acquired it.
>
> In a State where this Spirit prevails, the People multiply wonderfully; for this is the very opposite to sordid Self-love, Oppression, and Cruelty. Where this Love of Mankind prevails, there is no need of Laws to force Humanity, and prevent the Oppression of the Powerful; Good-nature there makes the Great a Law to themselves. When this Disposition is general, the selfish Wretch, even when authorized by Law, is afraid of oppressing his Inferiors; since such a Proceeding would draw upon him Contempt and Infamy.[19]

Oglethorpe provided for the practical, as well as the spiritual, needs of his community. He established military defenses (especially at Frederica on St. Simon's Island) and battled against Spanish forces during the War of Jenkins' Ear, from 1739 to 1748, during which conflict he attacked St. Augustine. That war was indecisively fought, but the continued southern flank security of Britain's American colonies was assured as a result of it.[20] Unfortunately, for Oglethorpe and his fellow trustees, the economic status of Georgia was not so successful.

Expectations Unfulfilled

Indigenous industries within the colony widely failed to meet expectations. Furthermore, prohibitions against rum, slavery, and the acquisition of large landholdings largely proved to be unenforceable. The trustees of the Georgian colony agreed to surrender their charter one year prior to the date of its expiration, and it became a crown colony, in 1752. The colony gradually began to prosper under the governors who were appointed by the imperial authorities in Britain; that level of prosperity was so high by the end of the French and Indian Wars, in the 1760s, that it dissuaded participation in political agitation among Georgia's population.[21]

Georgia did not send representatives to the Stamp Act Congress of 1765 and the First Continental Congress of 1775. An attempt to convene a Provincial Congress within Georgia in January 1775 met with slightly more success, although less than half of the colony's parishes were represented at that meeting. However, British military aggression within the northern colonies alarmed many Georgians and contributed to a relatively rapid shift in opinion towards a revolutionary sentiment. Reports concerning the Battles of Concord and Lexington, in 1775, strengthened these attitudes so effectively that they contributed to the success of a second Provincial Congress that met in July 1775. Every parish was represented within this congress, which voted to assume governmental authority from the colonial governor. Georgia sent delegates to the Second Continental Congress the next year, where its assent to the Declaration of Independence was made.[22]

Georgia Divided

However, Georgia remained deeply divided in its support for the new United States and its conflict with Great Britain. Georgia's economy had been dominated by mercantile interests; during this period, it deviated from the predominantly agrarian economies of the other colonies of the American South. Many Georgians who benefited from the economic system that the British established were reluctant to oppose imperial rule. On the other hand, British naval and military occupation of Savannah, Augusta, and Sunbury, and the surrounding areas intensified the opposition of Georgians who supported the American Revolution.

Two governments were established within Georgia during the war: the Provincial Congress continued to support the American cause; Governor James Wright continued to exercise royal authority over those areas that remained under British occupation. Skirmishes throughout Georgia occurred among guerilla bands that supported these rival governments, although the ultimate outcome of the war was determined elsewhere.[23]

Georgia's delegates to the United States Constitutional Convention tended to support efforts to create institutions that would promote a more strongly centralized federal system. Georgia had the only southern state delegation that appeared to support the approach to government of New York's representative to the convention, Alexander Hamilton. This position likely was motivated by the continued presence of a prosperous mercantile economy within that state. However, economic, social, and political developments within the state would lead it to adopt positions and policies during the next few decades that were consistent with the approach of the other states of the American Deep South.[24]

Georgia's State Constitution

Georgia's first state constitution was adopted in April 1776 by the Provincial Congress. This document established the basic institutions of the state government, including the Provincial Congress, a Council of Safety (which functioned somewhat like an upper house of the legislature), a president, various other executive officers, and certain judicial posts. This constitution was intended to be an expedient and, therefore, temporary; once the government decided to support the American Revolution, another constitution was drafted that provided for permanent institutions of government. This constitution was drafted and adopted, in 1777, by a special session of the legislature; it vested most governmental authority within the legislature, though it also declared support for the doctrine of a "separation of powers" in the tradition of the French political philosopher, Montesquieu. Likewise, it reflected a belief in other, basic liberal principles of law and government, consistent with the Articles of Confederation and the constitutions of other former colonies. This document guaranteed certain fundamental civil rights and liberties, including *habeas corpus,* procedural due process, and the freedoms of press and religion.[25]

This constitution also proved to be a transitional one. A new constitutional convention was called in 1788, following the ratification of the United States Constitution. Since ART. 4, SEC. 4 of the federal document required that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government,"[26] many states, including Georgia, revised their respective constitutions, accordingly. In fact, the Georgian convention drafted a document that was modeled upon its federal counterpart. It did not include a bill of rights but, essentially, the same civil rights and liberties that had been included within the Georgia Constitution of 1777 also were found within the 1789 document.

Georgia adopted a constitutional system that appeared to be based upon principles that were very similar to those ideals reflected within the federal, as well as many northern state, constitutions.[27]

Federal Judicial Influence upon Georgia's Constitution

However, a certain federal court case would alter that legal development and reveal a different approach for Georgia's ideological and constitutional evolution. Two citizens of South Carolina[28] sued the state of Georgia, in 1793, for the recovery of certain properties within the latter state that, they claimed, had been seized illegally by the Georgian government. That same government expressed (in a manner that was consistent with other state governments, especially in the South) the opinion it was immune from such suits, under the doctrine of "sovereign immunity." This opinion was based upon a belief that only limited sovereignty had been surrendered by the separate states when they ratified the federal Constitution—a fact that its Tenth Amendment supposedly confirmed.

The Georgian delegation to the Constitutional Convention in Philadelphia in 1787 supported many of the provisions that promoted a relatively centralized federalism, yet the government of that state appears to have shared the tendency of its neighboring southern states that favored an overall concept of a generally decentralized federalism. The government of Georgia reacted angrily when the federal courts agreed to hear the 1793 case of *Chisholm vs. Georgia*, and it refused to enforce the decision in favor of the petitioners that was upheld by the United States Supreme Court. Instead, Georgia began a movement that would result in the drafting, adoption, and ratification of the Eleventh Amendment to the United States Constitution, which explicitly declares that state governments are immune from suits that arise from outside their respective borders.[29]

Perhaps, the greatest significance of this case and Georgia's reaction to it is the apparent shift in constitutional orientation that it seems to have symbolized. Georgia became, during the following few decades, increasingly decentralized in its political and economic outlook. This shift had a profound effect upon that state's ideological and, consequently, its legal and constitutional, development. Certain court cases have provided a dramatic assertion of that shift, but its true source can be found within the economic changes that led Georgia increasingly to resemble the rest of the Deep South, especially in contrast to northern states.[30]

Georgia's Economy

Despite the success of Georgia's mercantile economy during the late colonial period (which resembled the pattern of many northern states), that state did not evolve, consequently, the same sort of industrial base that would influence the overall development of the United States north of the Mason-Dixon Line.

Georgia's economy became increasingly agrarian during the late eighteenth, and early nineteenth, centuries. Eli Whitney's invention of the Cotton Gin near Savannah, in 1793, made it possible for Georgia to become one of the largest producers of cotton and, subsequently, cotton textiles. Other agricultural products contributed to this economic development, in addition to cotton, especially rice. The rapid growth of the agrarian economy contributed to an equally rapid expansion of both the plantation system and the slave labor that was needed for servicing it. However, Georgian entrepreneurs and successive Georgian governments did not ignore the industrial infrastructure of the state; both banking and transportation growth was encouraged, which, in turn, contributed to the growth of industries such as textile companies. Nonetheless, the ultimate basis of Georgia's economy was agriculture, in general, and cotton, in particular, and it was typical, in this way, of the American Deep South as a region.[31]

The political implications of this economic development also resembled activities that occurred within neighboring states. It is important to note, however, that the South, including the Deep South, was not a homogeneous region of the United States; Georgia experienced a unique culture and history that contributed to an equally unique evolution of its specific variation of the liberal democratic ideological tradition and the state's legal and constitutional systems which were grounded upon it. The coastal areas of Georgia tended to benefit from, and thus support, plantation owners and their economic and political interests. However, inhabitants of the state's interior and western frontier areas were interested in the expansion of land claims and the growth of a small farming, trade, and transportation based economy. This distinction of economic interests would lead to interesting political developments within Georgia.[32] It also would contribute to another specific judicial controversy that would help to define further the state's attitude towards, and relationship with, the federal government and the contrasting visions of federalism that the two systems represented during the *antebellum* period of American history.

Yazoo Land Act—1795

The Georgia Legislature passed the Yazoo Land Act in 1795. This statute granted four land companies title to millions of acres of territory within the western frontier area that had been designated as belonging to Georgia, under its colonial charter. However, passage of this act constituted a serious breach of conflict of interest, because many members of the legislature also were stockholders of these land companies, and there were additional allegations of bribery in relation to the statute. Public pressure motivated the Georgia Legislature to repeal the act during the next session, following state elections of new representatives.

Unfortunately, much of the land already had been sold, and the titleholders resisted the surrender of their titles, so a protracted struggle ensued. The impasse was resolved through an agreement between the federal and Georgia govern-

ments, in which the United States was ceded these lands and, consequently, was delegated the responsibility for settling these claims. But positive sentiment towards the federal government was offset, once again, by the actions of the United States Supreme Court, under the leadership of Chief Justice John Marshall.[33]

The appointment of Marshall by his fellow member of the loosely defined Federalist Party, President John Adams, had affirmed the control of the high court by jurists who embraced a centralized federalist approach to constitutional jurisprudence. John Marshall interpreted, jurisprudentially, the scope of federal powers that were articulated within the United States Constitution expansively, in the same way that his political mentor and ideological ally, Alexander Hamilton, interpreted these powers in support of specific policy objectives. The extent of these federal powers included the authority of the federal Supreme Court to declare both federal and state statutes and policies that were inconsistent with the court's interpretation of the United States Constitution to be unconstitutional.[34] It was that belief and approach that led Chief Justice John Marshall, on behalf of the Supreme Court, to rule, within the 1810 case of *Fletcher vs. Peck*, that the Georgia Legislature had violated a federal constitutional protection of contracts, so the repeal of the Yazoo land grants in 1796 was declared to be invalid.

> The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American union; and that union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. The constitution of the United States declares that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.[35]

The federal government compensated the Georgia titleholders, in 1814, but the decision of the Marshall Court exacerbated tensions between the two levels of government and heightened support for decentralized federalism within that state. The settlement of the controversy included a promise that the federal government would eliminated the land titles of the Creek and Cherokee peoples within Georgia, despite the fact that these land titles represented, by treaty, sovereign Creek and Cherokee territory. The active hostility of federal and Georgian forces towards the Creeks prompted them to defend themselves, which included the acceptance of military support from British forces during the Anglo-American War of 1812. American and Georgian retaliation for this support included the seizure of Creek land and the imposition of treaties that resulted in the loss of additional lands to the United States. Georgian governments pressured the federal government, during the 1820s, to address this issue, definitively.

The Creeks and Cherokees

Through the imposition of the Treaty of Washington of 1826, the Creek people were compelled to cede almost all remaining land to the United States. The government of Georgia claimed this land (and the remaining Creek land that was surrendered the next year) for the state. It also moved to extend the authority of state laws to Cherokee lands within the northern part of the state, despite federal objections. These confrontations (along with the decision of President John Quincy Adams to repudiate the earlier Treaty of Indian Springs, which had attempted to extract all Creek lands in 1825) further exacerbated Georgian animosity towards the federal government. This opposition to central authority deepened as a result of two additional Supreme Court cases.[36]

Cherokee Nation vs. State of Georgia

The Georgia legislature passed a statute which declared that state laws were applicable within Cherokee territory, despite the fact that this territory was, according to treaty, autonomous and sovereign. Leaders of the Cherokee people challenged this action, as well as other affronts to their sovereignty, through the federal court system. This challenge resulted in the 1830 United States Supreme Court case of *Cherokee Nation vs. State of Georgia*, within which case Chief Justice John Marshall rendered a majority opinion that asserted the opinion that the Cherokee people constituted, constitutionally, a "domestic dependent nation" which lacked standing, either as representatives of citizens or as a recognized foreign power, to bring such a suit against an American state.[37] However, Chief Justice Marshall criticized the legal actions of the Georgia government in this respect, and his concerns were raised again within the 1832 case of *Worcester vs. State of Georgia*.

Worcester vs. State of Georgia

This case was brought by American missionaries (who possessed the legal standing that the Cherokee people formally lacked) against the state of Georgia and the laws that it imposed upon Cherokee territory. This time, the United States Supreme Court ruled that only the federal government possessed the constitutional jurisdiction within the lands of native peoples. Chief Justice John Marshall, on behalf of the court, dismissed the apparently self-serving rationale of the Georgia legislature and emphasized, instead, a centralist interpretation regarding the limitations that the federal system imposed upon the states.

> The charter to Georgia professes to be granted for the charitable purpose of enabling poor subjects to gain a comfortable subsistence by cultivating lands in the American provinces, "at present waste and desolate." It recites "and whereas our provinces in North America have frequently been ravaged by Indian enemies . . . the

> smallness of their numbers will, in case of any new war, be exposed to the like calamities, inasmuch as their whole southern frontier continueth unsettled, and lieth upon to the said savages."
>
> The motives for planting the new colony are incompatible with the lofty ideas of granting the soil, and all its inhabitants from sea to sea. They demonstrate the truth. . . . [t]he power of war is given only for defense, not for conquest. . . .
>
> Georgia, herself, has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister states, and by the government of the United States. Various acts of her legislature have been cited in this argument, including the contract of cession made in 1802, all tending to prove her acquiescence in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent.[38]

Calhoun's Theory of Government—States' Rights

This decision further alienated many Georgians from the federal government, and it deepened the decentralist emphasis of Georgian politics and society. Georgia, like its regional neighbors, embraced the political theme of "states' rights" that had been given a philosophical articulation by one of the South's most prominent political figures, John C. Calhoun. This leader of southern sectional interests began his political career as a staunch American nationalist and a supporter of the sort of centralized federalist objectives that led to the creation of the two Banks of the United States, a standing armed force for the country, and the pursuit of war with Great Britain in 1812. However, his ultimate loyalty to his native South Carolina eventually prompted him to develop a theory of government that would become a model for many southern states, including Georgia.[39]

Calhoun advanced a theory of government that was consistent with a decentralized federalism and a related interpretation of the liberal democratic tradition. He asserted the belief that state governments were best suited for the responsibility of meeting the needs, and protecting the interests (especially economic ones), of their respective citizens, since each state represented distinct influences, circumstances, cultures, and political communities. Consequently, a state could "nullify," or refuse to enforce, a federal law that appeared to violate the spirit of the American federal relationship. The Tariff Acts of 1828 and 1832 appeared to represent such a violation, since the agrarian interests of southern states appeared to be sacrificed, through that policy, to the needs of more industrialized northern states.[40] His theories also addressed a general ideological interpretation of the meaning and purpose of constitutional government that was embraced by the politicians and societies of many southern states, including Georgia.[41] It was a theory of republican values that emphasized the needs of a body politic in terms of an accommodation of identifiable groups, classes, or

economic concerns, rather than focusing upon the idealized concept of the autonomous individual person or even, necessarily, upon the will of a majority of the members of a society.

> Where the organism [of government] is perfect, every interest will be truly and fully represented, and of course the whole community must be so. It may be difficult, or even impossible, to make a perfect organism—but, although this be true, yet even when, instead of the sense of each and all, it takes that of a few great and prominent interests only, it would still, in a great measure, if not altogether, fulfill the end intended by a constitution. . . .
>
> It is only when aided by a proper organism, that it can collect the sense of the entire community—of each and all its interests; of each, through its appropriate organ, and of the whole, through all of them united. This would truly be the sense of the entire community; for whatever diversity each interest might have within itself—as all would have the same interest in reference to the action of the government, the individuals composing each would be fully and truly represented by its own majority or proper organ, regarded in reference to the other interests.[42]

Calhoun and Edmund Burke

This approach to government and society deviates from the premises of John Locke that have helped to guide the creation and evolution of the American constitutional tradition. Instead, it appears to resemble the classical conservative interpretation of the liberal democratic tradition that was offered, during the late eighteenth century, by the British politician and writer, Edmund Burke. The need to maintain continuity with the beliefs, traditions of a society, and its history underscores Burke's political, legal, and constitutional theories. A political community cannot sustain itself, he argued, without maintaining those ideals, and the institutions that embody them, which have defined it. The demands of a majority of society should not be permitted to overwhelm and eliminate these traditional institutions, for their absence would lead, ultimately, to instability and the undermining of the security and liberty of all members of the community. It was this loss of identity that Burke associated with the excesses of the French Revolution and the Reign of Terror that became one of its most notorious episodes. In particular, he valued those institutions that instilled personal and social virtues and communicated moral principles and a sense of historic identify and continuity to the community, especially institutions relating to religion and the family.[43]

Hobbesian Approach

The roots of this classical conservatism arguably can be traced, in part, to an early expression of liberal thought of the seventeenth century. Thomas Hobbes argued that individual liberty and the disposition of property can be guaranteed only under conditions within which political stability and physical safety have

been achieved. Those conditions only can be achieved through a surrender, on the part of all members of a society, of political authority to a sovereign power. Hobbes did not, necessarily, indicate that a particular type of sovereign authority was needed in order to achieve these results. However, that sovereign cannot be fettered by restrictions that would be imposed by the people over whom it rules. In particular, a claim to individual rights and liberties must not be allowed to undermine the effectiveness of the sovereign will, for such a claim will weaken that capacity to rule that can guarantee, alone, the political repose and economic prosperity of society. Hobbes' theories were based upon paternalistic motivations, as well as upon assumptions regarding the enlightened self-interest of the sovereign and the people over whom it rules.[44]

Jacksonian Democracy

Georgian society certainly seemed to respect such a perspective. Ironically, however, Georgians also seemed to be attracted to the political ideals that would define the ideological approach with which John C. Calhoun and other southern political figures would find themselves at odds. But it is important to note that the movement known as Jacksonian Democracy embodied principles that were not inconsistent with the basic beliefs of the advocates of "states' rights" and the constitutional theory of nullification. Andrew Jackson emphasized the supremacy of a governmental authority that was derived from the ultimate sovereign—the citizens. His political platform was based upon broad and ill-defined, but, nonetheless, genuine and consistent ideological values that appear to have been influenced by Hobbesian and Burkean interpretations of the liberal democratic tradition.

The populism of Jacksonian democracy complemented the belief that states, such as Georgia, constitute distinctive societies that can be protected only by imposing the will of the people of those respective states over those claims to alleged national values that the federal system might try to impose upon them. The distinctiveness of Georgian society has been reflected, in part, by the evolution of its constitutional system. The plantation system, its perpetuation of aristocratic pretensions that were tempered by republican ideals, the emphasis upon family ties and loyalties, and the hierarchical and structured social system that these values and institutions promoted became an integral part of the cultural milieu upon which Georgia's fundamental beliefs traditionally have been based.[45] These values were echoed by delegates to two Georgia constitutional conventions, in 1833 and 1839, that addressed these issues and ideas.[46]

Romantic Image of Georgian Society

This image of Georgian society may not have been entirely accurate, but it reflects a romantic ideal that has remained an important part of the cultural mythology of that state. This image is associated particularly with the *antebellum* South, but it

is one that seems to have motivated the political rhetoric and, arguably, the political, economic, and legal policies of Georgia throughout its history, including the period of Reconstruction and the years that included the Civil Rights movement, following the end of the World War II. Perhaps, the most vivid literary expression of that romantic image of Georgian culture and society has been offered by Margaret Mitchell. Her famous novel, *Gone with the Wind,* evoked the memory of an idealized Georgia culture that was devastated, but not forgotten or entirely abandoned, as a result of the American Civil War. The aristocratic perceptions and experiences of the main characters (especially the protagonist, Scarlett O'Hara) reflect the ideals of an economically, politically, and culturally dominant elite. The patriarchal, hierarchical, and family-oriented values that they espoused, as well as the obligation of individual members of society to fulfill their civic duty (as the larger community defined it), affirmed, for these Georgians, the particular concepts of liberty, community, and autonomy that they sought to preserve against the centralizing federal threat. Mitchell's narrative reveals the fundamental beliefs of the sort of people from whom Georgia's political, legal, and judicial elite also have emerged.[47] Therefore, the idealized portrait of Georgians preparing for war may not offer an entirely accurate portrait of that state's society, but the ideal remained a popular one that continued to be romanticized and emulated long after the Civil War and Reconstruction eras ended.

> The troop of cavalry had been organized three months before, the very day that Georgia seceded from the Union, and since then the recruits had been whistling for war. The outfit was as yet unnamed, though not for want of suggestions. Everyone had his own ideas on that subject and was loathe to relinquish it, just as everyone had ideas about the color and cut of the uniforms. . . .
>
> The officers were elected by the members, for no one in the County had any military experience except for a few veterans of the Mexican and Seminole wars and, besides, the Troop would have scorned a veteran as a leader if they had not personally liked him and trusted him. Everyone liked the four Tarleton boys and the three Fontaines, but regretfully refused to elect them, because the Tarletons got lickered up too quickly and liked to skylark, and the Fontaines had quick, murderous tempers. Ashley Wilkes was elected captain, because he was the best rider in the County and because his cool head was counted on to keep some semblance of order. Raiford Calvert was made first lieutenant, because everyone liked Raif, and Able Wynder, son of a swamp trapper, himself a small farmer, was elected second lieutenant.
>
> Able was a shrewd, grave giant, illiterate, kind of heart, older than the other boys and with as good or better manners in the presence of ladies. There was little snobbery in the Troop. Too many of their fathers and grandfathers had come up to wealth from the small farmer class for that. . . . He bore the honor gravely, and with no untoward conceit, as though it were only his due. But the planters' ladies and the planters' slaves could not overlook the fact that he was not born a gentleman, even if their men folks could.

> In the beginning, the Troop had been recruited exclusively from the sons of planters, a gentleman's outfit, each man supplying his own horse, arms, equipment, uniform and body servant. But rich planters were few in the young county of Clayton, and, in order to muster a full-strength troop, it had been necessary to raise more recruits among the sons of small farmers, hunters in the backwoods, swamp trappers, Crackers and, in a very few cases, even poor whites, if they were above the average of their class.[48]

Georgia's Economic Elite—States' Rights Party

Georgia's economic elite (including plantation farmers and other slave owners), who represented particularly the romanticized society that authors like Margaret Mitchell illustrated, joined with other voters along Georgia's coastal region to support the States' Rights Party that arose from a political faction that had been founded by Governor George M. Troup. This party evolved into the state's Whig Party. The demise of the Whig's throughout the United States, during the 1850s, resulted in the shifting of the support of Georgia's Whigs from that party to the state's Democratic Party. Residents of the western and northern parts of the state tended to join small farmers and other, less affluent voters in supporting the Unionist Party that evolved from a political faction that had been led by another prominent Georgian politician, John Clark. It later became known as the Jacksonian Democratic Party, and it proved to be the less dominant of Georgia's political parties.[49]

That fact proved to be constitutionally significant, since it was the political heirs of George Troup who directed Georgia's response to the growing federal crisis of the first half of the nineteenth century. Georgian governments became increasingly conservative as they also became increasingly hostile towards the perceived interference of the respective governmental branches of the United States, and they supported the growing regional movement that ultimately would result in the creation of the Confederate States of America.[50] A special convention was called in 1850 in order to address the series of crises that resulted, at the federal level, in the Missouri Compromise. This convention drafted and approved a document that became known as the "Georgia Platform." While the tone of this document was intentionally conciliatory, it threatened secession if the federal government imposed its authority further over the states, especially in terms of the issue of slavery. Although the Georgia Platform represented a compromise between the state's principal political factions, the Georgia Democratic Party was successful in asserting a theme that emphasized the sorts of values that would dominate Georgia's 1861 constitutional convention.[51]

Georgia's State Constitution

The election of Abraham Lincoln as President of the United States in 1860 provided the final impetus for the secession of most of the country's southern

states, including Georgia. The state constitution that emerged as a result of this action proved to be an especially significant one, since many of its features would remain permanent. In particular, the expansion of the guarantee of civil rights and liberties, along with the strengthened assertion of popular sovereignty as a basis for government, provided the ultimate foundation for this document and the Georgian constitutional tradition that would follow it. One member of this convention especially influenced it outcome. Thomas R. R. Cobb was a politician, lawyer, and legal scholar who represented many of the classical conservative values that had come to influence the evolution of liberal democracy within Georgian society. Significantly, he also published a comprehensive study of common and statutory law within the state that would serve as a model for subsequent legal codes. The twenty-eight sections of the Declaration of Fundamental Principles included the rights and liberties that also were guaranteed within the federal Bill of Rights, but these rights and liberties included an acknowledgment of respect for the traditional institutions of Georgia society. The paragraphs that address religious freedom within the Georgia Constitution were more detailed and explicit than the First Amendment of the United States Constitution, and the tone of the text suggests a general approval of the existence of religious institutions that is not found within its federal counterpart. Furthermore (and most conspicuously), the freedom of property included the right to own slaves, which implied an approval, upon the part of Georgia society as a whole, of the institution of the plantation system that appeared to rely upon slave labor for its success.[52]

Georgia was physically devastated by the American Civil War. The famous March to the Sea of General Sherman resulted in the destruction of the state along a sixty-mile wide path that included the principal economic centers of Atlanta and Savannah.[53] The ultimate defeat of the Confederacy during this war resulted in two successive constitutional documents for this state. The Georgia Constitution of 1865 essentially was the same as the 1861 document, except that it met the requirements of the victorious United States government that it repeal the Ordinance of Secession, abolish the institution of slavery, and repudiate the state's war debt. However, when the Georgia Legislature refused to ratify the Fourteenth Amendment to the United States Constitution in 1866, the Georgia Constitution of 1865 was rejected by the federal government and replaced by military rule. Another constitutional convention was called. This one was dominated by various pro-Union representatives, and they drafted the Georgia Constitution of 1868, which did meet the requirements that the federal government sought to achieve.[54]

This document, understandably, was regarded with hostility by a large part of Georgian society. It was replaced, in 1877, by a constitution that was made possible by the withdrawal of the last remaining federal troops and the lifting of the final restrictions that had been imposed upon Georgia as a result of Recon-

struction. A large constitutional convention was elected, and this body framed a document that was intended to restore the traditional values and relationship between the individual citizens and sovereign of that state. The Georgia Constitution remained, in spirit, essentially the same as the 1861 and 1865 versions, except for the fact that it included greatly increased detail relating to the powers and functions of government in order to limit the scope of judicial interpretation within this area.[55] However, that sort of detail made it necessary to amend the Georgia Constitution frequently, even when only a relatively minor change was sought in relation to legislative procedure or a delegation of governmental authority to a local level of government. This problem made the constitutional process within Georgia so inconvenient and confusing that the Institute of Public Affairs of the University of Georgia, in 1931, recommended the creation of a new constitutional document for the state.

The Georgia Constitution of 1945 was the result of the efforts of a commission that included the governor and several important members of all three branches of the Georgian government. It was the intention of this commission to "streamline" the state's constitution, after having extensive public hearings which called for structural and substantive reforms, including greater equal participation for women. However, this version of the Georgia Constitution (which was approved by the residents of the state through a special election) was overwhelmingly similar to the versions of 1861 and 1877, both textually and, particularly, in spirit.[56] Nonetheless, desires to revise the Georgia Constitution continued. In 1963, another Constitutional Revision Commission was established for that purpose.

The piecemeal approach to constitutional revision that followed the establishment of the 1963 commission resulted in indecisive reform. A structural reorganization of the document was submitted to, and approved by, Georgia voters in 1976. However, a general desire to clarify this document led to continued demands for constitutional revision in Georgia. The 1983 version of the Georgia Constitution generally conformed to this desire by clarifying the language of certain provisions, eliminating clauses that seemed to be more appropriately addressed by legislation, and reducing redundancies involving various related sections. However, the language that conveys the spirit of the Georgia Constitution as traced back to the nineteenth century and earlier has remained practically unaltered. The 1983 Georgia Constitution is, substantively, the same document that was drafted, in 1861, in terms of the fundamental values that it embraces and promotes.[57]

Fundamental Values

Those values also are apparent in terms of Georgia's history following the period of Reconstruction. The gradual withdrawal of the federal presence from Georgia made it possible for the state's Democratic Party to regain control of the

state government by the early 1870s. In addition to the process that returned the state's constitutional order to its pre-Reconstruction condition, Georgian politicians sought to reverse the political and economic gains that the emancipated slaves had achieved within that state. Governmental policy was influenced strongly by a faction that was known popularly as "Bourbon Democrats." Three members of this faction, Joseph E. Brown, Alfred H. Colquitt, and John Brown Gordon, especially dominated the early development of these policies, which included the promotion of business and industry. Northern capital provided the initial impetus for investments within Georgia, including the rise of a new banking industry. The agrarian economy began to diversify, but cotton remained important, especially as the textile sector was rebuilt, during the 1880s. Meanwhile, industry continued to expand, which fact was illustrated by the rebuilding and growth of Atlanta. That city became the largest industrial center of the southern region of the United States, and it spearheaded the New South movement of economic and political growth and reform that would remain a popular ideal throughout the twentieth century within southern states such as Georgia.[58]

Peoples' Party

However, small farmers and businessmen, especially in western parts of the state, suffered from a steady decline in prices. The Farmers' Alliance was formed at this time, and it evolved into the populist Peoples' Party under Representative Thomas E. Watson. This movement contributed to the larger Populist Party that was influential during the late nineteenth century; within Georgia, it provided a focus for popular discontent that seemed to follow the tradition that had been led by John Clark during the early part of the century. A notable part of Georgia's population was frustrated by this specific area of economic decline, and they tended to react to this condition by clinging to familiar cultural traditions and values, regardless of their practical utility.[59]

Much of this frustration was directed against African-American Georgians, who were effectively disenfranchised, by 1908, through the adoption of literacy standards and other obstacles in relation to voting requirements. The rise of the Ku Klux Klan within Georgia was motivated generally by a desire to preserve the state's "special culture." It appealed to an idealized vision of Georgia that included the traditional patriarchal plantation system and the political system that it promoted, the image of the family as an extended and entrenched social institution, the Jeffersonian and Jacksonian ideals of local and popular control of government, the resentment of outside (often interpreted as "progressive") interference, as well as the better known and notorious perception of the superiority of White culture and the need to preserve that culture against incursions from other racial, religious, and ethnic groups.[60]

"Separate but Equal"

Plessey vs. Furgesson

Successive Georgian governments took advantage of the United States Supreme Court ruling within the 1896 case of *Plessey vs. Furgesson* and promoted the "separate but equal" racial facilities and institutions that it permitted. Perhaps the best known Georgian political leader of the twentieth century, Governor Eugene Talmadge, was especially keen to capitalize upon this situation and the widespread discontent that was caused by the Great Depression in order to promote his vision of a White Georgian culture that emulated the traditional, classical conservative image of the state—a platform that his son, Governor Herman Talmadge, continued after his death. He was a populist leader who bitterly opposed the New Deal of President Franklin D. Roosevelt. His apparently dictatorial methods earned him a strong degree of notoriety, as well as the attention of political reformers both within, and outside, Georgia.[61]

The most famous of Georgia's leaders of political and social reform was Martin Luther King, Jr. The Southern Christian Leadership Conference that he led, both locally and at the national level, was aided by federal decisions that began to undermine legally sanctioned racial segregation, including the 1954 school desegregation case of *Brown vs. Board of Education of Topeka, Kansas*. The political and social message of King and other civil rights leaders was motivated by values that stressed human equality, the need for social and economic justice, racial harmony, social and cultural tolerance, and an activist government that can promote and guarantee those values. These values also are consistent with Georgia's culture and history, although they often have been politically, economically, and socially suppressed.[62] Opposition to this sort of platform continued within Georgia, especially under the guidance of Governors Marvin Griffin and Lester Maddox, during the 1950s and 1960s, but this official opposition decreased significantly, and it was ended finally by Governor Jimmy Carter, during the 1970s, prior to his successful campaign for United States President.[63]

Preamble of State Constitution

The Constitution of the State of Georgia has been interpreted within the context of this broad cultural and historical tradition. The most prominent source for this interpretation that can be found within the text of that document is the preamble. The Georgia Constitution appears to offer the only preamble that has been cited, specifically and effectively, within a major precedent of any American state's constitutional law.[64] The specific construction of this preamble reflects the principles of classical republicanism that are closely associated with Georgia's legal, political, and social development and, consequently, infers the constitutional association with those values.

> To perpetuate the principles of free government, insure justice to all, preserve peace, promote the interest and happiness of the citizen and of the family, and transmit to posterity the enjoyment of liberty, we the people of Georgia, relying upon the protection and guidance of Almighty God, do ordain and establish this Constitution.[65]

Cases and Opinions

Clabough vs. Rachwal—"Wrongful Death"

This preamble was invoked within the 1985 Georgia Court of Appeal decision of *Clabough vs. Rachwal*. This case involved a wrongful death suit in which the daughter and sister of a woman who died, after having been given an accidental overdose of medication, sued the mother of the victim. The Court of Appeal upheld the trial court's decision to bar that action, because it violated the doctrine of family immunity. The Georgia judicial system did not rely entirely, however, upon the statutory or common law bases for this doctrine to sustain this decision. Instead, Judge Dorothy Toth Beasley's (1995–96) opinion for a unanimous court made particular reference to the state constitutional sanction of this interpretation.

> The preservation of the family unit is of such utmost importance in this state that it has recently been given stature in our state constitution: "To . . . promote the interest of the citizen and the family . . . we the people of Georgia . . . do ordain and establish this Constitution."
>
> To allow decedent's son to bring the present suit would be against the public policy of this state. This youngster has lived with defendant since the mother's death, and defendant is now his legal guardian. As defendant "has assumed the status and obligations of a parent without a formal adoption," she stands "in *loco parentis*." In that capacity she may not then be sued by the unemancipated child or the guardian *ad litem* suing on his behalf.[66]

This doctrine was applied to this case, even though these persons were not legally related. The very semblance of a family relationship was sufficient for conferring constitutional status and protection upon this relationship. Judge Beasley's opinion stressed the fact that this approach was one that was especially applicable to Georgia, and the fact that a national trend in favor of the abolition of family immunity had not altered the public policy of Georgia.[67] She relied heavily upon the precedent established within the 1972 Georgia Court of Appeals decision of *Eschen vs. Roney, et al.* in defense of her interpretive approach. A motion for rehearing in that case, involving the attempted suit of guardian on behalf of a son against his mother, was denied upon the basis of precedents that supported Georgia's family immunity doctrine. The opinion of Judge Sol Clark stressed the need to maintain continuity with previous rulings and "preserve the harmony and stability of the law."[68]

Maddox vs. Queen—Family Immunity

But an even more significant precedent was provided by the 1979 Georgia Court of Appeals decision in *Maddox vs. Queen*. An unemancipated child sued her grandfather for negligence involving a lawn mower accident, with her father bringing the suit upon her behalf. The trial court found in favor of the grandfather, largely because of the doctrine of family immunity. Judge A. W. Birdsong's majority opinion stressed, again, that upholding this ruling was made simply because "[t]o allow an unemancipated child to sue a parent (or head of a household) would be against the public policy of this state."[69] The majority opinion was made without much elaboration, especially regarding the underlying constitutional justification for the decision. However, Chief Judge Braswell D. Deen Jr., did provide such an elaboration within his concurring opinion. He also made reference to the Court of Appeal decision in *Eschen* and noted, in particular, Senior Judge Thomas Clark's defense of Georgia's doctrine of family immunity. Ironically, he chose to support this part of that previous opinion upon principles that appear to be based upon libertarian (and which relied upon federal precedents, including the seminal 1965 United States Supreme Court decision in *Griswold vs. Connecticut*), rather than the apparently republican, principles that Judge Clark had invoked.

> Judge Clark's second point of prime concern is to preserve the peace, love and unity of the basic family household concept by preventing suits between members of a family. This is a well established principle and should be maintained inviolate as the public policy of Georgia, not necessarily because of Judge Clark's stated reason of *stare decisis,* but because of ethical "principles" surrounding fundamental privacy rights of people that comprise the basic family household concept.[70]

Privacy Rights

Chief Judge Deen's reference to privacy rights is misleading, in this instance, since he emphasizes that the privacy protection he explicates and defends does not support individual decisions regarding family relations, but the preservation of the privacy of a traditional "nuclear" family unit that is headed by a father and provided supportive nurturing by a mother. He admitted that this definition had been modified by the Georgia General Assembly, although he seemed to be critical of the manner in which the state legislature altered the traditional Georgian understanding of this legal relationship.[71] He also seemed to be critical of an alleged trend that he had observed within Georgia (seemingly emulating the tendencies of other states that embraced different values and traditions) towards a disentanglement of the state government from matters of marriage and divorce.[72] His concerns, again, seemed to relate to his explication of the fundamental nature of Georgian society that its legal and constitutional system was intended to interpret and uphold.

> House Bill No. 1031, which is now pending in the [Georgia] General Assembly, could radically eliminate right-wrong from the family household concept and, if the proposal is adopted would strike all grounds of divorce except the no-fault irretrievably broken ground. This would place the institution of marriage, and the divorce laws in the same liberal trend as no-fault insurance, no-fault alcoholism, no-fault effort in redefining the test for insanity, no-fault and no right or wrong answers within the current dominant values clarification and situation ethics taught in public schools and universities, and no-fault relativistic rehabilitation in prison systems. All of these trends erode absolutes undergirding the law and ultimately lead to a society based on total permissiveness of no right and no wrong and will eventually change the public policy to allow those within the basic family unit, assuming this concept survives, to sue each other. This trend itself is a form of positivism or sociological jurisprudence based on utilitarianism of "policy" rather than "principle." This was the legisprudence "policy" judicial philosophy of Justice Oliver Wendell Holmes when he said, "whatever the crowd wants" rather than that espoused by Ulpian's jurisprudence based on the principle of "just or unjust."[73]

Chief Judge Deen's preference for the legal principles of a classical Roman legal scholar over a famous American jurist seems to be particular appropriate within this context. His warning against the dystopian consequences of adopting highly individualistic values in this respect (which he offers in a note) also is particularly revealing.

> The Utopian model depicted in *Brave New World* for young students as the prospective family concept of values for the future is generally required outside reading along with *Lord of the Flies* and *The Hobbit* in "Modern British Literature" and "20th Century English" in many 11th grade public schools. Normal Utopian future family life is portrayed as one of free love, dope, soma and hypnopÆdia drugs only three or four generations away for all. Huxley suggests to students:
>
> "Hug me till you drug me, honey;
> Kiss me till I'm in a coma;
> Hug me, honey, snuggly bunny;
> Love's as good as soma."
>
> It is suggested in Utopia that marriage licenses will be, for the future family, issued like dog licenses—good for 12 months only. There will be no law against changing dogs or keeping more than one animal at a time.[74]

Bowers vs. Hardwick—Private Sexual Practices

The strong emphasis upon the family and its structure of authority within the Georgia constitutional tradition parallels its focus upon the enforcement of personal morality. This consideration is revealed most effectively within the area of

laws that address private sexual practices. Perhaps, the most notorious of these statutory prohibitions has dealt with sodomy, especially in relation to homosexual activity. The best known case to address this issue was the United States Supreme Court case of *Bowers vs. Hardwick*, in which Georgia's anti-sodomy law was upheld, despite the claim that it violated the equal protection clause of the Fourteenth Amendment to the United States Constitution and the right to privacy that is protected by, among other American constitutional clauses, the Ninth Amendment.[75]

Chris Christensen vs. State of Georgia

But that case rose through the federal courts, especially since the original charge was dropped and, consequently, never tried by a Georgia court. Nonetheless, sodomy laws have been upheld, and challenged, within the Georgia judicial system. The most significant of these cases was the 1996 Supreme Court of Georgia decision in *Chris Christensen vs. State of Georgia*. The plaintiff had been convicted for solicitation of sodomy, and he challenged that conviction on the basis of a violation of his freedom of speech and right to privacy under the Georgia Constitution.[76] The majority opinion of Justice Hugh P. Thompson emphasized the principle of legislative sovereignty in matters of public morals that is enshrined within ART. 3, SEC. 6 of the Georgia Constitution.

> The General Assembly shall have the power to make all laws not inconsistent with this Constitution, and not repugnant to the Constitution of the United States, which it shall deem necessary and proper for the welfare of the state. We hold that the prescription against sodomy is a legitimate and valid exercise of state police power in furtherance of the moral welfare of the public. Our constitution does not deny the legislative branch the right to prohibit such conduct. Accordingly, OCGA SEC. 16–6–2 does not violate the right to privacy under the Georgia Constitution.[77]

Similar clauses may be found within other state constitutions, either expressly or implied. But Justice Thompson's opinion makes clear the fact that the Georgia Constitution, unlike its counterparts at the federal level and within other states, has tended to place the burden of proof in favor of the sovereign will (which is the community's guardian of physical and moral welfare) in situations of constitutional challenge that are based upon the claimed violation of individual rights and liberties. This principle had been established firmly within the 1974 Supreme Court of Georgia decision of *Homer Davis Blencoe vs. State of Georgia*. The plaintiff had been convicted of possession of marijuana, and his appeal was based upon the claim that marijuana did not pose a demonstrable harm to society, so his private consumption of it should be protected under the right to privacy protections that are provided by the Georgia Constitution.[78]

Wellborne vs. Estes—Sovereign Authority

Chief Justice Carlton Mobley's opinion, for a unanimous court, acknowledged that a statute should be related to a legitimate state interest. However, the presumption of legitimacy and constitutionality was acknowledged to be very broad, with the threshold for proving otherwise being fairly high. Therefore, despite Bleancoe's success in establishing the contention that inconsistencies exist between laws that permit consumption of alcohol and tobacco and laws that ban marijuana use, and the government's failure to refute that testimony directly, the court easily sustained the sovereign authority of the Georgia government over the individual rights claim of the plaintiff.[79] Chief Justice Mobley quoted from the seminal precedent of *Wellborne vs. Estes* as a definitive defense of the court's superior claims of sovereign authority within Georgia.

> Legislative acts in violation of the constitution of this state or of the United States are void; and it is the duty of the judiciary so to declare them; but before an act of a co-ordinate department of the government will be declared unconstitutional, the conflict between the act and the fundamental laws must be clear and palpable.[80]

Justice Thompson then added his own elucidation of this principle, as it related to this case.

> In the exercise of its police power the state has a right to enact laws to promote the public health, safety, morals, and welfare of its citizens. There is also a concomitant interest in curtailing criminal activities wherever they may be committed. As was acknowledged in *Bowers vs. Hardwick* . . . the law "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." We hold that the proscription against sodomy is a legitimate and valid exercise of state police power in furtherance of the moral welfare of the public. Our constitution does not deny the legislative branch the right to prohibit such conduct. Accordingly, OCGA SEC. 16–6–2 does not violate the right to privacy under the Georgia Constitution.[81]

Justice Leah J. Sears' dissenting opinion objected to this approach and, instead, supported a libertarian interpretation of the Georgia constitutional tradition. Nonetheless, the dissent also served as an acknowledgment of the dominance of those republican values within Georgia society and its legal and constitutional systems that motivated the majority opinion.

> At trial, Christensen asserted his right of privacy under the Georgia Constitution in defense of the charge against him. The trial court rejected that constitutional argument by reasoning that the statutes criminalizing sodomy and the solicitation thereof are "based upon morality," and "reflect the . . . moral statement of the

majority" of Georgia's citizens. According to the trial court, no "further justification" was required in order for Georgia's sodomy statutes "to be constitutional." The trial court also held that the citizens of Georgia, both heterosexual and homosexual, have "no fundamental right to engage in sodomy," because that act does not lead to procreation. As explained below, the trial court's analysis of the right to privacy guaranteed by our State Constitution exhibits a failure to comprehend fundamental constitutional principles, and is clearly erroneous.

Today, a majority of this Court affirms the trial court's ruling by stating that the sodomy and solicitation of sodomy statutes "further . . . the moral welfare of the public." Like the trial court, the majority believes that Christensen's solicitation was immoral, and that in Georgia, what is beyond the pale of majoritarian morality also is beyond the limits of constitutional protection. If we lived in an autocracy, the majority would be correct. But such is not the case.[82]

Previous Rulings

Previous rulings in this area by Georgia courts generally did not stress justifications regarding the constitutionality of these statutes. Judge Randall Marshall's majority opinion in the 1977 Georgia Court of Appeals case of *Anderson vs. State of Georgia*, in which the court upheld a conviction for solicitation of sodomy without even addressing the claim (especially regarding free speech protections) that the statute violated both federal and state constitutional guarantees of individual rights and liberties.[83] The Supreme Court of Georgia was more direct in considering a related appeal within the 1991 case of *Anthony Smashum vs. State of Georgia*. Nonetheless, the claim that the action that resulted in a conviction of sodomy represented an unconstitutional violation of privacy rights under the Georgia Constitution (because the action was demonstrably consensual) also was rejected by the court. In this case, the sodomy statute was regarded as being, *prima facie,* consistent with Georgia and federal constitutional standards. The only consideration that Justice Griffin Bell's opinion for a unanimous court addressed was the sufficiency of the evidence that *consensual* sodomy occurred; the claim of unconstitutionality was dismissed, with little mention.[84]

Conclusion

The role of government in maintaining moral structures and standards on behalf of a sovereign people lies at the heart of the republican theory of law. One of the most influential sources of republican values for colonial Americans (including Georgians) were the writings of the British political activists and pamphleteers, John Trenchard and Thomas Gordon, who wrote under the pseudonym of Cato. The spirit of their Roman namesake was reflected, in part, in their devotion to a political will that imposed order and purpose upon a people—qualities that they regarded as being necessary for a true, positive freedom to be achieved.

Therefore, "virtue" became, for them, a central tenet of law, because the need for a secular government to impose private, as well as public, morality even superseded the role of organized religion within this area. Their perspective summarizes, in many respects, the political and constitutional tradition of the American South, in general, and Georgia, in particular.

> The truth is, and it is a melancholy truth, that where human laws do not tie men's hands from wickedness, religion too seldom does; and the most certain security which we have against violence, is the security of the laws. Hence it is, that the making of laws supposes all men naturally wicked; and the surest mark of virtue is, the observation of laws that are virtuous: If therefore we would look for virtue in a nation, we must look for it in the nature of government; the name and model of their religion being no certain symptom nor cause of their virtue. The Italians profess the Christian religion, and the Turks are all infidels; are the Italians therefore more virtuous than the Turks? I believe no body will say that they are; at least those of them that live under absolute princes: On the contrary, it is certain, that as the subjects of the Great Turk are not more miserable than those of the Pope, so neither are they more wicked.[85]

Georgia's republican tradition emphasizes the desire to promote the central role of the family and the enforcement of a community standard of "personal morality." It has been invoked in defense of a political and constitutional order that is intended to conserve a particular sense of a Georgia "community" that represents a variety of distinctive "interests" and wants to permit those interests to preserve their unique character and position within this broader society. It remains decentralist in its orientation, suspicious of the intrusions of the American federal system, and a defender of a modern variation of the ancient concept of "civic virtue." It is indicative of a regional culture that has been pivotal to the development of American history, politics, and law, and it should continue to serve as an example of this distinctive variation upon the larger American constitutional tradition.

Chapter 5

Hawaii
A Multi-Ethnic Heritage

No American state has represented a society that is as definitively heterogeneous as has Hawaii. It is the only American state that is not dominated by European-Americans; as a result of this demographic distinction, Hawaii is, arguably, less Eurocentric than the rest of American society and, therefore, the institutions of the Hawaiian state (including its constitutional tradition) also are less ideologically Eurocentric (both consciously and subconsciously) than other American states. Of course, the dominance of liberal democracy within Hawaiian society is as established a fact there as it is elsewhere within the United States. Nonetheless, the influence of competing fundamental values (particularly those values that emanate from Hawaii's aboriginal roots) upon the imported liberal democratic ideology within that state has produced a variation of that tradition that is distinctive, dynamic, and instructive.[1]

Hawaii's cultural distinctiveness seems to have been an inevitable result of its geographic isolation from the rest of the United States, as well as its unique geographical position at a crossroads of the Pacific Ocean. Hawaii's ethnic diversity includes citizens of Japanese descent, especially from southern Japan and Okinawa, which is the largest ethnic group to inhabit the archipelago. Other significant groups find their roots within the southern provinces of China, the Philippines, and (via the continental United States) Europe. However, it is those Hawaiians who are descended from the Polynesian people of the South Pacific who have elicited the most notice. The cultural heritage of the Polynesian people of Hawaii has been regarded, both within and without the state, as being one of the most striking features of Hawaiian society, despite the fact that few Hawaiians remain whose descent is purely Polynesian. But it has been estimated that aboriginal descent can be claimed by one-fifth of that society's population. Furthermore, the cultural legacy of the Polynesian people upon Hawaii is tremendous, and it has contributed to the development of practices, beliefs, and

values that have affected profoundly the political, ideological, and constitutional development of this state.[2]

The Polynesian People

The Polynesian people historically have developed a perspective that is derived from the clan system into which they are born. This clan system is an extensive one, since one's lineage is traced through both parents. It contributes to a personal identity that finds expression through belonging to the collectivity. It is not communitarian, in the European sense, because it does not make categorical distinctions between the individual person as a separate, autonomous being and the individual person as a contributing member of a community, to whose collective decisions that person must defer. It is, instead, holistic, because one's identity within the larger clan relationships reflects the wider identity within the larger world, including within the context of the ecosystem.[3]

It is a perspective which differs markedly from the visions of other cultures, particularly European ones. It resembles, in many respects, the culture, values, and interactions of other aboriginal peoples of the world. The atomistic world view of the liberal tradition is one that often appears to be isolated, unsupportive, and unnecessarily combative. Ironically, this criticism of the liberal society and its fundamental values resembles the Hobbesian criticism of the allegorical "state of nature" as being a condition of alienation and confrontation, while the more cooperative vision of the "state of nature" that was offered by John Locke might resemble, at least superficially, the relationships upon which the cultures of many aboriginal peoples are based.[4]

The term "aborigine" refers to a people of first habitation. It is used commonly to refer to the original native inhabitants of Australia. However, the term can be applied anthropologically to all original inhabitants who persist within a particular place, whether it refers to the Zulu people of South Africa, the Hopi people of the southwest United States, the Inuit peoples of northern Russian Siberia, Canada, and Greenland, the Lapp people of Finland, Sweden, and northeastern Russia, or the Ainu people of Japan's Hokkaido Island. These various people are diverse, and each exhibits distinctive cultural identities and traits. Nonetheless, despite that fact, there are general and basic patterns of thought, identity, and behavior that are remarkably common to many, if not most, aboriginal peoples.[5]

This similarity can be perceived among the Polynesian people of the Hawaiian archipelago. It is a similarity that is remarkable for two reasons: it offers a contrast with the thought, identity, and culture of Eurocentric and Asiatic peoples who also have inhabited this area; it provides a basis for understanding the development of social, legal, economic, and political institutions that are predominantly liberal democratic in origin and orientation but which also represent a variation of

that ideological tradition which is distinct, especially when compared to other variations of that tradition that are found among the several American states. This influence may appear to be subtle, but it remains significant, especially in terms of certain constitutional issues regarding such fundamental principles as property rights, equality, and the structural emphasis of government.

The relationship of Polynesian people to their respective clans and the clan structure, in general, provides a basis for all other communal relationships. Membership within a clan is determined through descent from a common ancestor who was, for some reason, memorable. Polynesian people identify with clans that are traced through both the maternal and paternal lineage. They belong to two clans, so their loyalties are shared ones. Therefore, the conditions of clan membership are not based upon a sense of absolute exclusivity but foster, instead, a sense of tolerance and accommodation that is important for the purpose of participating within the broader community.[6]

Both the clan and the whole people are bound together by an interlocking series of mutual responsibilities which result, in part, in a highly conscious division of labor. This division is based upon a fulfillment of the various needs of the clan and larger groups, and it is oriented towards the goal of mutual survival and prosperity. It is an arrangement that differs from the sorts of divisions that have marked the development of other cultures, especially European ones. The performance of different functions within aboriginal groups is not a product of competition, market forces, or class. It reflects, instead, the desire to meet certain collective needs, and it is grounded in the interpersonal relationships of the family, the clan, and the people. The essential requirements of a subsistence "economy" led certain members to be designated as food producers, protectors, counselors, caretakers, and guides. These positions are not chosen by the respective members; instead, they are predetermined according to such criteria as age, gender, and the predilections of other family, clan, or community members.[7]

The performance of these duties do not constitute an expression of individual pursuits or actualization; they are a form of participation within a greater whole. Everyone needs to perform their function if the entire group expects to survive and prosper. As a result of these mutual expectations, Eurocentric notions of achievement, interaction, and authority are not applicable to many traditional aboriginal peoples, such as the Polynesians of Hawaii. The highly integrated labor relationships of the clan necessitate a communal life that is highly coordinated. Therefore, it assumes the appearance of being centralized, which image creates the impression of a political community that is dominated by a hierarchical power structure.[8]

But this Eurocentric concept of government (which also is familiar to various non-European cultures, including the civilizations of Asia and the Middle East) fails to take into account the traditional divisions and mutual participation

found among such aboriginal peoples. Those members of a clan who make decisions do it within definitive parameters. Polynesian clans rely upon the direction of councils for their "political" guidance, but the membership of these councils is determined by demographic criteria. Experienced elders are responsible for providing this function. They do not command or rule, but the clan accepts the contention that these members are best suited to the task of providing this guidance. Their decisions are reached through a process of consensus, rather than through a formal process of majority rule. Likewise, clan chieftains do not wield the sort of authority that normally is associated with a medieval European feudal lord or a Renaissance monarch; they perform a function that is vital to the community, and the community respects the practical and spiritual guidance that they provide. However, these leaders can, and are, replaced if they display signs that they are unsuited to this responsibility.[9]

Polynesian Culture

Polynesian culture is based upon a broad concept of cooperation and consensus in all aspects of life, including that aspect that a European mind would interpret as being "political" in nature. This approach to communal life is a partial product of an economic relationship of aboriginal peoples to their immediate environment.[10] The same sort of cooperation, mutual participation, and support that is necessary in order for the clan to thrive also guides attitudes towards the physical environment upon which the people depend for their survival. The concept of economic exploitation, therefore, is anathema to aboriginal peoples, including the Polynesians, as are the concepts of feudal obligation, separation from agrarian production, or a surplus value of labor. In fact, the entire concept of individual aggrandizement, seclusion, and competitive success over other members of the community equally is anathema to Polynesian culture and values.[11]

Mana and *Tapu*

Two important ideals guided ancient Polynesian thought: *mana* and *tapu*. The concept of *mana* is one that refers to the ultimate life force that inhabits all things. It is a source of power that provides spiritual strength, and it needs to be respected in order for it to be harnessed and directed toward good and useful ends. The concept of *tapu* refers to a force that acts contrary to the proper nature of things. It became a particularly useful concept for explaining potentially negative, and even harmful, phenomena that could not be explained through normal points of reference. These two concepts provide the basis for a fundamental explanation of all occurrences and relationships. Anyone who violates *mana*, such as through the needless destruction of a natural resource, destroys the positive force within it. Ultimately, such devastation threatens the entire balance and harmony of the world. Therefore, a condition of mutual existence

must be maintained among all manifestations of *mana*, which includes the life-force of the people, of the land, and of all other entities and products.[12]

Tapu threatens that sense of harmony and balance. It is a force that is dangerous precisely because it cannot be explained readily and, thus, it appears to contradict the life-force of *mana*. The term refers to things that are "prohibited," since the effect is perceived to be, ultimately, destructive. It provides a source of interference and disruption that can undermine the happiness, prosperity, and even the survival of everything else. When outsiders introduced strange and seemingly superfluous technology to the Polynesian peoples, it appeared to manipulate the physical world in ways that were not immediately explainable. Furthermore, these objects and practices altered the environment and the normal affairs of the people in ways that appeared to be unnatural and, thus, contrary to the guidance and power of *mana*.[13]

Even after gaining familiarity with the technology of the industrializing world, Polynesians maintained a suspicion of the technological advances and modern institutions of hierarchical power that outsiders introduced and maintained. A cautious attitude has persisted from this cultural perspective that still influences attitudes within Hawaiian society. The need to accommodate, rather than dominate, is an ideal that has been encouraged through the desire to maintain the positive force of *mana* in the face of potential harmful phenomena that are regarded as being *tapu*.[14] Modern Hawaiians have maintained attitudes (especially towards the natural environment and the harmony of the community) that appear to reflect an adaptation of these traditional values, even though the vast majority of them are not descended from that culture. However, most Hawaiians have lived within a cultural context that has not been conducive to Eurocentric liberalism.[15]

Eastern Influences

Another source of philosophical influence within Hawaiian society and its constitutional heritage is derived from the cultural roots of those persons of Japanese, Chinese, and other East Asian descent. Certain values that are derived from this philosophical influence are very compatible with values that are derived from the Polynesian tradition. Again, that influence is a subtle one, but it also is potentially significant. It can be understood more easily through an evaluation of the central premises of dominant Eastern thought, the most prominent of which (particularly in relation to Japan and China) is represented by the Taoist, Confucian, and Shinto traditions.

It can be very difficult to lead a Western mind to comprehend Eastern thought meaningfully, since the conventional terms of reference for the fundamental beliefs of people who have been raised within a Western environment differ so essentially from the basic vision of other peoples. In fact, terms such as "ideology" and "society" reflect that divergence, since both terms refer to a

particular way of understanding human relationships, ideas, and the overall ordering of the world as people experience it.[16] Nonetheless, there are certain core differences which experts in the study of comparative religions and cultures have identified as useful for gaining a rudimentary insight into Eastern thought on the part of a Western observer.

Western Tradition

The Western tradition is a linear one, especially in terms of a comprehension of time and the nature of power. Time is something that has an origin and an ending; each moment is experienced only once, and past, present, and future are absolute concepts. Power also is understood in such linear terms, although it is conceived as a vertical, rather than a horizontal, conceptualization.[17] European feudal power was understood to have been derived from an ultimate source that was bestowed upon institutions and persons who wielded it on behalf of this source. Therefore, God was understood in terms of governing a universe in which power was distributed among varying orders of angels, humans, animals, and other life forms. Furthermore, religious authority (particularly within the Roman Catholic tradition that dominated medieval Europe) was invested directly from God to a "vicar," (specifically, the Vicar of Christ, in the person of the Pope) who governed a hierarchical structure of authority that descended to a College of Cardinals, then to archbishops, bishops, priests, and members of the laity. Temporal power similarly extended from God's secular representative, the king, through various levels of nobility and ranks of "common" people and, finally, to the peasantry.[18]

Liberal democracy reversed the order of this political hierarchy, so that power could be delegated from a collective sense of the members of society through elected representatives to an executive authority. However, it maintained a similarly linear perspective.[19] Marxists also have maintained this basic conceptualization, while changing the terms of reference from autonomous individual persons to the collective groupings of economically determined classes. Power is manipulated and imposed by the *bourgeoisie* (as it had been by previous dominant classes) upon the *proletariat* class, although this arrangement eventually will be overthrown, according to Marx, and replaced with a classless society.[20] The Western tradition also is one that compartmentalizes the various facets of human existence and interaction. Strict distinctions are made among different activities, institutions, patterns of thought, and intellectual disciplines. Politics, economics, sociology, psychology, religion, art, and other endeavors may interact (sometimes, thoroughly) but they are treated, nonetheless, as being separate entities which are comprehended, properly, in isolation from each other.[21]

Even intellectual pursuits such as philosophy and religion, or philosophy and political theory, or politics and law, are treated in this way within the broad

parameters of Western thought.[22] However, both Eastern and aboriginal thought approach the human condition and community differently. Furthermore, the concepts of time and power also are understood, within these former perspectives, much differently than they are understood within the latter perspective. Time generally is understood as being cyclical in nature within the broad parameters of both Eastern, and much of aboriginal, thought. There is no distinct beginning or end to time, nor are there distinct moments in time that are experienced only in isolation from the rest of time. Instead, time is a condition that defines existence, especially in terms of human interaction with the world.[23]

Eastern Tradition

Some Eastern traditions contend that time is a recurring state of existence which humans seek to escape through the attainment of enlightenment. Time does not exist as a separate component of existence; it is interwoven into a larger "fabric." The concept of power is perceived in a similar manner. Political authority is not, strictly speaking, something that is imposed from above, nor is it something that is exercised over other people.[24] Perhaps the best explanation of an Eastern concept of political authority is offered by Kung Futse, who is better known to Western audiences by the Latin adaptation of his name, Confucius. According to his teachings, all relationships within a community are based upon a fundamental notion of "reciprocal duties," or "mutual obligations." This arrangement is *not* equivalent to the Western concept of "reciprocity," in which people owe a compensatory response towards the acts of other people. It is, instead, based upon a belief that the interrelationships of a community are necessary for assuring its harmony; everyone fulfills particular roles that contribute to the greater whole, and everyone can expect other people to fulfill their particular roles, as well.[25] A ruler has an obligation to rule well, just as a soldier has an obligation to protect, a farmer has an obligation to produce food, and a teacher has an obligation to spread knowledge.

> The moral man conforms himself to his life circumstances; he does not desire anything outside of his position. Finding himself in a position of wealth and honor, he lives as becomes one living in a position of wealth and honor. Finding himself in a position of poverty and humble circumstances, he lives as becomes one living in a position of poverty and humble circumstances. Finding himself in uncivilized countries, he lives as becomes one living in uncivilized countries. Finding himself in circumstances of danger and difficulty, he acts according to what is required of a man under such circumstances. In one word, the moral man can find himself in no situation in life in which he is not master of himself.
>
> In a high position he does not domineer over his subordinates. In a subordinate position he does not court the favor of his superiors. He puts in order his own personal conduct and seeks nothing from others; hence he has no complaint to make. He complains not against Heaven, nor rails against men.[26]

This expression of order and "harmony" can be understood best in terms of the concept of "*li*." This concept is translated loosely as "law" or "lawful," but its true meaning is more expansive than this translation implies to a Western observer. "*Li*" refers to the maintenance of the sort of holistic relationship that is essential to the prosperity of the general community. It is a relationship that can be expressed through the media of ritual, such as official ceremonies, institutional functions, dance, or music. It reflects a pattern of belief and behavior in which the actions of one person necessarily affect the harmony and well being of everyone and everything.[27] Therefore, its legal and political meaning is one that defines and guides that overall relationship that binds people to each other (including rulers and ruled) and to their larger social and physical environment.

> Li, the principle of social order, is to a country what scales are to weight and what the carpenter's guideline is to straightness, and what the square and the compasses are to squares and circles. Therefore, when the scales are exact, one cannot be deceived in respect to weight . . . and when the sovereign is familiar with the principle of social order (li), he cannot be deceived by cunning and crooked manipulations. Therefore, a people who respect and follow li are called "a people with a definite principle," and a people who do not respect and follow li are called "a people without a definite principle."
>
> Li is the principle of mutual respect and courtesy. Therefore, when it is applied to worship at the temples, we have piety; when it is applied to the court, we have order in the official ranks; when applied to the home, we have affection between parents and children and harmony between brothers; when applied to the village, we have respect for order between the elders and the juniors. . . .
>
> Therefore, the rituals concerning a court audience are for the purpose of defining the proper relationships between the rulers and the ministers. . . .
>
> Li, or the principle of social order, prevents the rise of moral or social chaos as a dam prevents flood.[28]

Taoism

Taoism offers another world view that places humans within a larger, interdependent frame of reference. Contrasting forces that are found throughout the world (such as light and dark, or good and evil) are not regarded as existing in combative conflict. A Western understanding of such forces would conclude that, as one side gains an advantage, the other side must, necessarily be diminished. Instead, a Taoist conceptualization emphasizes the mutuality of such forces, since without one, the other cannot exist. For example, if darkness did not exist, the concept of light would be meaningless.[29] This perspective, which has been represented graphically by the symbol of the *yin* and the *yang*, is applied to the "political" life of a community. Political, economic, religious, cultural, and environmental forces that appear to have conflicting goals or means should be

accommodated in a way that strengthens the whole. The precise approach to that accommodation is one that requires a careful, intuitive insight in order to be realized, properly.[30] However, all such evaluations must not be perceived in isolation; the effect upon the larger community must be accounted, also.

> The quality of strength in people is original innate knowledge, the sane primal energy. This is called true yang, or the truly unified vitality, or the truly unified energy. . . .
>
> This energy is rooted in the primordial, concealed in the temporal. It is not more in sages, not less in ordinary people. At the time of birth, it is neither defiled nor pure, neither born nor extinct, neither material nor void. It is tranquil and unstirring, yet sensitive and effective. In the midst of myriad things, it is not restricted or constrained by myriad things. Fundamentally it creates, develops, and brings about fruition and consummation spontaneously, all this taking place in unminding action, not action, not needing force. It comes spontaneously from nature, not forceful yet strong, strong yet not forceful.[31]

Shintoism

Shintoism offers a variation upon this tradition (including a strong Buddhist influence) that has been very influential within the Japanese archipelago and among Japanese communities abroad. Its emphasis upon the harmonious relationship between humans and their natural environment has provided a focus of attention that has contributed to a profound understanding of the fundamental meaning of the human community, as a whole.[32] This perception of a common tie among all life forces resembles, in some ways, the Polynesian attitude towards *mana*, although it is derived from Eastern attitudes that lie at the basis of the Confucian concept of "reciprocal duties" or the Taoist concept of harmonious interaction. An ancient text that explains a Shinto cosmological vision offers an insight into this general perspective that is applicable to all aspects of human experience, including legal and political ones. It offers the basic Shinto attitude regarding the interrelationship and responsibilities that exist between humans and the divine force of nature.

> [W]hen Heaven and Earth began, the two Gods, Izanagi or the Divine Male and Izanami or the Divine Female, having entered into conjugal relations begat the Great-Eight-Island Country [Japan], its mountains and rivers, trees and herbs, the Sun-Goddess and the Moon God, and finally the God Susano-O, the Impetuous Male God.
>
> This God Susano-O, however, wept and wailed so much that he caused people to die untimely deaths and the mountains green to wither. Therefore his Divine Parents wrathfully decreed: "Now that thou art so exceedingly wicked, thou shalt no longer remain with us, but must descend to the Ne-no-Kuni or Underworld."[33]

These Eastern traditions do not treat religious, philosophical, political, or legal thought as being distinct and separate categories of existence. All of these endeavors can be understood in terms of the same, fundamental principles and values, unlike the Western tradition, in which such divisions often possess exclusive principles and methodologies that are guarded jealously.[34] Many aboriginal peoples share this particular Eastern perspective of mutual relationships and a holistic concept of the "political" and "legal" community and its relationship to the world as a whole.[35] The influence of Eastern thought upon the political, social, and legal institutions of Hawaiian society may not be as obvious, nor may be as profound, as the influence of Polynesian beliefs and values. But it is possible to argue that Eastern philosophical contributions serve to reinforce the influence and acceptance of the Polynesian tradition upon that society and its institutions, particularly since so much of Hawaii's population is descended from that cultural heritage.

Hawaiian Society and Western Thought

However, the primary social, legal, economic, and political institutions of Hawaiian society reflect the dominance of Western thought, in general, and liberal democracy, in particular. The Hawaiian constitutional tradition is, in fact, a liberal democratic one that also has been influenced by the evolution of the common law system that originated in medieval England.[36] There is not, of course, one, homogeneous variation of that liberal democratic tradition. The variation that has developed within Hawaii is one that has been shaped by forces that are particular to Hawaii's history and development, and it can be traced to the first important Western influence that occurred within that archipelago.

The first important contact that native Hawaiians received from the West occurred in the form of missionaries who arrived and, more significantly, stayed within Hawaii for the purpose of spreading Christianity. The ideological significance of that development lies within the fact that these missionaries represented the ideals and values of evangelical Protestantism. In particular, most of them came from the New England region of North America, and they represented denominations that were derived largely from the Calvinist religious tradition that, in turn, reflected many of the "revolutionary" precepts of a seventeenth-century mercantile economy.[37] The nineteenth-century missionaries who arrived within Hawaii represented a Puritanism that may have differed, somewhat, from its theocratic New England origins, but the fundamental teachings, and the legal, political, and economic implications of those teachings, still reflected these early and, in many ways, rigid liberal ideological assumptions.

Calvinism

The Puritans who came to New England during the seventeenth century brought with them the essential assumptions regarding Protestant Christianity: an indi-

vidual person's relationship with God is a personal one; intermediaries (particularly in the form of a priesthood or church hierarchy) are not necessary for the purpose of experiencing that relationship; salvation is achieved through faith, rather than through good works; humans are sinful and corrupt, so they need to submit themselves to the control of a superior authority for the preservation of their souls.[38] These tenets reflect the parallel development of a liberal interpretation of society that also is based upon certain essential assumptions: (*a*) the individual person operates as an autonomous agent; (*b*) relationships within society are not subject to the intervention of a hierarchical social or political structure, nor should any such structure prevent the general advancement of any person; (*c*) the individual person is free to make choices (especially of an economic nature) and enter into relationships with other people; (*d*) some sort of governing authority (both moral and secular varieties) is required, nonetheless, in order to control the naturally aggressive and, otherwise, harmful tendencies (which, admittedly, is an interpretation of human nature that is derived from a Hobbesian, rather than a Lockean, ideological interpretation) of the individual person.[39]

An interesting aspect of these parallel values can be found within the Calvinist doctrine of "predestination." God preordains all things, including the destiny of those persons who will achieve eternal salvation and those persons who will suffer eternal damnation. Christians can discover the category within which they will be placed through the level of their own prosperity. In particular, those persons who experience economic success are regarded as having received God's favor and grace; wealth becomes an indication of salvation.[40]

The Puritans, especially within Scotland and England, extended these beliefs as part of their desire to "purify" Christianity of its emphasis upon religious images and other paraphernalia, upon the persistence of intervening forces within church hierarchies, and continued political interference with religious affairs. In the face of persecution, these religious "purists" sought sanctuary within the confines of the New World, from which location they continued to spread their message as they created a society that could mirror the fundamental theological and secular beliefs and values that had become a defining part of the religious and ideological development of seventeenth-century Europe, including the parallel rise of Protestantism and liberalism.[41]

Calvinists and their theological descendants (including the New England Puritans) were particularly concerned about anything that might interfere with the accumulation of wealth, including the unnecessary interference of a feudal hierarchy or a civil government. The Puritans of New England were austere moralists, but they also were economic libertarians. Freedom became an ambiguous concept within this religious tradition; even though human destiny was preordained, and even though moral authority needed to be imposed upon the faithful (whose membership was severely regulated), the civic life of such a theocratic arrangement needed to assure both individual participation within society and government

and the unfettered ability to explore individual relationships (economic, political, and social) with God, other persons, and the community.[42]

The nineteenth-century revival of these values occurred during a general evangelical movement, throughout New England and elsewhere, that became known as the "Second Great Awakening." It coincided with the spread of missionary activity on the part of Protestants who inherited this Calvinist and Puritan tradition. These missionaries (especially of the Congregationalist denomination, although Methodist, Lutheran, and other Christian missionaries also were successful, later) constituted the earliest significant Western religious and, particularly, liberal ideological influence within the Hawaiian archipelago.[43] The great seventeenth-century religious and political leader of the Massachusetts Bay Colony, John Winthrop, epitomized some of the basic values that these missionaries propagated within his political "sermons."

> For the other point concerning liberty, I observe a great mistake in the country about that. There is a twofold liberty, natural (I mean as our nature is now corrupt) and civil or federal. The first is common to man with beasts and other creatures. By this, man, as he stands in relation to man simply, hath liberty to do what he lists; it is a liberty to evil as well as to good. This liberty is incompatible and inconsistent with authority, and cannot endure the least restraint of the most just authority. . . . The other kind of liberty I call civil or federal, it may also be termed moral, in reference to the covenant between God and man, in the moral law, and the politic covenants and constitutions, amongst men themselves. This liberty is the proper end and object of authority, and cannot subsist without it; and it is a liberty to that only which is good, just, and honest.[44]

Migration

Polynesian people migrated across the Pacific Ocean and settled the Hawaiian archipelago by the ninth century, and they maintained regular contact with Tahiti and other island groups, particularly from the twelfth through the fourteenth centuries. Oral histories do not offer a precise understanding of Hawaiian history prior to the late eighteenth century, although the native inhabitants appear to have prospered during this period under the traditional clan system that they derived from Polynesian culture.[45]

Soon after the British explorer, Captain James Cook, made contact with the islands and their inhabitants, Hawaii became part of a regular, and steady, pattern of Pacific trade, especially in connection with Hawaiian exports of sandalwood. Western merchants maintained sustained relations with the Hawaiians and, through this contact, began to influence them.[46] These outsiders led many influential Hawaiians to question certain aspects of their values and life-styles, including the dominance of the traditional, and relatively decentralized, clan system.[47] One clan warrior, in particular, began to consolidate this system through both military and political actions that were designed to unite the archipelago

under his leadership. This clan warrior leader, Kamehameha, began a series of military campaigns, in 1782 (aided by firearms and other weapons that he obtained from Western traders), for the purpose of uniting the archipelago under his leadership. He finally compelled fealty from the leaders of the islands of Kauai and Niihau, in 1810, and he used that occasion as the opportunity to consolidate a united Hawaiian Kingdom.[48]

Hawaiian Kingdom

Kamehameha's ability to unite Hawaii did not deflect the growing influence of Westerners, including their settlement of land. In fact, his establishment of a united kingdom was based, in part, upon certain Western notions of the concept of a nation state which complemented traditional Polynesian visions of community.[49] However, it was not until his son, Kamehameha II, succeeded him, in 1819, that this influence led to an abolition of the *kapu* system of ancient taboos, under which restrictions Hawaiians had lived for centuries. This change enabled Westerners to engage more freely in economic and cultural intercourse with native Hawaiians. It also presaged the arrival of the first American missionaries, who established themselves and their ideas permanently among the native inhabitants.[50]

Hawaiian leadership fell, during the reigns of Kamehameha II and Kamehameha III, increasingly under the influence of these missionaries, especially such leading, mid-nineteenth-century figures such as Gerrit P. Judd and Hiram Bingham.[51] Perhaps, the most significant of these influences was the development of land distribution and management that was called the "Great Mahele," or "grand division." Clan leaders dominated land ownership throughout Hawaii. They demanded produce and services from the tenants of these lands that resembled European feudalism more than the traditions of Polynesian communities.[52]

Furthermore, various clan leaders had agreed to donate land to the foreigners who had migrated to the archipelago and had begun to dominate the life of the community through trade and religious activities. But these "donations" were ambiguous, controversial, and, sometimes, contradictory, and most Hawaiians failed to benefit from this arrangement. Kamehameha III was persuaded by his Western advisors to rationalize these arrangements, during the 1840s, and, thus, he confirm the property rights of all landowners. Native Hawaiian's benefited under this change; payments of commodities to clan leaders were eliminated, especially since the sale of land now could supply revenue to a central government that was interested in aggrandizing its position at the expense of the traditional clan structure.[53]

This system was created gradually, in order to facilitate the process and ensure that the traditional interests of native Hawaiians were not entirely overlooked, especially in terms of guaranteeing continued access to the resources of these lands for everyone. Nearly half of the land was reserved to Kamehameha and his family and government, and nearly half was sold to outside interests,

with a relatively small number of Western landowners acquiring most of these divisions. A small percentage of the land was retained by aboriginal inhabitants. Because the concept of land ownership was not consistent with traditional Hawaiian values, most native inhabitants were not dismayed by this arrangement. As long as they could continue to use and respect the land, and as long as it met their needs, the Western idea of private property continued to lack meaning for Hawaiians. Therefore, the Great Mahele reflected two different philosophical perspectives: for native Hawaiians, it maintained the traditional holistic relationship of the people to nature; for Westerners, it confirmed the establishment of the liberal principle of "property," in both its immediate, and abstract, sense. This conflict of interpretation would remain a significant one, and it would contribute to an interesting controversy regarding the interpretation of Hawaiian constitutional law and the fundamental ideological and cultural values upon which it is based.[54]

American Influence upon Kamehameha III—Constitutional Monarchy

Foreign powers began to compete actively for control of the Hawaiian Islands during the latter part of the nineteenth century, especially as its economic importance and their level of investments increased, dramatically. Chinese and Japanese laborers also began to immigrate into the islands, in very large numbers, as part of this economic growth.[55] The influence of Americans upon Kamehameha III became so strong that he adopted, by 1840, a form of constitutional monarchy that was modeled, in large part, upon the United States Constitution. This constitutional system included a Bill of Rights that already had been adopted in 1839. It was especially important in terms of the recognition of the property rights of individual persons, even over the interests of landlords.[56] This constitution created three branches of government, with an hereditary, instead of an elected, chief executive. Furthermore, it defined the king's landholding as being part of a public domain, rather than remaining his personal property.[57]

Organic Acts—1845–1847

Additional statutes contributed to this constitutional development. The Organic Acts of 1845–1847 produced a statutory instrument in support of the civil rights and constitutionally defined powers of Hawaiian government that implicitly acknowledged the interpretive authority of the common law system that had come from England, through the United States. These legal institutions, together with the Great Mahele, the creation of the Board of Commissioners to Quiet Land Titles, in 1845 (which adjudicated land claims), and the passage of the Kuleana Awards Act of 1850 (which recognized and enforced the land claims of tenant holders), established the foundations of both Hawaii's modern land dis-

tribution and ownership system and the liberal democratic constitutional tradition of Hawaii as an American territory and state.[58]

American dominance of the Hawaiian government thwarted attempts by other countries to impose their authority over the islands, although the Japanese and British were successful in obtaining trade agreements and the French forced the Protestant dominated Hawaiian government to issue an act of religious toleration, especially for the benefit of persecuted Roman Catholics. Nonetheless, this dominance reinforced attitudes which led many of Hawaii's political elites to advocate a surrendering of independence in the interest of alleviating the kingdom's economic and strategic vulnerability. Furthermore, as American business interests increasingly dominated the archipelago, the desire of these forces for greater ties to the United States motivated the movement towards annexation.[59]

The attempt of Queen Lilliuokalani to increase monarchical powers at the expense of the Hawaiian Constitution prompted these American-dominated interests to seek a final solution to this issue. A revolution was staged by these elites (with the assistance of American military and naval forces that had been sent to the islands in order to "assist" the government in maintaining peace and protecting American interests) which resulted in the overthrow of the monarchy and its replacement with a republic, in 1893. Some of these revolutionary leaders were sugar planters who wanted the islands to be annexed by the American government in order to promote a more lucrative trade with the United States, while other leaders simply wanted to promote political stability and preserve the liberal system that Liliuokalani seemed to threaten.[60]

Establishment of the Republic of Hawaii

The interim result was the establishment of the Republic of Hawaii under Sanford B. Dole, in 1894, who lobbied vigorously with the United States Congress for annexation. This task was accomplished in 1898 with the formal Territory of Hawaii being established in 1900. The Land Act of 1895, which transferred former Crown lands to the Hawaiian government, was confirmed, and a new Organic Act was enacted by Congress, which served as a territorial constitution, with laws and basic principles that resembled the constitutional tradition of the United States.[61] Furthermore, Congress also passed certain land reform laws. The most significant of these laws was the Hawaiians Home Commission Act of 1920, which made certain public lands available to Hawaiian residents who could claim, successfully, to be of at least half aboriginal descent.[62]

The Territorial Legislature of Hawaii petitioned Congress for statehood as early as 1903, but this drive was not successful, until 1959. However, by 1950, a draft state constitution had been prepared, which was based upon its liberal democratic constitutional predecessors.[63] This relatively brief state constitution provided a concise statement of liberal values, but it also contained signs of other philosophical influences, especially in terms of Hawaii's aboriginal heritage. Two

articles of this Constitution, as finally drafted and approved in 1959, are especially significant in this respect. ARTICLE 11, for example, addresses the constitutional relationship of Hawaiian society to its natural environment.

> SEC. 1: For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
>
> All public natural resources are held in trust by the State for the benefit of the people.
>
> SEC. 2: The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be provided by law . . . .
>
> SEC. 3: The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. The legislation shall provide standards and criteria to accomplish the foregoing. . . .
>
> SEC. 4: The State shall have the power to acquire interests in real property to control future growth, development and land use within the State. The exercise of such power is deemed to be for a public use and purpose.
>
> SEC. 5: The legislative power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general laws . . . .
>
> SEC. 6: The State shall have the power to manage and control the marine, seabed and other resources located within the boundaries of the State, including the archipeilagic waters of the State . . . .
>
> SEC. 7: The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people. . . .
>
> SEC. 8: No nuclear fission power plant shall be constructed or radioactive material disposed of in the State without the prior approval by a two-thirds vote in each house of the legislature.
>
> SEC. 9: Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.
>
> SEC. 10: The public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law.
>
> SEC. 11: The State of Hawaii asserts and reserves its rights and interest in its exclusive economic zone for the purpose of exploring, exploiting, conserving and managing natural resources, both living and nonliving, of the seabed and subsoil, and superadjacent waters.[64]

Cases and Opinions

Charles F. Reppun, et al. vs. Honolulu Board of Water Supply

The underlying values that shaped this constitutional provision were examined by the Supreme Court of Hawaii within the 1985 case of *Charles F. Reppun, et al. vs. Honolulu Board of Water Supply*. This case addressed a decision of the Board of Water Supply of the City and County of Honolulu to reduce the amount of water that could be diverted from the Waihee stream for the purposes of irrigation of patches of *taro*, which is a staple plant food that is native to tropical regions. The plaintiffs claimed that this action violated their riparian and appurtenant water rights, as first defined for Hawaiian purposes during the Great Mahele.

Riparian rights refer to the common law principle that owners of lands on the bank of waterways accrue a right to use that water (including the soil beneath it), even if the waterway is not included in the definition of the property provided within the grant. Appurtenant rights refer to the common law principle that is related to the concept of providing an easement, through which an owner of adjacent property may enjoy reasonably unfettered access to commonly used resources.[65] The Water Board claimed that ART. 11 of the Hawaiian Constitution (particularly SECS. 7 and 11 of that article) supported its statutory authority to limit the exercise of these rights in the interest of regulating water resources for the benefit of all Hawaiians.

The Supreme Court of Hawaii felt compelled to provide, within the opinion (for a unanimous court) of Chief Justice William S. Richardson, a constitutional interpretation that would reconcile the competing values that were raised by this case and, in doing it, make them mutual supporting, rather than exclusive. First, the fundamental principles that underlie ART. 11 needed to be understood within their historical and cultural context, including in terms of the traditional arrangements that existed between tenants (*makaainana*) and royal agents (*konohiki*) in the attempt to preserve the balance of nature and promote a "spirit of mutual dependence."

> The system based on this "spirit of mutual dependence" was a stable one. . . . This benevolent attitude was not a product of indifference to the application of water nor of overabundance. On the contrary, the cooperative nature of the system appears to have stemmed from the critical import of water in the lives of the people. . . .
>
> As with the ownership of land, there were no fixed rights to water. Rather, water privileges were earned through participation in the construction of the irrigation systems and retained only by the productive application of the waters to which one was thereby entitled. . . . In times of plenty, all shared in nature's munificence; in times of scarcity, allocation was resorted to in order to insure the survival of all.[66]

On the other hand, the Hawaiian Supreme Court was highly conscious of the competing legal principles that represented both the English common law doctrines and the traditional liberal values upon which the Hawaiian constitutional tradition is based. That fact also is reflected within the statutory instruments that support Hawaii's legal system, especially as found within the revised statutes of the state.

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.[67]

However, it also found that the actual interpretation of these values could represent a variation of these doctrines and this ideological tradition that could find inspiration from the aboriginal context within which Hawaii originally developed.

> The western doctrine of "property" has traditionally implied certain rights. Among these are the right to the use of the property, the right to exclude others and the right to transfer the property with the consent of the "owner." In conformance with creation of private interests in land, each of these rights were embodied in the delineation of post-Mahele judicial water rights. Ostensibly, this judge-made system of rights was an outgrowth of Hawaiian custom in dealing with water. However, the creation of private and exclusive interests in water, within a context of western concepts regarding property, compelled the drawing of fixed lines of authority and interests which were not consonant with Hawaiian custom.
>
> Thus, the distinction drawn between "rights" and "supplies by permission" or "favors" . . . while making perfect sense within the western understanding of "property," would make no sense at all under the ancient system of allocation. Under the ancient system both the self-interest and responsibility of the *konohikis* would have created a duty to share and to maximize benefits for the residents of the *ahupua'a*. In other words, under the ancient system the "right" of the *konohiki* to control water was inseparable from his "duty" to assist each of the deserving tenants. The private division of land and the subsequent division of water allowed for the separation of this "right" from the concomitant "duty."[68]

Therefore, even though common law usages had been incorporated (through the influence of Western advisors and economic elites) into traditional Hawaiian law and custom, especially during the latter half of the nineteenth century, they had to be reconciled with an entirely different aboriginal perspective. It is this reconciliation that accounts for the unique variation of the liberal democratic tradition that is reflected within the modern Hawaiian constitutional tradition and constitutional controversies, such as this one.

> Inalienable title to water rights in relation to land use is a conception that had no place in old Hawaiian thinking. The idea of private ownership of land was likewise unknown until Kamehameha [I]'s autocracy, established as a result of the intrusion of foreign concepts, set up the figment of monarchy, a politico-social pattern alien to the Polynesian scene theretofore existing.[69]

Therefore, while the Hawaiian Supreme Court recognized that the plaintiffs did, indeed, enjoy both riparian and appurtenant rights to this water, these rights could be restricted legitimately by the state on behalf of the interests of the community generally. The concepts of property ownership and *kanawai* (mutual sharing of resources) could be reconciled, and even made to be complementary, through a judicial application of "flexibility" which was, itself, consistent with traditional Polynesian notions of law and the resolution of conflict.

> The desirability of flexibility may perhaps be best realized by emphasizing that the public interest almost never lies solely on one side of the balance of equities. Can it be said, for example, that there is no public interest in the continuation of small-scale taro farming? (See Hawaii Const. ART. 11, SEC. 3. ("The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands.") Or can it be said that there is no public interest in a free-flowing stream for its own sake? (See Hawaii Const. ART. 11, SEC. 1). ("For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect natural beauty. . . .)"[70]

Thus, this decision became the definitive precedent regarding water regulation, riparian rights, the meaning and purpose of ART. 11 of the Hawaiian Constitution, and the ideological and cultural values system upon which these ideas have come to be defined within Hawaiian jurisprudence.

> With these objectives in mind, we adopt the public use doctrine with modifications to accommodate what we perceive are the competing interests. Thus, we hold that where water has been improperly diverted by a public entity for actual public use, a complainant may not obtain injunctive relief against the diversion of water to which a public use has attached at the time suit is filed, unless the court, applying and interpreting Hawaii's Constitution and relevant statutes, finds that another public interest of substantially the same magnitude as that of the public's interest in adequate water will be advanced by injunctive relief.[71]

McBryde Sugar Company, Ltd. vs. Aylmer F. Robinson, et al.

This decision clarified an earlier precedent that addressed this same issue. The 1973 case of *McBryde Sugar Company, Ltd. vs. Aylmer F. Robinson, et al.* also concerned an issue in which landowners were limited in the diversion of water

for private use. Justice Arnold T. Abe's majority opinion addressed, in particular, the specific origins of the legal principles that supported the constitutional development of ART. 11 of the Hawaiian Constitution. This opinion emphasized, as would later cases, the Polynesian roots of the beliefs and values that have been responsible for this constitutional development.[72] However, in this case, a point of emphasis that was examined more closely than it was within *Reppun vs. Board of Water Supply* was both the English common law doctrines[73] and the New England liberalism that missionaries had brought to the Hawaiian archipelago and the development of constitutional government there, including the enactment of the Great Mahele.

> We shall next consider the possible reason for the enactment of the [Land Commission Act] law. We are aware that the missionaries, many of whom came from Massachusetts, not only brought the Christian religion to the Hawaiian people, but also brought with them the English common law as recognized in Massachusetts. Also, history shows that missionaries had tremendous influence among the leaders of the Hawaiian Kingdom.
>
> In *Weston v. Alden*, 8 Mass. 136 (1811) the Massachusetts Supreme Court recognized the right of an owner of a parcel of land adjoining a brook to use water from such brook for domestic use, including the watering of animals and irrigation of his land. Then, in *Colburn v. Richards*, 13 Mass. 420, 421 (1816), the Massachusetts court held that an owner of a parcel of land adjoining a natural watercourse had the right to use the water to irrigate his farm; however, it also held that he could not divert such water from the natural to the detriment of an owner of land below. In *Anthony v. Lapham*, 22 Mass. 175, 177 (1827), the Massachusetts court said "[e]very man, through whose land water passes, may use it for watering his cattle or irrigating his land, but he must use it in this latter way so as to do the least possible injury to his neighbor who has the same right." It is interesting to note that on this point the court as footnote 1 refers to 3 *Kent's Commentaries* (13th ed.) 439,444.[74]

Justice Abe's opinion noted that pre-statehood precedents also confirmed this interpretation which combined these competing perspectives into a coherent and consistent whole, especially the 1958 case of *Glover vs. Fong,*[75] and the 1930 case of *Territory of Hawaii vs. Gay*.[76] Together, these cases offer a profound insight into the complex philosophical convergence that have shaped the collective and individual environmental guarantees that are provided by ART. 11 of the Hawaiian Constitution, as well as the overall character and guiding principles of that social and legal document and the tradition from which it ultimately emanates.[77]

Hawaiian Constitution, ART. 12

An even more representative part of the Hawaiian Constitution, in terms of the dominant ideological basis that supports this constitutional tradition, can be

found within ART. 12 of that document. Much of this article focuses upon the role of the federal government in protecting and promoting the interests that it addresses. But the article is, nonetheless, one that was initiated by, and reflects the principles of Hawaiian society. In particular, it addresses directly the relationship of Hawaii's aboriginal people to the land and the political community.

> SEC. 1: Anything in this constitution to the contrary notwithstanding, the Hawaiian Homes Commission Act, 1920, enacted by the Congress . . . is hereby adopted as a law of the State. . . . The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms and spirit of such Act. The legislature shall make sufficient sums available for the following purposes: (1) development of home, agriculture, farm and ranch lots; (2) home, agriculture, aquaculture, farm and ranch loans; (3) rehabilitation projects to include, but not limited to, educational, economic, political, social and cultural processes by which the general welfare and conditions of native Hawaiians are thereby improved; (4) the administration and operating budget of the department of Hawaiian home lands; in furtherance of (1), (2), (3) and (4) herein, by appropriating the same in the manner provided by law.
>
> Thirty percent of the state receipts derived from the leasing of cultivated sugarcane lands under any provision of law or from water licenses shall be transferred to the native Hawaiian rehabilitation fund whenever such lands are sold . . . for purposes other than the cultivation of sugarcane.
>
> SEC. 2: The State and its people do hereby accept, as a compact with the United States . . . the requirement that section 1 hereof be included in this constitution, in whole or in part. . . . The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out.
>
> SEC. 3: As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the constitution of this State. . . .
>
> SEC. 4: The lands granted to the State of Hawaii by Section 5(*b*) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution . . . shall be held by the State as a public trust for native Hawaiians and the general public.
>
> SEC. 5: There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. . . .
>
> SEC. 6: The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law . . . for native Hawaiians and Hawaiians. . . .
>
> SEC. 7: The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by *ahupua'a's* tenants who are descendants of native Hawaiians who inhabited the Hawaiians Islands prior to 1778, subject to the right of the State to regulate such rights.[78]

William Kalipi vs. Hawaiian Trust Company, Ltd., et al.— Access through Private Lands

Much of the constitutional review related to this article has been based upon the underlying principles and values that have shaped it. Perhaps the most cited precedent, in this respect, is the 1982 case of *William Kalipi vs. Hawaiian Trust Company, Ltd., et al.* This case resulted from a claim for access through private lands "in order to gather indigenous agricultural products for use in accordance with traditional Hawaiian practices."[79] The claim was based upon an interpretation of ART. 12 of the Hawaiian Constitution in relation to access to an *ahupua'a*, or traditional land division (in this case, on the island of Molokai) that are recognized under SEC. 7 of the state's statutes.[80] Chief Justice Richardson's opinion for a unanimous Hawaiian Supreme Court acknowledged that such claims to access upon private property could not be recognized absolutely, especially within the context of liberal property rights. However, a traditional liberal interpretation of property rights was not regarded as being sufficient for understanding or deciding this issue.

> Generally, Defendants argue that regardless of their purported sources, traditional gathering should not be recognized or enforced as a matter of policy. They characterize the rights asserted as dangerous anachronism which conflict with and potentially threaten the concept of fee simple ownership in Hawaii.
>
> We recognize that permitting access to private property for the purpose of gathering natural products may indeed conflict with the exclusivity associated with fee simple ownership of land. But any argument for the extinguishing of traditional rights based simply upon the possible inconsistency of purported native rights with our modern system of land tenure must fail. For the court's obligation to preserve and enforce such traditional rights is a part of our Hawaii State Constitution. . . . And it is this expression of policy which must guide our determination.[81]

The Hawaiian Supreme Court needed to reconcile the contributing influence of Hawaii's aboriginal heritage for the purpose of shaping the state's constitutional development and judicial precedents, just as it did within the *Reppun* decision.

> The problem is that the gathering rights of SEC. 7–1 represent remnants of an economic and physical existence largely foreign to today's world. Our task is thus to conform these traditional rights born of a culture which knew little of the rigid exclusivity associated with the private ownership of land, with a modern system of land tenure in which the right of an owner to exclude is perceived to be an integral part of fee simple title.
>
> We believe that this balance is struck, consistent with our constitutional mandate and the language and intent of the statute, by interpreting the gathering rights of SEC. 7–1 to assure that lawful occupants of an *ahupua'a* may, for the purposes of practicing native Hawaiian customs and traditions, enter undeveloped lands

> within the *ahupua'a* to gather those items enumerated in the statute. Such activities would, of course, be subject to further governmental regulation.[82]

This approach and interpretation confirmed similar precedents within Hawaiian jurisprudence, although its definitive importance is demonstrated by the fact that these ART. 12 rights now are commonly cited as "Kalipi rights." This decision, in turn, has been confirmed by subsequent Hawaiian Supreme Court decisions, such as the 1992 case of *Pele Defense Fund vs. William Paty, et al.* The plaintiffs of this case claimed that an exchange of ceded public lands by the state government for a tract of private land violated both the terms of SEC. 5 of the federal Hawaii Admission Act and ART. 12 of the Hawaii Constitution. While the opinion of Associate Justice Robert Klein, for a unanimous court, acknowledged that a federal interpretation of the Hawaii Admission Act might support the position of the state that a transference of such lands is legally permissible, he ruled that the fundamental protections that are guaranteed by the Hawaii Constitution are more expansive, in this respect. This interpretation was based upon the earlier precedent of *Kalipi*, the long constitutional and cultural traditions of this archipelago and state, and an originalist approach to ART. 12 of the Hawaii Constitution, as expressed within the record of the proceedings of the convention that drafted this document and petitioned the federal government for its approval and the admission of Hawaii to the union.

> The State argues that, because the Ninth Circuit ruled that the Admission Act creates no private implied right of action there can be no right of action to enforce the terms of the SEC. 5 (f) trust under Hawaii law. We disagree. We have held, in a variety of contexts, that this court is not precluded from finding that the Hawaii Constitution affords greater protection than required by similar federal constitutional or statutory provisions.[83]

In particular, the Committee on Hawaiian Affairs of the Hawaiian Constitutional Convention offered a comprehensive insight into this sort of challenge, especially in terms of tenancy within traditional native land grants, known as *ahupua'a*.

> The Committee on Hawaiian Affairs added what is now ART. 12, SEC. 7 to reaffirm customarily and traditionally exercised rights of native Hawaiians, while giving the State the power to regulate these rights. Although these rights were primarily associated with tenancy within a particular *ahupua'a*, the committee report explicitly states that the new section "reaffirms all rights customarily and traditionally held by ancient Hawaiians." The committee contemplated that some traditional rights might extend beyond the *ahupua'a*; "for instance, it was customary for a Hawaiian to use trails outside the *ahupua'a* in which he lived to get to another part of the Island." The committee intended this provision to protect the broadest possible spectrum of native rights.

> Your Committee also decided that it was important to eliminate specific categories of rights so that the courts or legislature would not be constrained in their actions. Your Committee did not intend to remove or eliminate any statutorily recognized rights or any rights of native Hawaiians from consideration under this section, but rather your committee intended to provide a provision in the Constitution to encompass all rights of native Hawaiians, such as access and gathering. Your Committee did not intend to have the section narrowly construed or ignored by the Court. Your Committee is aware of the courts' unwillingness and inability to define native rights, badly needed judicial guidance is provided and enforcement by the courts of these rights is guaranteed.
>
> If, as argued by PDF [Pele Defense Fund], the customary and traditional rights associated with tenancy in an *ahupua'a* extended beyond the boundaries of the *ahupua'a,* then ART. 12, SEC. 7 protects those rights as well. The drafters of the constitutional amendment emphasized that all such rights were reaffirmed and that they did not intend for the provision to be narrowly construed. We therefore hold that native Hawaiian rights protected by ART. 12, SEC. 7 may extend beyond the *ahupua'a* in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner.[84]

"Injury in Fact"

The plaintiffs countered the state's claim that they lacked standing for the purpose of bringing this suit before the court; the fact that they are part of the native Hawaiian community and were supporting a claim that affected the whole community, was, they claimed, sufficient for that purpose. The Hawaii Supreme Court accepted this argument and extended its earlier reasoning within rulings such as the 1982 case of *William Akau, Jr., et al. vs. Olohana Corporation, et al., Life of the Land, et al. vs. Land Use Commission of the State of Hawaii, et al.*, and other cases, through which the three part "injury in fact" test was developed for the determination of standing in such instances.[85] It was within *Akau*, in particular, that traditional liberal and aboriginal values were employed in order to develop a concept of standing that is broadly based upon the collective relationship of the political community to the environment, upon which source they depend for existence. This case emphasized this relationship in terms of native Hawaiians. However, the language of the Hawaiian Supreme Court assumed a tone that appeared to be elastic, especially in the way in which it implied the mutual obligations involved between the state and society in consideration of such environmentally and culturally relevant issues. This ruling by Chief Justice Richardson, on behalf of a unanimous court, was consistent with precedents found within the constitutional traditions of other American states, but it used alternative sources for a justification of an expansion of the scope of that doctrine.

> We turn now to a review of the trial court's ruling certifying the class. The trial court certified two classes under HRCP 23. They are:

Subclass A

All residents of the State of Hawaii who in the past have used and enjoyed reasonably, or who have been prevented or deterred by Defendants' actions and conduct from using and enjoying reasonably, the Kawaihae Trail, the Kawaihae-Puako Road and the intersecting trails and paths claimed in the second amended complaint filed in this cause to reach the beaches and tidelands between Hapuna State Beach Park and Samuel Spencer Park.

Subclass B

All persons who reside or own property within the *ahupua'as* of Kawaihaw and Ouli who in the past have used and enjoyed reasonably, or who have been prevented or deterred by Defendants' actions and conduct from enjoying and using reasonably the Kamehameha Trail, the Kawaihae-Puako Road and the intersecting trails and paths claimed in Plaintiffs' Second Amended Complaint to reach the beaches and tidelands between Hapuna State Beach Park and Sameul Spencer Park.

Defendant argues that class certification was improper because the class definition is too vague and it is hard to tell who is in the class. . . . [But] [t]he class is defined so that all members have standing because the people who had used or had been deterred from using the trails are among the injured. Moreover, this class action is an appropriate method to deal with the problems created by this suit asserting public rights. Accordingly, we find no abuse of discretion.[86]

Individual Rights and Liberties

Finally, the issue raised within these cases regarding the greater extension of individual rights and liberties within Hawaiian constitutional law, as compared to American constitutional law, also is significant. There are many cases within which the Hawaiian judicial system has affirmed the principle that the Hawaii Constitution can, and often does, confer greater protection, in this respect. Most of these cases, however, make that declaration without analyzing the ultimate origin of that state constitutional principle.

In general, there appears to be a judicial assumption that these state level rights and liberties are merely stronger extensions of their federal counterparts and that they, in fact, derive their primary understanding and ideological authority from the federal constitutional tradition. The 1985 case of *Hawaii Housing Authority vs. Richard Lyman, Jr., et al.*, for example, focused upon a challenge to the result of condemnation proceedings. This challenge was based, in part, upon an interpretation of the "takings clause" articulated within ART. 1, SEC. 20 of the Hawaii Constitution, which Chief Justice Herman T. F. Lum compared to its federal counterpart within his opinion on behalf of the Hawaii Supreme Court.[87]

When enacted, article I, section 20 of the Hawaii Constitution was identical to the fifth amendment to the United States Constitution and was adopted because [according to

> the report of the Committee of the Whole of the Hawaii Constitutional Convention] of the certainty given to the interpretation of the section by the federal decisions. . . . The two sections remain substantially similar. Consequently, the United States Supreme Court's interpretation of the federal public use clause as it applied to the Land Reform Act is persuasive authority for our review of the Hawaii constitutional provision.
>
> However, we are not precluded from interpreting our state constitution to afford greater protection than that required by federal constitutional interpretations and have not hesitated to do so where warranted by logic and due regard for the purposes of those protections.[88]

The court ultimately declined to embrace the broader rulings that had been adopted within previous Hawaiian cases, but it reserved for itself the prerogative to do it. Furthermore, the emphasis upon "logic," associated with "due regard for the purposes of those protections" provides a clue regarding the origin of this expansive protection. It is possible that the nineteenth-century liberal influence upon Hawaii's constitutional development that was provided by merchants, traders, and, especially, Puritan missionaries may have prompted a more libertarian variation of that liberal tradition, consistent with its New England origins, than might have been found elsewhere within the United States. Thus, the "logical" evolution of this particular civil right might have led, within Hawaii's liberal democratic context, to a continued expansion of the scope and stringency of its application and judicial enforcement.[89] That sort of conclusion could be drawn also in respect of the privacy guarantees that are provided within ART. 1, SEC. 6 of the Hawaii Constitution.

> The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.[90]

There is no written counterpart to this constitutional clause within the United States Constitution. However, the existence of a concept of privacy as an "unenumerated right" has been established (through the Ninth Amendment and the penumbras of other parts of the federal Bill of Rights and the Fourteenth Amendment) as an integral part of the American constitutional tradition, especially through such landmark federal cases as the 1965 decision of *Griswold vs. Connecticut*, the 1972 decision of *Eisenstadt vs. Baird*, and the 1973 decision of *Roe v. Wade*.

State of Hawaii vs. Brian Kam—Right of Privacy

The 1988 Hawaii Supreme Court case of *State of Hawaii vs. Brian Kam* provides an important insight into the fundamental Hawaiian understanding of this constitutional concept. Kam, along with codefendant Deborah Cohen, had been

convicted of selling pornographic magazines. They appealed their conviction, in part, upon the basis of a violation of the right to privacy. The majority opinion of Justice Toshimi Hayashi provided another example of the willingness of the Hawaiian judicial system to provide a more expansive protection of civil rights, based upon the Hawaiian Constitution, than the federal Constitution might offer. But, in doing it, he appeared to ground the interpretation of this right within the fundamental principles and values of the American constitutional tradition.

> The Hawaii Constitution must be construed with due regard to the intent of the framers and the people adopting it. The fundamental principle in interpreting a constitutional provision is to give effect to that intent.
>
> The privacy provision was drafted by the 1978 Constitutional Convention and incorporated into the Hawaii Constitution by the general election of that year. The Convention's Committee on Bill of Rights, Suffrage and Elections recommended passage of the proposed article I, section 6 by stating that:
>
> > Perhaps the most important aspect of privacy is that it confers upon people the most important right of all—the right to be left alone. As Justice Brandeis said in his now celebrated and vindicated dissent in *Olmstead v. U.S.*, 277 U.S. 438 (1928): "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."
> >
> > It gives each and every individual the right to control certain highly personal and intimate affairs of his own life. The right to personal autonomy, to dictate his lifestyle, to be oneself are included in this concept of privacy. As Justice Abe stated in his concurring opinion in *State v. Kantner*, 53 H. 327, 493 P.2d 306 (1972): each person has the "fundamental right of liberty to make a fool of himself as long as his act does not endanger others, and that the state may regulate the conduct of a person under pain of criminal punishment only when his actions affect the general welfare—that is, where others are harmed or likely to be harmed."
>
> It should be emphasized that this right is not an absolute one but, because similar to the right of free speech, it is so important in value to society that it can be infringed upon only by the showing of a compelling state interest. . . . However, in view of the important nature of this right, the State must use the least restrictive means should it desire to interfere with the right.[91]

Conclusion

Again, the Hawaiian Supreme Court offered a state interpretation of a fundamental right that originated within the federal constitutional system but which appeared to extend those principles more expansively than the broad American liberal tradition seemed to indicate. This more libertarian approach, which has been noted within other Hawaiian precedents, may indicate the New England

and Puritan origins of liberal ideological values within Hawaii, although, generally, Hawaiian courts have been vague, and even silent, upon that point.

Hawaii may represent the most unique state constitutional tradition within American society. It has combined ideological and cultural influences that transcend the normal parameters of American history and constitutionalism. In fact, it has brought together fundamental perspectives, values systems, and philosophical visions that might, otherwise, be regarded as so different from each other as to be irreconcilable opposites. Nonetheless, this state constitutional tradition has combined aboriginal, Eastern, and Western themes (as well as a living image of a Native American) into a system that is both dynamic and stable. The Hawaiian constitutional tradition is unique, but it also is very much part of the mosaic that diversifies, strengthens, and unites the federal and state levels of the American constitutional tradition.

Chapter 6

Louisiana

Constitutional Patriarchy

Louisiana has adopted, so far, eleven written constitutions. It is only the most recent one, which was adopted in 1974, that has provided an emphasis upon the constitutional role of the protection of individual rights and liberties. This emphasis normally is a frequent one within a liberal democratic society; within American society, at both the federal and state levels, it has become an expected one. The fact that the constitutional tradition of Louisiana appears to have deviated historically from that expectation may provide an important clue regarding the specific ideological and cultural influences that have dominated the overall social, political, cultural, legal, and judicial values, institutions, policies, and public decisions of that state.

Louisiana's Origins

The history of Louisiana provides insight into the conditions that have fomented this development. That history differs from the rest of American society in certain significant ways. Other parts of the United States were occupied initially by non-British European colonists, but the effect of Spanish and French migration to the region would have a more lasting effect upon Louisiana than similar colonial periods would have upon other American states. These Europeans established (after displacing the Natchez, Chicasaws, and other native inhabitants of this area) a culture and society that would reflect their continental origins.

That continental influence would prove to be significant. French explorers would enjoy early success in establishing their presence and the presence of the French society from which they came. French forts were established during the late seventeenth century along the Mississippi River by colonists under the leadership of ambitious entrepreneurs, such as Pierre le Moyne, sieur d'Iberville and his brother, Jean-Baptiste le Moyne, sieur de Bienville. King Louis XIV

established a permanent institutional presence in this region of the continent when he awarded, in 1712, this vaguely defined territory (which stretched along the Mississippi River from the Gulf of Mexico northward into the North American plains) as a proprietary colony to the French merchant, Antoine Crozat.[1]

This colony previously had been named "Louisiane" (in honor of the Sun King) by René Robert Cavelier, sieur de La Salle; it developed quickly. The colony's charter was transferred to the Scottish entrepreneur, John Law, in 1718, with the sieur de Bienville serving as governor. The new Scottish leader sought to implement economic and immigration initiatives, while the French leader pursued civic growth. Law introduced new European colonists and African slaves to the region, and he encouraged the growth of trade, shipping, and rudimentary industries; Bienville established a community, in 1718, and then a colonial capital, in 1722, at New Orleans. He also initiated the creation of various legal and political institutions throughout the colony.[2]

Despite these efforts, the colony experienced economic problems, especially because of the logistical difficulties that were inherent in managing a colonial empire within the New World, especially for France, which had additional interests in distant Quebec and which was engaged in periodic struggles with its imperial British rival. John Law was compelled, for financial reasons, to surrender his charter in 1731; Louisiana then reverted to the status of a royal colony. However, French control of the region would continue for only three more decades. France's ongoing conflict with Great Britain undermined the stability of the former country's overseas empire. The French and Indian Wars, which were fought from 1754 to 1763, represented an extension of the larger, European-based conflict that was known as the Seven Years War. The war in North America was proving to be less successful for France than its military efforts in Europe, and France wished to deny its traditional rival, Great Britain, the acquisition of such a potentially lucrative territory. So, the French government of King Louis XV secretly arranged, through a treaty, for the transfer of the royal colony of Louisiana to Spain in 1762.[3]

The Spanish takeover of all French territory west of the Mississippi River influenced the future economic development, culture, and values of Louisiana, significantly. The Spanish vigorously improved the mercantile infrastructure of the colony and encouraged further increases in migration and settlement. The colony began to prosper greatly under Spanish rule, and this prosperity was especially evident within the expanding city of New Orleans. Competent governors, such as Esteban Rodriguez Miro and Bernardo de Gálvez, established stable administration and favorable conditions of trade within Louisiana, which further advanced its economic development. Few Spanish colonists settled within Louisiana; Spanish authorities were content to allow the French inhabitants (including the exiled Acadians, whom the British had expelled from Nova Scotia and to whom the Spanish administration of Louisiana extended welcome) to

conduct business there without unnecessary interference, while Spain simply benefited from the revenues that grew concurrently with the colony's expanding economy.[4]

Nonetheless, despite this increased prosperity, the French populace of Louisiana resented this "foreign" rule and they rebelled against it in 1768 by overthrowing the Spanish governor in favor of French self-rule. Spanish rule was restored when a new Spanish governor, Don Alejandro O'Reilly, arrived and suppressed the rebellion, but the political strength of the local inhabitants had been demonstrated. Furthermore, French culture, as well as many political, legal, and economic institutions that were French in origin, dominated the colony throughout this period of Spanish administration. A permanent Spanish influence would remain within Louisiana (especially in terms of architecture and certain legal concepts and ideals), but the original French population of that colony would overshadow it.[5]

The legal, judicial, and constitutional significance of these French colonists and their descendants, known as the Creoles, should not be underestimated. Spanish society also shared in many of the same continental ideological principles and values as did French society, but the latter society, through the Creole population, proved to be very influential throughout Louisiana society, in that respect. However, that continental influence did not necessarily originate within the sort of ideological climate that had been convincingly articulated by the *philosophes* of the latter part of the eighteenth century. A very different philosophical influence seems to have motivated and guided the Creoles of Louisiana as they developed the policies and institutions that would dominate, arguably, that society and the constitutional tradition that it, ultimately, produced.[6]

Jesuit Missionaries

Jesuit missionaries were among the first Europeans to inhabit this region. They brought a Roman Catholic perspective that had resisted the humanism of the Renaissance and the rise of liberal values that accompanied Europe's shift from a feudal to a mercantile economy. They preached a perspective that emphasized the role of a community which strongly delineates members and nonmembers, a hierarchical power structure, a paternal concept of leadership, and a belief that societies should be governed by a "natural law" that is ontological, deontological, and transhistoric.[7] This perspective would not predominate within Louisiana, but it would influence the future ideological development of that colony and, later, state. The natural law tradition of Roman Catholicism reflected a preference for the ideas of St. Thomas Aquinas over John Locke. However, it is very important that this influence should not be exaggerated, despite the early influence of a Gallican Catholic tradition within Louisiana. Nonetheless, that influence is not negligible either, especially in relation to the development of Louisiana's constitutional tradition.[8]

Natural Law

Natural law constitutes the oldest, and most persistent Western philosophical tradition. Its origins can be traced to the pre-Socratic era of ancient Greek thought, and it had a profound effect upon the development of Roman law, from which the civil law tradition originated. However, during the European Middle Ages, natural law achieved a zenith of sophistication and acceptance, primarily because of its theological relevance to Roman Catholicism. This legal and moral theory provided a convenient vehicle for a defense of the prevailing economic and political order of medieval Europe, as well as a support for the religious and political role and structure of the medieval Church of Rome.

Although its specific content has differed widely (depending upon the historical and cultural context within which it is found), natural law has remained a consistent tradition because of the presence of its two most prominent structural characteristics. The ontological aspect of this philosophy has focused upon the "nature" of the physical world, the human condition, and the relationship between them. The deontological aspect has focused upon the moral duties that arise from these ontological identifications, including activities which people are expected to do, as well as activities from which they must refrain. This calculation, whether it is achieved through observation or the process of reason, is held to be universal in its functioning and its application in terms of both time and place. But this theoretical tradition lost favor with the advent of liberalism; natural law treated humans as part of an integrated whole and not as independent, autonomous agents.[9] Furthermore, natural law dictated behavior within all aspects of human existence, so that it did not distinguish between a public and a private realm; humans, in order to be morally consistent with the natural legal order, must perform in certain ways and fulfill certain duties, and they cannot decline to do it, whether it involves acts of economic or political participation, charity, sexuality, or even assuming a responsibility for maintaining ones's "place" within a larger communal or social structure. Modern scholars, such as Shadia Drury, have identified these common reference points among the many diverse manifestations of this legal and philosophical tradition.

a. When used in a narrow sense, natural law refers to a universal, transhistorical, moral order that is independent of human volition, convention, or political decree. This means that it is an objective moral standard. Furthermore, it is (to some degree) accessible to man through reason.
b. The knowledge of natural law or natural justice is practical in the sense that it directs or guides action, unlike purely theoretical knowledge.
c. Natural law is a deontological ethic. . . . [which] is one that regards moral duties as fundamental and intrinsically valuable. The natural law requires us to act rightly, but this is not the same as requiring us to perform actions that produce the best results. Natural law is not only deontological, but more importantly, it is act deontological. . . .

d. There is a necessary connection between law and morality. Law is not properly speaking law unless it has a moral content. Positive laws or the laws of the state are valid if and only if they are in harmony with the law of nature.
e. The law of nature is forever transcendent. It is an ideal to aspire towards; but it can never be completely realized in any given historical political order. . . .
f. The most modest degree of everyday justice will fail to be realized by law alone. Not even the best set of laws can guarantee a moderately just society . . .
g. Natural law presupposes a particular view of nature. That view explains why nature can be a source of moral and legal norms.[10]

There are two avenues through which the natural law tradition may have approached Louisiana society and, consequently, influenced that state's constitutional history and perspective. First, Louisiana represented a commercial venture that was augmented by the moral claims of evangelization and a propagation of the faith. Father Jacques Marquette and his journeys of exploration along the Mississippi basin are emblematic of this effort. The early institutions, especially the laws, of Louisiana's colonial period reflect those religious and cultural values. It also leads toward the second avenue of natural law influence within that state.

Civil Law System

The civil law system has been strongly associated with French history and ideals. However, that system was introduced to Louisiana prior to the creation of the Code Napoléon, with which it often is associated. The civil law of Louisiana, under both French and Spanish guidance, was a product of the ancient Roman law that was inspired, largely, by natural law ideas and concepts. The ancient Romans believed that the *jus naturale* provided a basis for uniting the diverse peoples of their expansive empire as an inspiration for the *jus gentium*, or "law of nations." Regardless of the parochialism and cultural relativism of local laws (as in the *jus civile* of the city of Rome), the *jus gentium* could apply the universal principles that human reason could perceive towards the establishment of common principles of law.[11] The belief that these principles were, indeed, universal and that they should, rightfully, be imposed upon everyone, regardless of individual or collective local desires, was accepted confidently by ancient jurists, such as Marcus Tullius Cicero.

> There is in fact a true law—namely, right reason—which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. . . . To invalidate this law by human legislation is never morally right, nor is it permissible to restrict its operation, and to annul it wholly is impossible. . . . It will not lay down one rule at Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one

> law, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter, and its sponsor. The man who will not obey it will abandon his better self, and, in denying the true nature of man, will thereby suffer the severest of penalties, though he has escaped all the other consequences which men call punishment.[12]

Codes

The shared principles that the natural law, through the *jus gentium*, provided were classified (under appropriate categories) and codified; the most famous example of this process was the *Institutes Corpus Juris Civilis* that had been enacted under the direction of the Byzantine Emperor, Justinian the Great. These codes provided specific instructions regarding legal ideas, terminology, definitions, and application. A jurist, under this system, need only refer to the proper codes or other, articulated parts of the law in order to determine the precise and consistent answer to any legal question. Thus, when European Renaissance scholars sought to support the emergence of a centralized nation-state with an appropriate legal system, the classical example of the civil law provided a model which all continental jurists could emulate as part of a shared legal structure.[13]

Common Law System

The civil law system differs from the common law system that was developed in England, which has been inherited by those societies that have been, at one time, part of the British Empire. The common law system evolved as the result of the attempts of English monarchs (especially, during the twelfth century, King Henry II) to enhance centralized political control through a consolidation of the legal structure of the kingdom. Since it was necessary to reconcile a variety of local legal practices and ideas that were derived from customary law, those officials who were appointed to tour various judicial "circuits" relied upon previous judicial rulings, the writings of scholars, and prior, commonly accepted practices as the basis for their articulation and application of legal principles and decisions. They sought to provide, through this process, a means of determining those legal values, principles, and ideals that these local laws and customs generally shared, which, then, became the basis of a unified legal system.[14] This process encouraged the perpetual evolution of the law, since it was based upon earlier decisions, or "precedents," that were interpreted and applied by a variety of jurists, especially within the eventual emergence of the concept of a "rule of law," under which restriction even the sovereign is bound. Thus, the common law system became a more fluid one than the civil law system of the continent; the addition of the former system to the later one within Louisiana would provide an interesting amalgamation.[15]

The common law has, indeed, displaced the civil law within most areas of the Louisiana legal system (especially within the area of public and constitutional law), but the civil law's theoretical origins continue to provide a strong source of influence over the evolution of Louisiana constitutionalism.[16] One of the values that the natural law tradition imparted through the codified standard of Roman canon law was an acceptance of a hierarchical and paternalistic notion of religious and political authority. The most influential source for understanding these principles and ideas are found within the writings of Saint Thomas Aquinas. The Thomistic approach to the tenets of faith and reason were adapted from a central premise of Aristotelian philosophy that everything in nature has an essence that it tends to fulfill. That pursuit of an entity's ultimate "end," or *telos*, could be applied towards the attainment of a comprehensive appreciation of humanity and its relationship to law, politics, and social structures, in general.[17]

Thomistic Philosophy

According to Aquinas, this relationship manifests itself through certain "natural inclinations" that are bestowed upon humanity by a benevolent and rational God. These inclinations are identified as being part of a hierarchical structure of the universe that includes God at its apex and lower life forms at its base. This cosmic structure is mirrored by a hierarchical religious structure that includes the Pope (as God's vicar) at its apex and the laity at its base; a hierarchical political structure similarly includes the King at the top and the peasantry at the bottom. The dominant forces who are found within the higher reaches of this structure are bound, by a moral obligation, to protect and provide for the basic needs of the occupants of the lower strata of the hierarchy; as God protects and provides for humanity, so should civic leaders protect and provide for their subjects or constituents. Furthermore, while leaders must fulfill a duty to protect and provide, the people whom they lead must fulfill their duty to respect, honor, and obey that authority.[18]

> Nevertheless, it must be noted, that if the observance of the law according to the letter does not involve any sudden risk needing instant remedy, it is not competent for everyone to expound what is useful and what is not useful to the state: those alone can do this who are in authority, and who, on account of such like cases, have the power to dispense from the laws. If, however, the peril be so sudden as not to allow the delay involved by referring the matter to authority, the mere necessity brings with it a dispensation, since necessity knows no law.[19]

Thomistic thought would remain a dominant influence within the development of Western political theory for many centuries, especially within those societies that were slow to abandon feudal economic and political principles and structures. Human reason would continue to be interpreted in terms of the need

to fulfill basic human inclinations, including the need for self-preservation, the need to fulfill animal drives, and the need to fulfill the potential of humans as social beings who exist and interact within familial, religious, and social communities that are ordered and benevolent.[20]

Both French and Spanish political thought of the seventeenth and early eighteenth centuries reflect these influences. They differ tremendously from the ideological orientation of the *philosophes* and other, continental liberal philosophers of the latter eighteenth and the nineteenth centuries. One exception, though, may occur in terms of a greater emphasis upon the individual person as a member of an intrinsic moral and sociopolitical community, which has influenced both medieval theologians and modern communitarians, alike. Spanish and, especially, French explorers, entrepreneurs, and colonists brought these influences to Louisiana and its persistent legal, cultural, social, and political foundations during the seventeenth and eighteenth centuries.

A prominent representative of this philosophical trend can be found within the writings of the eminent French religious thinker and physical scientist, Blaise Pascal. Although he wrote in defense of Jansenism (which recommended that elements of Calvinist-inspired piety be introduced into Catholic practice, which ideas, in turn, were denounced as a heresy by the Holy See), his writings also provided for a defense of the maintenance of a humble and deferential human community in the presence of God and the lawful structures of authority. He promoted these beliefs, unlike Saint Thomas Aquinas, upon the basis of faith, rather than upon the basis of reason, since that latter basis was finite and could not possibly explain the divine mysteries of God's *cosmos*. But, in political terms, Pascal also reflected an important social critique regarding the nature of political power and the relationship of humans to that power during the seventeenth century. This relationship was established through the legal and political institutions of colonial Louisiana, which relied heavily upon the direct authority of governors and their delegated, executive officials.

> 60. La puissance des rois est fondée sur la raison et sur la folie du peuple, et bien plus sur la folie. La plus grande et importante chose du monde a pour fondement la faiblesse. Et ce fondement-là est admirablement sûr, car il n'y a rien de plus sûr que cela que le peuple sera faible. Ce qui est fondé sur la seule raison est bien mal fondé, comme l'estime de la sagesse.[21]

A System of Values

Other seventeenth century commentators, such as l'Abbé Pierre d'Ailly, while being critical of the concept of hereditary nobility, nonetheless continued to support a deference to a hierarchical and paternalistic ordering of society.

> 82. L'illusion de la plupart des nobles est de croire que leur noblesse est en eux un caractère.

83. La noblesse véritable et naturelle est celle qui vient des avantages du corps et de l'esprit.
84. Plus la noblesse que l'on tire de ses aïeux seulement est ancienne, moins elle est bonne, plus elle est suspecte et incertaine. Le fils d'un maréchal de France qui a obtenu cette charge par son grand mérite doit être plus noble que ses descendants. Cette source de noblesse est encore toute vive dans les veines du fils, et soutenue par l'exemple du père; elle s'affaiblit et s'altère en s'éloignant.
85. On s'étonne tous les jours de voir des personnes de la lie du peuple s'élever et s'ennoblir, et l'on en parle avec mépris, comme si les plus grandes familles du monde n'avaient pas eu un commencement semblable, à les rechercher jusque dans le fond de leur origine.[22]

The system and values of which d'Ailly was critical continued to dominate much of continental Europe (especially France) throughout that century. However, Louisiana offered the opportunity to create a new society that was led and protected by a "nobility" of merit, rather than by a merely arbitrary caste whose membership was based upon an accident of birth. Such a society could be promoted through institutions which reflected these values and, especially, through the law. However, these attitudes were not confined to continental philosophers; English scholars of this century articulated a popular, if not dominant, appreciation of this concept of hierarchical and paternal authority. This ideological perspective would be, ultimately, rejected, but its influence (as expressed by theorists such as Thomas Hobbes) would not be negated entirely.

> The office of the sovereign, be it a monarch or an assembly, consisteth in the end, for which he was trusted with the sovereign power, namely the procuration of *the safety of the people***;** to which he is obliged by the law of nature, and to render an account thereof to God, the author of that law, and to none but him. But by safety here, is not meant a bare preservation, but also all other contentments of life, which every man by lawful industry, without danger, or hurt to the commonwealth, shall acquire to himself.
>
> And this is intended should be done, not by care applied to individuals, further than their protection from injuries, when they shall complain; but by a general providence, contained in public instruction, both of doctrine, and example; and in the making and executing of good laws, to which individual persons may apply their own cases.[23]

This understanding of the role of the sovereign authority within a society also leads to a particular perspective regarding an insistence upon collective and individual respect, deference, and obeissance from the people towards that sovereign.

> [T]hey [subjects] ought to be informed, how great a fault it is, to speak evil of the sovereign representative, whether one man, or an assembly of men; or to argue and dispute his power; or any way to use his name irreverently, whereby he may be

> brought into contempt with his people, and their obedience, in which the safety of the commonwealth consisteth, slackened. Which doctrine the third commandment by resemblance pointed to.[24]

English Theorists

Similar sentiments were expressed, during this century, by English theorists as diverse as Sir Robert Filmer (against whose ideas regarding the biblical and familial source for absolute monarchical authority John Locke focused his efforts)[25] and even the heroic defender of republican and liberal principles and values, Algernon Sydney.[26] These ideas had not been completely rejected, once liberalism firmly came to dominate English (and, later, British) society and the colonies that it established. But they would find, arguably, greater acceptance within a society such as Louisiana, which had already been influenced, in its institutions and popular culture, by the continental principles and values of the century in which this society was established and developed, first.

Transition to American Control

France regained control of the Louisiana Territory (which still included extensive territory westward from the entire Mississippi River basin) by the end of the eighteenth century. The first consul of the French Republic, Napoléon Bonaparte, arranged for Spain to cede the territory back to France through a secret treaty that was signed and ratified, in 1800. This move was part of a larger French plan to expand the country's territorial ambitions throughout North America and the Caribbean Sea. However, the revolt of Toussaint l'Overture in Haiti, as well as a shifting of emphasis more exclusively back towards Europe, thwarted these plans. Therefore, in 1803, Bonaparte agreed to sell the entire territory to the United States, which had sought initially only to gain either control of New Orleans or, at least, a guarantee of navigation rights through the Mississippi River to the Gulf of Mexico.[27]

In order to facilitate the governance of this new territory (which was under exploration by the famous expedition of Merriweather Lewis and Roger Clark), the American administration of Thomas Jefferson arranged for the reorganization and apportionment of the territory. The United States Congress passed an act, in 1804, which designated that portion of the Louisiana Territory south of 33 degrees north latitude as comprising the new Territory of Orleans. A territorial government was established whose institutions retained much of the former French influence, as did the culture and society, generally, and this government began to plan for statehood. Congress passed an act, in 1811, that allowed Louisiana to draft a state constitution and, in 1812, this constitution was created and submitted to Congress, which, subsequently, admitted Louisiana into the union.[28]

State Constitution

The first state constitution of Louisiana contained no formal reference to civil rights and liberties; its substantive section began (like its federal counterpart) with a description of the powers of the three branches of government. Its structure was patterned after the state constitution of Kentucky, although the underlying premise of the document differed in certain notable ways that already have been suggested.[29] A special provision was made, for example, in reference to the legal system.

> The existing laws in this territory when this constitution goes into effect, shall continue to be in force until altered or abolished by the legislature; provided however that the legislature shall never adopt any system or code of laws, by general reference to the said system or code, but in all cases, shall specify the several provisions of the laws it may enact.[30]

This section, although it appears to provide an innocuous allowance for the administrative transition from a territorial to a state government, was designed, in fact, to allow the state to retain its civil law system and, also, to discourage the informal adoption, by either the legislative or the judicial branches of government, of the common law system that has prevailed among the several legal systems of the United States. Statutes enacted under the common law can draw upon precedents and generally accepted principles that have evolved within the system, so a legislature does not need to specify many related legal issues that every statute, inevitably, raises. The civil law, however, specifies every "provision" of a law with a corresponding code. This approach was not merely allowed under the Louisiana Constitution; it was demanded.[31]

A Bilingual Heritage and Law

This cultural and institutional uniqueness was promoted further by this constitution; it also was a bilingual document, since both the French and the English versions (the latter version was submitted to Congress for approval) were declared to be authoritative. More than half of the delegates to this first state constitutional convention spoke French as their first language, and some of them could not function in the English language. Many of the anglophone delegates also could converse and write in French. Therefore, this fact did not represent a mere symbolic gesture; Louisiana constituted, in large part, a francophone culture and society. This culture did not appear to be confined to the political and economic elites of Louisiana society, but their dominance and influence was obvious.[32]

This fact would promote a sense of identity that would be both distinct and collective, and it would persist (although with decreasing effect and significance)

throughout Louisiana's history. The language of this document (including the symbolic language of the preamble) may have aped the United States Constitution and the Kentucky Constitution, but it was designed for a society that differed, in important respects, from the rest of the country. These different languages represent conceptual variations that are more than semantic; language also provides an epistemological medium that informs fundamental understandings of profound ideas, including legal and constitutional conceptualizations. It is possible to argue that legal and constitutional terminology of the English language reflects common law, and British philosophical, influences, while French language terminology represents civil law and continental influences. The fact that these terms frequently cannot be translated precisely adds credence to this perspective, which has been argued, in greater detail, within a different theoretical environment.[33]

Nonetheless, this constitution was a liberal democratic document, and those values did, ultimately, predominate within Louisiana society. However, Louisiana's variation of that tradition would remain its own (a tradition that was tied to a different heritage from much of the rest of the North American continent), as the tone of the official French version of the preamble would indicate.

> Nous les Représentans [*sic*] du Peuple de toute cette partie du Territoire ou pays cédé sous le nom de Louisiane, par le traité fait à Paris, le 30 Avril 1803 . . . afin d'assûrer à tous les citoyens qui habitent ce Territoire, la jouissance des droits attachés à l'existence, à la liberté et aux propriétés, ordonnons et établissons la Constitution ou forme de Gouvernement suivante, et convenons mutuellment de nous ériger en Etat libre et indépendent sous le nom de l'Etat de la Louisiane.[34]

Louisiana would prosper under this system of government throughout the *antebellum* period. A new state constitution was drafted, in 1845, partly so that the authority of the state could be expanded to provide for public education. The state constitution that was drafted, in 1861, in support of secession from the American union continued the emphasis upon state power, without a comprehensive declaration of rights.[35] Additionally, the sense that Louisiana represents an exclusive, and (within the limits of that exclusivity) integrated community, with a sense of collective identity, was reaffirmed by delegates to that constitutional convention, such as John K. Elgée, who led the debate regarding the state flag.

> We dedicate, therefore, the thirteen stripes upon our [state] flag, to the memory of those [original thirteen colonists] whose unconquerable love of freedom has taught us this day, how peacefully to vindicate our rights and protect our liberties.
>
> The [special] committee [on the state flag], too, could not forget that another race [*sic*], bold, warlike and adventurous, had planted the first colony of white men on the shores of Louisiana; the name of our State, that of our city, nay, even the morning roll call of the Convention, as it summoned us to our duties, bade us

> remember that some tribute was due to the children and descendants of the founders of the colony—the blue, the white, the red, emblems of hope, virtue and valor, to the memories of those who first on this soil laid the foundations of an empire.
>
> Still another race [*sic*] and another nation remained who equally demanded a recognition in a flag designed to be national. If to France we are indebted for the foundation of the colony, Spain merits an acknowledgment at our hands, for by her was the infant structure built up. Her mild and paternal rule is yet spoken of by the oldest inhabitants, whilst the great body of our law stands this day a monument of her wisdom. To the children of Spain we dedicate the colors of red and yellow, which we have woven into our plan. The star cannot fail to remind you that Louisiana has arisen to take her place in the political firmament.[36]

Louisiana Constitutions of 1868 and 1898

The Louisiana Constitution of 1868 differed dramatically from the earlier versions, especially in terms of its inclusion of a formal Bill of Rights. These changes were imposed upon the state as part of the necessary conditions for readmission to the union, following the defeat of the Confederate States during the American Civil War, and they were implemented by representatives who were elected by a Louisiana constituency that included the newly enfranchised ex-slaves. However, this "Reconstruction Constitution" was replaced when a new Louisiana Constitution was drafted and adopted in 1898. In addition to the inclusion of the infamous "grandfather clause" that had been adopted by other southern states (resulting in the reduction of the state's registered voters by over 95 percent), this new constitution extended the entrenchment and description of governmental offices at the state, county, and municipal levels, particularly in relation to the executive branch.[37]

The Louisiana Constitution of 1898 retained a Bill of Rights, but it shifted the constitutional emphasis back towards the institutional dimension. The principle of the sovereignty of the community again was elevated to a position that appeared to take precedence over the place of the individual member of society. The first article of both the Louisiana Bill of Rights and the Constitution as a whole signified this fundamental value.[38]

> All government, of right, originates with the people, is founded on their will alone and is instituted solely for the good of the whole. Its only legitimate end is to secure justice to all, preserve peace and promote the interest and happiness of the people.[39]

Ironically, this version of the Louisiana Constitution was the result of an elite accommodation (primarily among members of the state's Democratic Party) that sought to overturn the results of a popular rejection of a similar constitutional draft, two years earlier. In fact, the idea of popular sovereignty that was

expressed within article one was used precisely in support of elite sovereignty, and the populace seemed to accept that arrangement with historical consistency.

> Historically, the initiators and principal practitioners of constitutional revision have been the state's public elite—governors, legislators, and other office holders, together with lobbyists for various local and special interests. These educated, articulate, powerful, and relatively affluent Louisianians have used the process of constitutional revision to construct or maintain a governmental apparatus conforming to their own specifications.[40]

Most of these constitutions were regarded by many Louisiana politicians and other civic elites as being incomplete, despite their apparent thoroughness. Therefore, they were amended frequently. However, the amendment process required an uncertain participation on the part of the electorate, so a constitutional convention often proved to be a preferred method of constitutional change. The 1921 Louisiana Constitution was the result of such political machinations.

Louisiana Constitution of 1921

This constitution was amended 536 times within fifty-one years in order to refine, clarify, or expand governmental power or revenue plans, despite the fact that it was detailed and extensive.[41] In particular, this constitution, like earlier versions, aggrandized the power of the executive branch of government by providing for a relatively large number of administrative posts and agencies to whom the governor of the state could appoint "suitable" office seekers. It was so specific, in this respect, that it actually designated the authority and composition of a commission for regulating and supervising the French Quarter of New Orleans in detail, within a section that was, by itself, over five hundred words in length.[42]

The Louisiana Constitution of 1921 delegated powers to the governor that would prove to be very useful for the purpose of political patronage and which would confer a degree of influence upon the governor that could be used towards manipulating the other branches of government, as well as the electorate.[43] No governor would take advantage of that constitutional environment more effectively than Huey P. Long. However, despite his image as a brash populist who manipulated the political, governmental, and constitutional system in order to establish a practical dictatorship over Louisiana, this colorful governor and senator could be described as being, simply, the most conspicuous example of a trend that reflects a meaningful and entrenched historical value system at work within that state.

> Concentrating power in the office of governor has been standard practice in Louisiana since colonial times. Under French and Spanish rule, royally appointed gov-

ernors and courts exercised all authority. When Louisiana became an American state, its constitution granted more power to the chief executive than that enjoyed by virtually any other governor. During Reconstruction, the Republican Governor Henry Clay Warmoth augmented his constitutional powers by intimidating legislators into granting him control over local officials and election procedures (sixty years later, Huey Long would say privately that he had learned something by Warmoth's example). When conservative Democrats gained control of Louisiana after Reconstruction, the Constitution of 1879 granted authority unprecedented for a governor of any American state: this constitution, in effect when Foster became governor, gave his office not only the power of line item veto, but also the right to appoint all parish assessors (who also acted as voter registrars), all police jury members (the equivalent of county commissioners in other states), and the state school board (which in turn appointed parish school boards). With only slight overstatement, a book about Louisiana published in the 1890s declared: "The people have abdicated the right of local self-government."[44]

Political Patriarchs and the Constitution of 1921

Politicians such as Huey P. Long insisted, nonetheless, that their control and use of government was done primarily for the benefit of the "people" of Louisiana. Long spearheaded the dominance of the "Neo-Populist" faction of Louisiana politics (and he identified consciously with poorer citizens), yet similar claims were made by prominent "Neo-Bourbon" leaders, who generally were associated with the goals of commercial and business interests.[45] His speeches may have been more strident than other leading politicians within that state, but the paternalistic tone was typical of the expectations and results of its governmental system.

I am not going to be drawn into a political discussion for some months, because, were I to engage in politics, I would be almost compelled to arouse opposition from at least some of the officials in Baton Rouge, Lake Charles, New Orleans, Shreveport, Monroe, Alexandria, and in the Parishes; and to arouse such opposition would mean that I would have to stop or retard some of our work until the politics was over.

We are building roads ten times as strong and for less than half the cost of the roads built by other administrations before us . . . we are building so many big bridges that it seems almost impossible that one administration would dare to undertake that much work; we are modernizing the ports of New Orleans and Lake Charles . . . we are on our way to unifying terminals at New Orleans and bridge the Mississippi at both New Orleans and Baton Rouge; the Louisiana State University is leaping into the position of one of the world's greatest and most complete institutions of learning . . . we are stamping out illiteracy . . . the free school book law is a settled fact; the free bridges are up over Lake Pontchartrain and a 40-foot wide concrete road leads all the way to them; the four-year farmers' road program

> is again just under way—all of which simply means that we cannot mix in politics and destroy any harmony among those with whom we now have to work, if we are to complete the job.[46]

This attitude and cultural tone was captured even more effectively within Robert Penn Warren's famous fictional variation upon this Louisiana phenomenon. Willie Stark (a character who was based upon Huey Long) and his aids and advisors embodied this mixture of radical populism and contemptuous paternalism that, if not unique to American politics, was portrayed by Warren (and accepted by many Americans, including Louisianans) as being extremely characteristic of Louisiana's political climate and fundamental values.

> "They didn't seem to be paying attention much tonight. Not while I was trying to explain about my tax program."
>
> "Maybe you try to tell 'em too much. It breaks down their brain cells."
>
> "Looks like they wanted to hear about taxes, though," he said.
>
> "You tell 'em too much. Just tell 'em you're gonna soak the fat boys, and forget the rest of the tax stuff."
>
> "What we need is a balanced tax program. Right now the ratio between income tax and total income for the state gives an index that—"
>
> "Yeah," I said, "I heard the speech. But they don't give a damn about that. Hell, make 'em cry, make 'em laugh, make 'em think you're their weak erring pal, or make 'em think you're God-Almighty. Or make 'em mad. Even mad at you. Just stir 'em up, it doesn't matter how or why, and they'll love you and come back for more. Pinch 'em in the soft place. They aren't alive, most of 'em, and haven't been alive in twenty years. Hell, their wives have lost their teeth and their shape, and likker won't set on their stomachs, and they don't believe in God, so it's up to you to give 'em something to stir 'em up and make 'em feel alive again. Just for half an hour. That's what they come for. Tell 'em anything. But for Sweet Jesus' sake don't try to improve their minds."[47]

Louisiana Constitution of 1974

This paternalistic attitude can be discerned within the development of Louisiana's constitutional tradition, even after the adoption of the 1974 state constitution. This most recent version of the Louisiana Constitution was drafted, again, by an elite group. However, this group differed from previous constitutional conventions, because it was not dominated by elites who were drawn from the public sector. Most of its membership was elected from the private sector, and the rest were appointed by the governor. This body included genuine constitutional scholars and other intellectuals, representatives of key professional and demographic groups (which the governor had been directed to assure), and other members of Louisiana society.[48]

This constitutional convention produced a document that reduced tremendously the constitutionally sanctioned scope of government, strengthened the emphasis upon civil rights and liberties, and consciously reduced the formal and, indirectly, informal powers of the executive branch of government. The size of the document also was reduced tremendously, so that it resembled other state constitutions more closely than previous versions.[49] Nonetheless, despite the conscious effort to alter the path of Louisiana's traditional constitutional development, the underlying values which that overall tradition represents persists, both among members of Louisiana society and within the judicial branch of that state's government.

Cases and Opinions

City of New Orleans vs. Mallie Lewis—Liberty and Deference

The 1972 case of *City of New Orleans vs. Mallie Lewis* offers a good example of one aspect of that tradition. Mallie Lewis was arrested and charged with disturbing the peace after "reviling the police on January 3, 1970."[50] Specifically, she was charged with violating a New Orleans municipal ordinance that specified that "[i]t shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty."[51] This ordinance, known generically as the "no sassing law," was challenged by Lewis as being "vague and overbroad." The Louisiana Supreme Court refused to accept this argument, as well as the argument that this ordinance violated the "free speech" clause of the First Amendment of the United States Constitution. That court maintained that the long-standing tradition of Louisiana constitutionalism supported the preeminent role of police (as an arm of the executive branch of government) for the purpose of maintaining peace, order, and social stability in, arguably, a Hobbesian fashion.

> The above jurisprudence affirms that a police officer is a peace officer and that he keeps the peace; it stands to reason that wantonly cursing or reviling, or using obscene or opprobrious language toward or with reference to any police officer while in the actual performance of his duty is a breach of the peace. "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others."
>
> Freedom of Speech is protected by the First and Fourteenth Amendments to the United States Constitution; however, the United States Supreme Court in *National Association for the Advancement of Colored People vs. Button*, stated "The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can

> justify limiting First Amendment freedoms." The Court also state in *Feiner vs. New York*, "This Court respects, as it must, the interest of the community in maintaining peace and order on its streets." Thus, as ably urged by counsel for the City of New Orleans, the City of New Orleans as an arm of the State has a compelling interest in preserving the efficient and effective operation of its police department which in turn provides for law and order on the streets. Wanton interference with a policeman while he is endeavoring to discharge his duties creates a threat to the community at large. Here, a vital State interest is in question, i.e., the efficient operation of an officer of the law while in the discharge of his duties. We find that protected speech does not apply to Section 49–7 supra. The vital and compelling interest of the City of New Orleans justifies the prohibition of certain language to a member of the city police while in the actual performance of his duties.[52]

Free Expression and Deference to the State

It is significant to compare this ruling with the one provided by the United States Supreme Court, to which body the decision of the Louisiana Supreme Court was appealed. The federal court overturned the state's opinion upon the basis of a recent ruling in the case of *Gooding vs. Wilson*, in which a similar Georgia statute had been overturned.[53] The federal high court rejected the state court's argument regarding a compelling state interest.[54] Justice William Brennan, on behalf of a majority of the court, ruled that deference to the free expression of the individual citizen (at least in this instance) outweighed demands for deference to the prestige and authority of official representatives of the state, especially in the case of police officers who are "trained to exercise a higher degree of restraint than the average citizen."[55] However, the concurring opinion of Associate Justice Lewis Powell provided a more meaningful insight into the fundamental beliefs and values that motivated, ultimately, the court's opinion.

> This ordinance [828 M.C.S., sec. 49–7], as construed by the Louisiana Supreme Court, confers on police a virtually unrestrained power to arrest and charge persons with a violation. Many arrests are made in "one-on-one" situations where the only witnesses are the arresting officer and the person charged. All that is required for conviction is that the court accept the testimony of the officer that obscene or opprobrious language had been used toward him while in performance of his duties. Indeed, the language need not be addressed directly to the officer since the ordinance is violated even if the objectionable language is used only "with reference to any member of the city police."
>
> Contrary to the [New Orleans] city's argument, it is unlikely that limiting the ordinance's application to genuine "fighting words" would be incompatible with the full and adequate performance of an officer's duties. In arrests for the more common street crimes (e.g. robbery, assault, disorderly conduct, resisting arrest), it is usually necessary that the person also be charged with the less serious offense of addressing obscene words to the officer. The present type of ordinance tends to

> be invoked only where there is no other valid basis for arresting an objectionable or suspicious person. The opportunity for abuse, especially where a statute has received a virtually open-ended interpretation [as it had within the Louisiana Supreme Court decision], is self-evident.[56]

Nonetheless, the dissenting opinion of Justice Harry Blackmun was more sympathetic to the Louisiana perspective upon this issue than the court's majority.

> The speech uttered by Mrs. Lewis to the arresting officer "plainly" was profane, "plainly" it was insulting, and "plainly" it was fighting. . . . The ordinance, moreover, poses no significant threat to protected speech. And it reflects a legitimate community interest in the harmonious administration of its laws. Police officers in this day perhaps must be thick-skinned and prepared for abuse, but a wanton, high-velocity, verbal attack often is but a step away from violence or passioned reaction, no matter how self-disciplined the individuals involved.[57]

But the Louisiana court system had been even more specific in terms of advancing the prerogative of the government and its representatives. This perspective also is apparent, though in less dramatic form, within various cases that have challenged the general administrative authority of the state, including within the realms of taxation, zoning, property takings, and the delegation of governmental authority from the state to the municipal levels.

Perry O. Plebst, et al. vs. Barnwell Drilling Company, et al.— Governmental Power

An important and representative precedent in this respect is the 1963 case of *Perry O. Plebst, et al. vs. Barnwell Drilling Company, et al.* The plaintiffs challenged the planning and zoning authority of the police jury of Caddo Parish upon the basis that the state government lacked the constitutional authority to delegate that governmental power to this sort of municipal unit. The Louisiana Constitution of 1921 described these bodies, but it did not grant them, specifically, this precise authority. However, Justice E. Howard McCaleb, Jr. on behalf of a unanimous Louisiana Supreme Court, emphasized very strongly the deferential nature of political authority within that state and its constitutional tradition, and he upheld the constitutionality of this sort of delegation of governmental power.[58] In doing it, he affirmed a principle that, while it might exist within other states, also, has been particularly and strongly promoted within the ideologically motivated customs and beliefs of Louisiana society.

> In this connection, it is well to observe that it is fundamental that the Legislature is supreme except when restricted by the [Louisiana] Constitution and that, unlike Congress, which can do nothing that the Federal Constitution does not authorize, may do everything that the State Constitution does not prohibit. . . . Thus, in view of this basic principle, the fact that the Constitution, by special provision granted

> to municipalities the power to zone their territory, cannot be regarded as a tacit restriction or limitation on the legislative power to delegate such authority to other public subdivisions.[59]

State ex rel. Civello vs. City of New Orleans—Hierarchical Authority

An earlier case which upheld the constitutional supremacy of state power is the 1923 case of *State ex rel. Civello vs. City of New Orleans*. A similar challenge to the extension of governmental authority was made upon the basis of the language of the new Louisiana Constitution of 1921, which, the plaintiffs argued, established limits beyond which the state government could not extend itself. However, the Louisiana Supreme Court debunked that notion, definitively.

> That provision [ART. 14, SEC. 29] in the new [1921] Constitution, of course, did not add anything to the authority of the Legislature to allow municipalities to zone their territory, to create residential, commercial and industrial districts. It was sufficient that the Constitution did not expressly prevent the exercise of the police power in that respect.[60]

This ruling reaffirmed a principle that had been upheld similarly under the previous versions of the state constitution and expressed within decisions such as the 1919 case of *Colorado vs. Johnson Iron Works*,[61] as well as early state precedents, such as *Bozant vs. Campbell*,[62] *City of New Orleans vs. Graihle*,[63] *State of Louisiana vs. Hufty*,[64] *In re New Orleans Draining Company*,[65] and *Hunsicker vs. Briscoe*.[66] That sense of deference also was affirmed particularly during the Huey Long era, especially in terms of challenges to his executive authority under the Louisiana Constitution.

Challenges to State Laws

Challenges to his successful nomination by Louisiana's Democratic Party were made (upon the basis of irregularities regarding the state laws that govern party primaries) within the 1928 case of *State of Louisiana et rel. Eugene F. Lyons vs. Democratic State Central Committee et al.*[67] The fact that Huey Long continued to hold the office of governor, despite having been elected (although he had not taken the oath of office yet) as a United States Senator, was cited within the celebrated 1932 case of *State of Louisiana ex rel. Paul N. Cyr vs. Huey P. Long*,[68] but was rejected for reasons that resemble, in general, other cases relating to the constitutional scope of, and judicial deference to, state authority. However, this constitutional tradition of deference to state authority was not limited to the judicial era that preceded the drafting and adoption of the Louisiana Constitution of 1974, despite the conscious attempt by that constitutional convention and many jurists to use that document as a means for breaking with that tradition.

That opinion was definitively expressed within the 1986 case of *Board of Commissioners of the Orleans Levee District vs. Louisiana Department of Natu-*

ral Resources. This challenge to a decision of the state department was based, in part, upon an invocation of the Declaration of Rights of the Louisiana Constitution. In particular, the plaintiffs invoked SEC. 24 of that declaration (ART. 1), which was patterned after the Ninth Amendment to the United States Constitution. This federal amendment has been a controversial one, but it has been largely (though not unanimously) acknowledged as providing guarantees of rights and liberties that have not been specified within the federal Constitution but which, nonetheless, are regarded as reflecting principles that are so fundamental to the value system (i.e., the dominant ideology) of American society that their existence must be accepted and protected.

Griswold vs. Connecticut—Privacy Rights

The unenumerated federal right to privacy partially was established in that manner, particularly through the concurring opinion of Justice Arthur J. Goldberg within the famous 1965 precedent of *Griswold vs. Connecticut*. The role of this amendment was explored further within the landmark case of *Roe vs. Wade*, when the decision whether or not to carry a pregnancy to term was regarded as a private choice that a woman had the right to make, especially in consultation with her physician. The Louisiana judicial system appears to have interpreted the state counterpart to this federal amendment broadly, as well. The Louisiana Supreme Court invoked ART. 1, SEC. 24 of the 1974 state Constitution as part of an overall declaration regarding the changed emphasis of the Louisiana constitutional tradition. The court made that point clear in reference to a challenge to state claims of immunity that had been made by the Louisiana Department of Natural Resources.

> The organization of the 1974 Constitution indicates that Article I, the Declaration of Rights Article, protects the rights of individuals against unwarrantable government action and does not shield state agencies from law passed by the people's duly elected representatives. . . . Section 1, which is basically a second preamble, makes clear that the article protects an individual's rights by enumerating them, by providing that the rights of the individual shall be inalienable and by declaring that they shall be preserved inviolate. Every section of the article provides a safeguard for an individual, person, citizen or accused against possible unjust action by a government official. The final section underscores the entire article's concern with individual liberty by providing that "the enumeration in this constitution [of certain rights] shall not deny or disparage other rights retained by the individual citizens of the state."[69]

Louisiana's Rights "Retained by the People"

The only notable difference between the wording of the federal Ninth Amendment and ART. 1, SEC. 24 of the Louisiana Constitution of 1974 occurs at the end of each clause. The federal clause states that rights are "retained by the people," while its Louisiana counterpart specifies that these rights are "retained by the

individual citizens of the state." The drafters of the 1974 Constitution were determined to change the emphasis of the state's constitutional tradition from one based upon a collective and integrated identity to one that was consciously libertarian.[70] Nonetheless, despite this effort, the traditional deference to state authority by the courts has persisted, though not as strongly as it had in the past. Therefore, within the 1988 case of *Board of Directors of the Louisiana Recovery District vs. All Taxpayers, et al.*, the Louisiana Supreme Court rejected a challenge to the constitutionality of the state recovery district, which had been established by the state legislature and administered by the executive branch for the purpose of raising revenues, especially through the issuance of state bonds. Justice James L. Dennis declared, on behalf of a unanimous court, that not even an invocation of the unenumerated rights that are guaranteed through ART. 1, SEC. 24 of the 1974 Constitution can overturn the discretionary authority of the state government regarding a delegation issue, such as this one.

> A person attacking the constitutionality of a statute of public purpose must show clearly the constitutional aim to deny the Legislature the power to enact the legislation.
>
> The legislative power of the state is invested in the Legislature. Except as expressly provided by the constitution, no other branch of government, nor any persons holding office in one of them, may exercise the legislative power. Furthermore, it is a general principle of judicial interpretation that, unlike the federal constitution, a state constitution's provisions are not grants of power but instead are limitations on the otherwise plenary power of the people of a state exercised through its Legislature. In its exercise of the entire legislative power of the state, the Legislature may enact any legislation that the state constitution does not prohibit. Thus, to hold legislation invalid under the constitution, it is necessary to rely on some particular constitutional provision that limits the power of the Legislature to enact such a statute. . . .[71]

Many cases that have been challenged in a similar manner since the adoption of the 1974 Louisiana Constitution have been treated likewise by the state's judicial branch of government. However, the language that the court adopted within this particular opinion is striking in the way that it echoes the traditional values that had been upheld within this area by state courts, prior to 1974.[72] Furthermore, although it is true that the presumption of constitutionality has been accepted by other state level judicial systems, it is difficult to find a state court that has expressed this principle as categorically as the Louisiana courts have done, which the language of this opinion appears to demonstrate.[73]

> Unless the fundamental rights, privileges and immunities of a person are involved, there is a strong presumption that the Legislature in adopting a statute has acted within its constitutional powers. . . . The presumption is especially forceful in the case of statutes enacted to promote a public purpose, such as statutes relating to

> taxation and public finance. . . . The party attacking such a statute has the burden of showing clearly that the legislation is invalid or unconstitutional, and any doubt as to the legislation's constitutionality must be resolved in its favor. . . . In an attack upon a legislative act as falling within an exception to the Legislature's otherwise plenary power, it is not enough to show that the constitutionality is fairly debatable, but, rather, it must be shown clearly and convincingly that it was the constitutional aim to deny the Legislature the power to attack the statute. . . .[74]

Private Law and Public Law

In fact, there has been an allusion to ART. 1, SEC. 24 within another area of state jurisprudence, but it has been related to a matter of private (particularly family) law, rather than public law. The issue of parental rights is one that has been addressed frequently within Louisiana's civil law system. However, despite the normal specificity that a civil law system provides, this issue often has been subject to a lack of direction regarding certain individual cases. Still, this civil law heritage was regarded by both legislators and jurists as being an advantage for Louisiana, since it helped to define the relationship of the family to society, and its laws, in general. That historic significance was noted by Justice John Baptiste Fournet within his opinion concerning a custody controversy between maternal grandparents and a biological father within the 1966 case of *Emmett Kennie Roy, et ux. vs. Clifton Frank Speer*.

> Although adoption prevailed among Biblical ancients and other civilizations of antiquity; had reached a high level of development by Justinian times, to whose institutes our civil law is traceable; and was known early in Louisiana under Spanish law, it was never considered an inherent right here and, after Louisiana became a state, it was specifically abolished by the civil codes of 1808 and 1825. Adoption was not permitted in this state, therefore, until, following specific authorization in the Constitution of 1864, Act 48 of 1865 was passed, any adoption prior thereto being only on an individual basis and effected through a specific legislative act. As stated in *Green vs. Paul* . . . "It has been firmly settled by this court that adoption is a creature of statute; that, this being so, it is only what the law makes it and that, to establish the relation, the statutory requirements must be strictly carried out, otherwise, the adoption is a nullity."[75]

Glenn E. Maxwell vs. Darleen LeBlanc—The "Higher Law" of the Family

Therefore, since the civil code lacked the normal specificity that this system normally requires, and since the common law system has not been adopted in this respect, the Louisiana judicial system developed a need to compensate for these omissions by achieving a meaningful appreciation of the historical, cultural, institutional, and ideological context from which the state's family law has emerged. That problem was noted by Justice Dennis within his opinion within the 1983 visitation rights case of *Glenn E. Maxwell vs. Darleen LeBlanc*.

> The right of visitation for a non-custodial parent is a natural right with respect to his children, and this right is enforceable in a civil action when the custodial parent denies visitation access. . . . French Civil Code article 288 specifically provides the non-custodial parent with the rights of visitation and hebergement, which is defined by French jurisprudence to include such rights as (1) the right of correspondence, (2) the right of both parents to enjoy the presence and love of their children, even though both may not have the right to continuing custody, and (3) the right to enjoy the presence of one's children during special occasions . . .[76]

The reference to a "natural right" is significant, since it invokes a persistent and misunderstood philosophical tradition. The association of "natural rights" with "natural law" has led even notable scholars, as well as political leaders, to conclude that such rights are derived from a "higher law" to which all positive law should conform in order to be consistent with certain moral truths and principles. However, rights and liberties are not consistent with the natural law tradition, because they impose no deontological ethic. Claiming a right merely restrains governments and other persons; it does not impose moral duties upon the person claiming that right to act in any particular manner.

In fact, the concept of rights and liberties is derived from the liberal tradition. Therefore, so-called natural rights really are rights that are claimed and recognized upon the basis of a liberal principle or value that is regarded as being so fundamental that the failure to acknowledge it would contradict, and even undermine, the liberal constitutional foundation upon which that right is based. The Louisiana variation of the liberal ideological tradition, therefore, serves as a proper focus for understanding the state's judicial system regarding the protection and promotion of the "natural rights" of parents, especially in terms of "unenumerated rights," which serves as a catalyst for exploring this foundation and its practical legal and judicial consequences.

"Natural Rights" of Parents

Nonetheless, the incompleteness of the civil code respecting parental rights has led Louisiana jurists to draw upon "natural" principles in order to define this biologically "natural" relationship within the parameters of both the civil and the public law. The most striking example of this ideological application arguably can be found within the 1990 case of *In re: Adoption of B.G.S.*, in which a mother sought to terminate the parental rights of her child's unwed father so that she could make that child available for adoption. Justice Dennis, on behalf of a unanimous Louisiana Supreme Court, addressed the gaps within Louisiana's family law codes from that particular orientation.

> Although we have no doubt that appellee has a protected interest under the Fourteenth Amendment, we believe that there are additional reasons to conclude that his liberty interest is also recognized as such by our state constitution. That charter

> was framed to "afford opportunity for the fullest development of the individual." Prior to the adoption of the [1974 Louisiana] constitution, this court consistently held that a parent has a natural right to his biological child and that a child likewise has a right to his parent. . . . Since then, both by recognizing the natural rights of parents to their children and by enforcing innominate fundamental rights of illegitimate children to inheritance and alimony against natural fathers or their descendants, we have implicitly recognized that the reciprocal rights and obligations of natural parents and children are among those unenumerated rights retained by individuals pursuant to Louisiana Constitution, article 1, sec. 24.[77]

The court remained vague regarding the precise source of this unenumerated right, but its central premise was consistent with Louisiana's constitutional tradition and its fundamental value system.[78] These unenumerated values that the court identified under ART. 1, SEC. 24 of the 1974 Louisiana Constitution also have been articulated in other parental rights cases, such as the 1980 case of *Donald Deville vs. Lloyd LaGrange*.[79] Prior to the adoption of the 1974 document, the Louisiana judicial system stressed the need to adhere to statutory guidelines for all cases within this realm of state law. That point was emphasized, with particular force, within the 1947 case of *R.C. Gree et ux. vs. Charles S. Paul*.[80] Nonetheless, the paramount importance of biological parental rights were upheld prior to 1974, even in the absence of unambiguous statutory directive, as part of a natural and fundamental relationship that fits within, and even helps to shape, society, such as within the 1974 case of *Wood vs. Beard*[81] and the 1952 case of *Mouton vs. Williams*.[82] That principle has been upheld even in relation to controversies in which parental rights ultimately were overturned by the courts, such as the 1958 case of *State of Louisiana ex rel. Paul vs. Peniston*[83] and the 1955 case of *State of Louisiana ex rel. Deason vs. McWilliams*.[84]

The Louisiana judicial system's apparent concern regarding this relationship, and its contention that it is addressed by the fundamental "unenumerated rights" as guaranteed by the Louisiana Constitution, seems to reflect the perpetuation of a perspective within which the family serves as a microcosm of, and a model for, society, as a whole. This is a perspective that has been reflected within the Thomistic world-view that influenced the seventeenth-century founders and settlers of Louisiana. This basic relationship between the hierarchical and paternalistic family and the hierarchical and paternalistic society is reflected within the writings of seventeenth-century philosophers who articulated the beliefs and values of many people of that time, even if it did not remain, ultimately, a dominant ideological framework for their respective societies. Nonetheless, these beliefs, as expressed in England by the political theorist Sir Robert Filmer, expressed opinions that remained popular on the European continent (especially throughout France and Spain) among many people of this century, including, arguably, people who shaped the initial development and future direction of Louisiana.

> I see not then how the children of Adam, or of any man else, can be free from subjection to their parents. And this subordination of children is the fountain of all regal authority, by the ordination of God himself. From whence it follows, that civil power, not only in general is by Divine institution, but even the assigning of it specifically to the eldest parent. . . .
>
> This lordship which Adam by creation had over the whole world, and by right descending from him the Patriarchs did enjoy, was as large and ample as the absolutest dominion of any monarch which hath been since creation. . . . These acts of judging in capital crimes, of making war, and concluding peace, are the chiefest works of sovereignty that are found in any monarch. Not only until the Flood, but after it, this patriarchal power did continue, as the very name of Patriarch doth in part prove.[85]

Conclusion

The Louisiana Constitution of 1974 was framed with the intention of altering, consciously, this ideological and constitutional tradition. Changes within Louisiana society, itself, probably facilitated this process, as the state became more heterogeneous and began to reflect more closely the specific liberal democratic values of American society. Individual civil rights and liberties have assumed a dominant role within the jurisprudence of that state, and the unchallenged dominance and expansiveness of a paternalistic and, often, authoritarian government has been constitutionally and politically curtailed.

However, the effect of this previous tradition upon the institutions and attitudes of Louisiana society has persisted (despite these challenges) within its legal and judicial system. Elites can lead a society, but they cannot transform it, entirely, especially since they are not immune to mass beliefs and values. It is reasonable to assume that the Louisiana constitutional tradition will continue to reflect, to a diminishing extent, liberal democratic principles that achieved an accommodation with the legacy of a seventeenth-century continental emphasis that was bolstered through the partial retention of a civil law structure and the dominance of political forces that often seemed to prefer patriarchy to democracy.

Chapter 7

Utah

A Liberal Theocracy

The territory, and later the state, that became known as Utah was dominated by a religious community that had been persecuted for its beliefs and practices. It is understandable that many observers might expect that the Utah Constitution, as well as other legal and political institutions, might reflect both that experience and the unique religious and cultural beliefs of that community.[1] In particular, the fact that this community is the Church of Jesus Christ of Latter Day Saints, which originated in the northeastern United States, migrated to the American Midwest, made a unique mass exodus to the basin of the Great Salt Lake, and which adheres to a religious tradition and set of theological beliefs that are unknown to the rest of Christendom adds to the fascination with which jurists, scholars, and many other people have regarded this aspect of Utah's political, social, economic, legal, and constitutional history.[2]

However, the Utah Constitution does not reflect practices and beliefs such as tithing, abstention from all stimulants (including caffeine), patriarchal rule, or the moral certainty in a particular vision of human redemption. It is, in many respects, a conventional American state constitution that reflects a particular history of political persecution and isolation more than it reflects obvious theological influences. Nonetheless, the fact that Mormons conspicuously and strongly have dominated, demographically, culturally, economically, and politically Utah's modern history must not be disregarded.[3] There are institutional, and even theological, influences present, here, but they are not, necessarily, obvious. A closer examination reveals both the conventionality and uniqueness of the Utah constitutional tradition in this, and other, respects.

The express political and religious price of statehood for Utah was the abandonment of both the practice of polygamy and the theocratic system of government within that territory that had been established there by the Church

of Jesus Christ of Latter Day Saints, whose members are known, more conventionally, as Mormons. The more profound, and more subtle, price was a *de jure* acceptance of the basic value system that had been embraced by American society and reflected within its economic, political, and legal (especially constitutional) institutions. That price proved to be less onerous to the residents of that new state than might have been anticipated. There are two explanations that may account for the relative ease of transition between the theocratic community of Deseret and the American state of Utah.

Protestantism and American Culture

The first explanation is derived from the American value system, especially in relation to the constitutional norms that it has produced. It has been well established that American society and its constitutional tradition participate in the broader liberal democratic tradition that has embraced most of the industrialized world.[4] That ideological tradition is, however, a very flexible one; beyond its core principles there is great scope for variation regarding the precise interpretation and application of those principles, which include liberty, individualism, autonomy, property, and (as a part of a later and continuing process of ideological evolution) equality. The malleability of liberalism lies in its adaptability to social, cultural, economic, and political change and the corresponding institutional developments.[5] The different regions of the United States have provided an excellent example of this variety; state constitutions provide the basis for the exhibition of liberal values that are specific to a particular community and the competing beliefs that have shaped it and made it unique.[6]

These beliefs are so varied that it has proven to be difficult to find an American consensus regarding their precise parameters at the federal level. This search for consensus has tended to lead to a basic interpretation of liberalism among jurists and scholars. It has resulted in the adoption of a minimalist frame of libertarian values within which a broad consensus can be juridically asserted.[7] That consensus prevailed within the context of the eighteenth century Enlightenment that also influenced the emerging American society.[8] The belief of Enlightenment scholars and political leaders in rationality and the scientific method provided a basis for articulating a secular morality that rejected the traditional sources of conventional religious and social institutions.[9] Despite the presence of seventeenth-century republican ideals that advocated the replacement of patriarchal governmental authority with the practice of "civic virtue" by the members of society, the Lockean vision of libertarian values emerged as the dominant philosophical force that shaped the creation and evolution of the American constitutional tradition.[10]

This vision does not mandate a particular type of public behavior among the members of society; it is flexible in its interpretation and tolerant of the practice of other beliefs. That tolerance extends only so far as these practices do

not undermine the basic tenets of the liberal value system and do not pose a demonstrable harm to society and its members.[11] Otherwise, all activities and beliefs that have the purpose of assisting persons in their personal goals, either individually or as a community, can be included within the broad parameters of a liberal political and legal system. This "harm principle" has provided a fundamental basis for the system of civil liberties that is an integral part of the American constitutional tradition.[12]

The second explanation for Utah's relatively smooth transition from a theocratic community to American statehood can be related to similarities that appear to exist between Mormon beliefs and the general spirit of eighteenth-century humanism. The Mormon faith resembles many Protestant denominations (including the "dissenting" denominations of the Protestant Reformation) in its focus upon the central place and role of humans within God's morally certain, but ambiguously structured, universe.[13] Mormons can be contrasted sharply with Roman Catholics for the same reason; that latter Christian sect dominated both the theological and the political value systems of medieval Europe, especially in terms of its emphasis upon God's hierarchically structured universe and the deontological law that guided it, of which humans and their secular law merely formed an imperfectly reflective part.[14]

Meanwhile, Protestants (including those descendants of English Calvinism who came to dominate much of the early colonial history of the United States) generally emphasized many values that were not inconsistent with the emergence of liberal society: the individual relationships between God and humans; the private nature of that relationship, as opposed to the public relationship between people and government; the freedom to define that relationship and one's place within the world; the desire to resist the unwarranted and coercive interference of temporal authority, especially regarding matters of fundamental property interests.[15] Protestants were not uniformly enamored of the secularism of eighteenth-century humanism, but they were not hostile to many of its underlying assumptions in the manner with which Roman Catholicism, even following the Catholic Reformation, became conspicuously associated.[16] The tenets of the Mormon faith clearly are comfortable (as will be demonstrated) with this human-centric vision of both the Protestant Reformation and the liberal Enlightenment, especially in terms of a belief in human perfectibility, personal development through work and other activities, and fulfillment through the exploitation of one's talent and other potential, including potential that is derived from the theoretically broad notion of "property."[17]

Mormonism

However, the Mormons differ from traditional Protestants in terms of the way in which they define the relationship between humanity and divinity. Those differences may appear to be subtle or superficial, but they provide important

clues regarding the unique approach to secular issues (including law, politics, and economics) that the Mormons of Utah have embraced and practiced. Three of those differences are especially significant: the special relationship of the community to the individual member, and the protection of the spiritual freedom of both of them from unnecessary interference; the pivotal status of history and ancestry to the community; the emphasis upon hierarchical, but nonauthoritarian, structure, organization, and leadership that includes, most significantly, a special deference to secular civil authority.[18] These principles have contributed to certain unique aspects of Utah's constitutional development, especially in ways that may differ (though, often, subtly) from the libertarian approach of the federal constitutional tradition and even the republican constitutional approach of certain other American states.

Mormons do not conceive of God in terms of a being who is omnipotently distinct from humans. Instead, they believe that God evolved from an imperfect, human state and achieved perfection and dominion over the universe. Furthermore, they believe that each human person is capable of achieving a similar transition and, literally, evolving into a divine being.[19] They reject the traditional Protestant emphasis upon faith as the primary, or the sole, source of salvation; one's actions (especially in terms of obedience to the ordinances of the Mormon community) are essential to the process of perfectibility that will achieve personal divinity. This belief is based upon a profound conviction that humans possess an infinite capacity for personal development and that each one is, inherently, good.[20] This optimistic vision of the human spirit is as essential to Mormon theology as a similar humanist perspective has been to the evolution of liberal ideology and institutions, including legal and constitutional ones.[21]

Mormons signify their acceptance of this path of religious perfection through "justification," which parallels the traditional concept of sacraments that are found commonly within other Christian denominations. This process includes (in addition to general faith and obedience) baptism by complete immersion, repentance of sins, and the reception of the "Spirit gifts," including the powers of prophetic vision and speaking "in tongues."[22] Mormons complement this process by engaging in "temple work" in support of the entire spiritual community. This activity includes proselytizing, support of church governance, and the process of conducting baptism, endowment (a ritual washing), and "sealing" (binding men and women together in marriage) on behalf of deceased persons.[23]

These latter activities reinforce the important theme of human perfectibility. Even those people who consciously reject the path to salvation can achieve a status of eternal divinity, partially through the intervention of other members of the community. The relationship between individual members and the community is a defining one for Mormons. The community reinforces the path to salvation, but that path is, nonetheless, one which all members pursue through their own free will.[24]

This relationship is expressed through the institutional structure of the church. All Mormon males are eligible, and generally become, deacons, teachers, and priests of the Aaronic priesthood when they are twelve, fourteen, and sixteen years old, respectively. They generally become elders of the priesthood of Melchizedek at the age of twenty, at which time they frequently engage in missionary activities.[25] The distinction between laity and clergy is blurred among Mormons, which is a feature of the church that is indicative of its amalgamation of individualistic and communal values.[26] Another feature of this institutional structure is the division of the church into units of several hundred members, known as "wards" (each administered by a bishop), that are grouped, in turn, into "stakes" of approximately five thousand members, each. This decentralized church structure is important to the Mormon community, for it reinforces both the respect for central authority and the autonomy of local and individual action.[27]

The apex of this structure constitutes those institutions that collectively are known as the General Authorities of the Church and which oversee its operation and doctrines. They include the First Presidency, the Council of the Twelve, the First Quorum of Seventy, the Presidency of the First Quorum, and the presiding bishop and two councillors of the Priesthood of Aaron.[28] However, the practical interpretation and application of these doctrines and the values that they represent occurs at the most basic level of the church organization. The ward provides for the coordination of the spiritual and secular life of the individual member (for the two aspects reinforce each other), including their religious, economic, social, and charitable activities.[29]

Traditionally, these activities have encompassed public and private, secular and sacred considerations, including the church's active social welfare system and its former political role in the life of surrounding societies, particularly Utah. An emphasis upon the virtue of public service to the political, as well as the religious, community has been an important part of Mormon life. This emphasis was evident in terms of the cooperative effort that dominated Utah's economy during the mid-nineteenth century. This economy was planned and self-sufficient, and it integrated various sectors of agriculture, trade, and small industry. The profits that were generated by one sector would be reinvested in another one, and this process was coordinated through the offices of the church.[30]

Deseret Constitution

The introduction of mining, trading, and other entrepreneurial activities did not supplant, but supplemented, Utah's economic development. The Mormon willingness to promote general prosperity motivated private and individual economic decisions, as well as public and collective economic policies of the territory, and, later, the state of Utah.[31] The political manifestation of these values was

reflected within the territorial government. The attempt to establish a state called "Deseret" (the name was derived from the Book of Mormon and means "honeybee," and it alludes to the concept of "virtuous industry") was bolstered by the fact that it would be based upon the same institutional structure of other American states. It provided for competing political parties, democratic participation by all members of society, and the promotion of political diversity.[32] Indeed, the Deseret Constitution was patterned after the Illinois Constitution of 1818, under which document the Mormon community of Nauvoo had functioned.[33] The minimally structured Deseret Constitution offered a lucid exposition of traditional and, apparently, sincere American liberal values. The protection of civil rights and liberties within ART. 8 of that document offer a good example of this fundamental influence and orientation.

> SEC. 1. In Republican Governments, all men should be born equally free and independent, and possess certain natural, essential, and inalienable rights; among which, are those of enjoying and defending their Life and Liberty; acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.
>
> SEC. 2. All political power is inherent in the people; and all free Governments are founded in their authority, and instituted for their benefit; Therefore, they have an inalienable and indefeazible [*sic*] right to institute Government; and to alter, reform, and totally change the same, when their safety, happiness, and the public good shall require it.
>
> SEC. 3. All men shall have a natural and inalienable right to worship God, according to the dictates of their own consciences; and the General Assembly shall make no law respecting an establishment of Religion, or of prohibiting the free exercise thereof, or disturb any person in his religious worship or sentiments; provided he does not disturb the public peace, nor obstruct others in their religious worship; and all persons, demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws . . .[34]

But this constitutional promise was offset, in the opinion of federal officials, by the actual political practices of the Latter Day Saints who dominated this "state." The church established its own political party (which eclipsed the opposition parties that also were organized there), and this organization was a focal point for the public participation of all of the faithful. Mormons were free, publicly, to vote in accordance with their individual consciences; they were required, privately, to follow the political guidance of their religious leaders. The tendency to engage in "bloc voting," as well as the allowance of plural marriages, needed to be overcome before the United States would accept this political request.[35]

Six constitutional conventions, held between 1849 and 1887, failed to resolve this conflict. Each of these proposed constitutions appeared to conform, on the surface, with the requirement of ART. 4, SEC. 4 of the United States

Constitution that each state should have a "republican form of government."[36] However, the actual social, economic, and political practices of Utah's Mormon leaders suggested, to federal authorities, that an informal theocracy of collective behavior would continue to be imposed. Statehood was approved only when the People's Party (which was the political vehicle of the Church of Jesus Christ of Latter Day Saints) was disbanded, plural marriage was disavowed formally by the church leadership, and that same leadership agreed to discontinue the tendency of approving exclusive economic relations among Mormons.[37]

Utah Constitution

The Utah Constitution resembles its federal counterpart in formal structure and tone. Those aspects of the Utah Constitution that do not resemble the United States Constitution share formal characteristics with many state constitutions, especially in terms of the use of popular referenda as a means of enacting statutes (in areas that have not been mandated otherwise by two-thirds of both houses of the Utah legislature) and the presence of state Supreme Court justices, who are elected for ten year terms.[38] It explicitly guarantees the protection of civil rights and liberties that are consistent with the federal Bill of Rights, and it differs from that entrenched charter only in terms of its equally explicit rejection of plural marriages and "sectarian control" of public schools. In all respects, the Utah Constitution appears to provide a typically liberal democratic legal and jurisprudential tradition.[39]

Despite the political and religious trauma that surrounded this process, the constitutional convention was conducted with little signs of real controversy among the Mormon and non-Mormon delegates.[40] Indeed, debate regarding the Utah Bill of Rights required only two days (it had been in committee hardly longer), and almost all arguments focused upon parochial concerns of technical wording.[41] The debate upon the religion clauses in ART. 1 is typical of the discourse that dominated these proceedings. Perhaps, the most contentious argument that occurred during this particular consideration involved a brief exchange among delegates Roberts, Farr, Whitney, and Eichnor regarding the most appropriate language for clarifying the already accepted intent of article one, section four.

> MR. ROBERTS. In line 10 of that section [four, of article one], I move the insertion of the following after the word "thereof:" "No person shall be compelled to attend, erect, or support any place of worship, or maintain any minister against his consent."
>
> . . . it seems to me that this addition ought to be made to that section. . . . I wish to say it is a clause from the constitution of Tennessee in [its] bill of rights.
>
> MR. FARR. Will not that open up a loophole so that if a man promised to help pay for the erection of a church and the building was started and partially completed, could he not avoid his promise by pointing to the declaration here, and fall back on this part of the Constitution? There is a question there. . . .

MR. WHITNEY. That is provided for in the first part, "the rights of conscience shall never be infringed." . . .

MR. EICHNOR. I am opposed to the amendment. This view, as presented by Mr. Roberts, is taken from various constitutions of the United States. It arose in Massachusetts; Massachusetts framed the first constitution in 1780; in the constitution of Massachusetts and several other eastern states, they made it compulsory for a man to belong to a church. Now, I do not think there is anything of that kind west of the Mississippi river. If we insert that amendment as proposed by the gentleman from Davis County [Roberts], why, we give it out to the world that we have that kind of people here. I think it is unnecessary here and I am opposed to the amendment.

The amendment was rejected.[42]

Delegates made it clear that this constitution would embrace the same fundamental values that inform the traditions of the federal, and many state constitutions. However, the interpretation of the Utah constitutional tradition reveals a subtle, yet potentially significant, variation of American liberalism. Mormon theological values may continue to provide a basis for judicial interpretation within Utah. This influence may be bolstered by the compatibility of this theological tradition with those humanist values that permeate the broader American cultural history. The fact that the Utah judiciary, like other branches of the state's government, has been dominated by Mormons makes that assertion seem to be especially plausible. Certain sections of the Utah Constitution and certain judicial cases reveal this influence.

SECTION 1 of the Utah Constitution offers a possible example of this influence. It finds a parallel in various parts of the United States Constitution and in the language of the Declaration of Independence. In particular, the First Amendment is echoed, here, as well as aspects of the "contracts clause" and the Fifth Amendment of the federal document.

> All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.[43]

"Perfectability" and the "Harm Principle"

The theme of "personal responsibility" is one that resonates within the Mormon tradition, but it also is acceptable to the tenets of liberal democracy. The Mormon perspective stresses the theme of "perfectibility," while the liberal perspective stresses the "harm principle" and the legitimate authority of a government for the purpose of protecting society. These state and federal perspectives arguably reinforce Utah's legal, political, and constitutional experience. An excellent

example of this reinforcement is provided within ART. 1, SEC. 14 of the Utah Constitution, which mirrors, textually, its federal counterpart that is found within the Fourth Amendment of the United States Constitution.

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.[44]

"Exclusionary Rule"

Utah courts have followed the example of the federal courts in their interpretation of the warrant requirement, especially within the controversial area of employing an "exclusionary rule." However, this trend was not adopted immediately within Utah's constitutional jurisprudence. The exclusionary rule was established federally by the 1914 United States Supreme Court case of *Weeks vs. United States*. Justice William Day's majority opinion was vague regarding whether an exclusionary rule was merely an evidentiary requirement or a constitutional mandate, but it was clear about the need to enforce the search and seizure provisions of the United States Constitution.

> The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. . . . The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.[45]

The libertarian values that the federal court expressed within this case were clear, but the *constitutional* basis for the remedy was not demonstrated or, even, truly asserted. Most state judiciaries chose to regard this ruling as being irrelevant to an interpretation of the search and seizure provisions that were provided by their own state constitutions, even though they generally approved of the sentiments that were cited in support of it.[46] These sentiments relate to the broadly (but not uniformly) libertarian interpretation of liberal democracy that emerged from the Age of Reason, inspired the American Revolution, and largely prevailed in the development of the American constitutional tradition.[47] Despite the strong challenge of republican values that emphasized "civic virtue" over individual isolation of the citizen from the rest of the political community, the liberalism of John Locke, with its strong support for limited government and maximum individual

freedom and autonomy, has, imperfectly, prevailed.[48] Steven Dworetz provides an excellent summary of this liberal victory within American society, politics, and law. He distinguished this Lockean liberalism from a strictly libertarian interpretation of that tradition (for, he admits, "[t]he liberal has something very important in common with the libertarian: Both accept the genetically liberal ideal of limited government,")[49] but its features and influence are unmistakable.

> The written and institutional legacies suggest that the Lockean-liberal spirit played a very important role in the formation of the American myth and, ideologically, in the making of the American Revolution. This book has anchored Lockean liberalism in the written record, primarily from the Revolutionary years. But the spirit in these writings is consistent with the institutional continuity which the founding generation sought to preserve and improve through the colonial, Revolutionary, and Constitutional periods. This was a political tradition of lawful, limited government, the consent of the governed, religious toleration and the separation of church and state, the sovereign judgment of the people—in sum, a tradition embracing a *combination* of principles which, it seems, *only* liberalism, integrally and by definition, justifies and requires in the organization of political life.[50]

State of Utah vs. John Aime

Utah courts, in the wake of the federal ruling in *Weeks*, declined to adopt the exclusionary rule in support of ART. 1, SEC. 14 of the Utah Constitution. However, in the 1923 Utah Supreme Court case of *State of Utah vs. John Aime*, the majority opinion was careful to express support for the same ideological considerations that had guided the federal high court in *Weeks*. John Aime had been convicted of the manufacture and sale of "intoxicating liquors" that had been banned under both federal and state law, as well as the Eighteenth Amendment to the United States Constitution. The evidence that was used to convict him had been obtained through use of a warrant that the state's Attorney General admitted was unsigned and invalid. The majority opinion cited, instead, the "general" and "long standing" approach of American constitutional precedents "that the admissibility of evidence is not affected by the illegality of the means through which it has been obtained."[51] Justice James William Cherry's opinion for a unanimous court relied upon previous federal cases, as well as precedents from a variety of states, to support an alternative interpretation of the basic values that the United States Supreme Court emphasized in *Weeks*.

> The purpose of evidence is to establish the truth in legal tribunals, in order that justice may be done. . . . In determining the competency of evidence, the essential test is its credibility and its value in discovering the truth. . . .
>
> With the profoundest respect for the high tribunal which has reached a contrary conclusion, we are led by the force of what we deem the better reason to conclude

> with the vast majority of state courts that the admissibility of evidence is not affected by the illegality of means through which it has been obtained . . .[52]

The Utah judicial system, like the judicial systems of most states, refused to declare that such a remedy was applicable to its state constitutional tradition, despite the admitted similarity between the state and federal documents. Therefore, ART. 1, SEC. 14 of the Utah Constitution was not found to include an exclusionary rule. Utah jurists generally accepted this interpretation, although the issue arose, infrequently.[53] But when the United States Supreme Court imposed this rule upon the states, through the Fourteenth Amendment, in the 1961 case of *Mapp vs. Ohio*,[54] Utah courts treated ART. 1, SEC. 14 as reflecting a similar interpretation, in this respect. It began a period that Paul Cassell calls a "lockstep" approach of interpreting the Utah Constitution in an identical manner to the prevailing interpretation of the United States Constitution.[55] This approach received a definitive expression within the 1990 Utah Supreme Court case of *State of Utah vs. Phillip Paul Larocco*.

State of Utah vs. Phillip Paul Larocco—"Search and Seizure"

The defendant in this case had been convicted of the theft and possession of a stolen automobile. Police made that determination after having opened the unlocked door of a suspected automobile, without obtaining a warrant, and comparing the vehicle identification number [VIN] on the inside of the door with the VIN on the dashboard, which was visible from outside the automobile. The defendant appealed the conviction by claiming that the VIN evidence should have been suppressed because it resulted from a warrantless search. This claim was based upon both the Fourth Amendment of the United States Constitution and ART. 1, SEC. 14 of the Utah Constitution. The Utah Court of Appeals rejected this appeal,[56] but the Utah Supreme Court reversed that decision and ordered a new trial.

Chief Justice Christine M. Durham concluded, within her majority opinion, that this evidence might be allowed under a federal interpretation, but it should be excluded under ART. 1, SEC. 14 of the Utah Constitution. Her conclusion was based upon an interpretation of federal and state precedents, but also upon a belief that, while the fundamental values of the Utah Constitution reflects the values found within the American constitutional tradition, the state tradition provides a more stringent and consistent application of those basic values.

> In *State vs. Watts*, 750 P.2d 1219 (Utah 1988), this court explained that because of the similarity between article I, section 14 of the Utah Constitution and the fourth amendment of the United States Constitution, we have not in the past drawn any distinctions between the protections respectively afforded by them. We then noted, however, that "we have by no means ruled out the possibility of doing so in some

> future case" since "choosing to give the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating this state's citizens from the vagaries of inconsistent interpretation interpretations given to the fourth amendment by the federal courts."[57]

Justice Durham noted that this practice was occurring within many other state jurisdictions. In particular, she noted that the New York Court of Appeals, in the 1983 case of *People of New York vs. P. J. Video*, was willing to adopt more stringent protections of civil rights and liberties under its state constitutional tradition. The New York tribunal adopted this approach, not in support of values that differ fundamentally from the federal tradition, but "when doing so best promotes predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens."[58]

The Utah Supreme Court appears to have drawn a similar conclusion, for it made no claims that Utah society was so unique that its status justified an interpretation of ART. 1, SEC. 14 of the Utah Constitution that should differ substantively from federal interpretations of the similarly worded Fourth Amendment of the United States Constitution or similar clauses that are found within other state constitutions. Justice Durham's interpretation of the state clause continued to focus upon matters of procedural consistency and clarity, and not upon matters of social, political, or legal values.

> The time has come for this court, in applying an automobile exception to the warrant requirement of article I, section 14 of the Utah Constitution, to try to simplify, if possible, the search and seizure rules so that they can be more easily followed by the police and the courts and, at the same time, provide the public with consistent and predictable protection against unreasonable searches and seizures. This can be accomplished by eliminating some of the confusing exceptions to the warrant requirement that have been developed by federal law in recent years. Specifically, this court will continue to use the concept of expectation of privacy as a suitable threshold criterion for determining whether article I, section 14 is applicable. Then if article I, section 14 applies, warrantless searches will be permitted only where they satisfy their traditional justification, namely, to protect the safety of police or the public or to prevent the destruction of evidence.[59]

This approach was extended to an interpretation of the exclusionary rule. Justice Durham, again, linked ART. 1, SEC. 14 of the Utah Constitution to its federal counterpart, and the values that it represents.

> Having concluded that a significant violation of defendant's rights under the Utah Constitution occurred in the warrantless search of the vehicle here, we must decide whether the trial court erred in refusing to suppress the VIN obtained in that search. This court has never separately articulated an exclusionary rule as a nec-

> essary part of article I, section 14, but there is a series of cases in which this court has approved the federal rule and afforded its protection to Utah citizens.[60]

This sort of ambiguity can be found throughout Utah's constitutional jurisprudence; there have been many requests for, and attempts to discover, a state constitutional tradition that reflects substantively different cultural and ideological values than the corresponding federal tradition. Certainly, Utah's unique history and the equally unique cultural contributions of the dominant Mormon population of the state makes that appeal and search seem to be (as it has for many Utah jurists) a reasonable expectation. However, attempts to fulfill this desire for a uniquely Utah constitutional jurisprudence have yielded little, if any, conclusive results, especially in the general area of civil rights and liberties.[61] The interpretation of privacy and search and seizure protections that are guaranteed by ART. 1, SEC. 14 of the Utah Constitution have provided the most conspicuous attempts for Utah jurists to achieve these results, but that conscious effort also has proven to be futile.

State of Utah vs. Gillis Hygh

The 1985 Utah Supreme Court case of *State of Utah vs. Gillis Hygh*, offers an example of this experience. A conviction for aggravated robbery was overturned upon the basis of a warrantless "inventory search" of an automobile that occurred while the suspect was placed under custodial arrest. Justice Gordon R. Hall concluded, in his majority opinion, that ART. 1, SEC. 14 of the Utah Constitution and the Fourth Amendment to the United States Constitution provided identical protections in this area.[62] However, in his concurring opinion, Justice Michael D. Zimmerman raised the issue of a different constitutional standard under Utah law.

> I join with the reversal of the conviction of defendant Hygh. . . . However, I cannot agree with two assumptions implicit in the majority opinion: first, that the scope of the warrant requirement under article I, section 14 is congruent with that developed by the federal courts under the fourth amendment; second, that the remedy for a violation of the Utah's search and seizure provision is the same as the remedy for a violation of the federal provision—exclusion of the evidence seized. . . .
>
> I do not suggest that without further consideration this Court should either adopt the hypothetical warrantless search and seizure rule discussed above or reject the exclusionary rule as a remedy for violations of article I, section 14. I only contend that such arguments should not be foreclosed from consideration by our unanalyzed acceptance of the federal position.[63]

State of Utah vs. Cecil Earl Brooks et al.—Rules of Evidence

Justice Zimmerman could not identify a basis for such a uniquely Utah interpretation; his most specific suggestion was that Utah courts might benefit from

procedural interpretations found within the Washington Constitution.[64] The court had made vague suggestions regarding an expansive interpretation of the Utah Constitution within the 1981 Utah Supreme Court case of *State of Utah vs. Cecil Earl Brooks, et al.* (concerning rules of evidence in an assault case), but with no clear suggestions regarding a possible basis for it.[65] Chief Justice Hall reached a similarly ambiguous conclusion in the 1988 Utah Supreme Court case of *State of Utah vs. Allen R. Watts*, involving, in part, another instance of a claimed illegal search and seizure, this time regarding possession of marijuana.

> In declining to depart in this case from our consistent refusal heretofore to interpret article I, section 14 of our constitution in a manner different from the fourth amendment to the federal constitution, we have by no means ruled out the possibility of doing so in some future case. Indeed, choosing to give the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating this state's citizens from the vagaries of inconsistent interpretation given to the fourth amendment by the federal courts.[66]

Utah Law and Federal Precedents

Other constitutional areas have provided examples of the manner in which Utah constitutional law has been content to follow the example, and echo the values, of its federal counterpart. Prior restraint of obscene and pornographic materials offers an excellent illustration of that trend.[67] The 1978 Utah Supreme Court case of *West Gallery Corporation vs. Salt Lake City Board of Commissioners* demonstrated the willingness of Utah jurists to follow federal precedents within this area. There appear to have been no attempt to impose any theological norms upon these controversies, and Justice Hall's majority opinion confirmed this restrained approach.

> Examination of the pronouncements of the federal judiciary, and particularly the Supreme Court, does not lead to the conclusion that prior restraint, as a means of controlling obscenity, is constitutionally unacceptable. The initial case on the point is *Near vs. Minnesota* which dealt with a State's attempt to enjoin the continued publication of a periodical which had, from its inception, been loaded with scandalous and libelous statements. . . .
>
> The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Chief Justice Warren's words, the States' "right . . . to maintain a decent society."[68]

This approach was confirmed in relation to an adult book store in the 1978 Utah Supreme Court case of *Ogden City vs. Eagle Books, Inc.*, in which ART. 1, SEC. 1 of the Utah Constitution was mentioned, but the First Amendment of the

United States Constitution actually was cited. Again, federal precedents (and, to a lesser extent, the precedents of neighboring states) dominated the court's decision to affirm the city's prohibition of the operation of this bookstore.[69] Seminal cases, such as the United States Supreme Court decisions in *Roth vs. United States*,[70] *Stanley vs. Georgia*,[71] *Miller vs. California,*[72] and *Paris Adult Theatre I vs. Slaton*,[73] and not any appeal to "unique" Utah culture and ideology (including Mormon theological values), have dominated the Utah judicial system throughout this area. It might seem that obscenity and pornography cases might present a particularly fertile area for the influence of Mormon values to prevail, but, even in this area, Utah jurists have proven to be reticent.

This area of jurisprudence is significant, because, here, the prevailing values arguably are not libertarian, but republican. Cases such as *Roth* and *Miller* established the standard that forms of "speech" could be suppressed if they appeal to "prurient interests," lack serious artistic, scientific, or political value, and describe sexual conduct in a "patently offensive" manner.[74] These criteria originally were derived from "national" standards, but, in *Miller*, Chief Justice Warren E. Burger's majority opinion reoriented that test towards "community" standards.

> Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive. . . . To require a State to structure obscenity proceedings around evidence of a *national* "community standard" would be an exercise in futility.[75]

Republican Values—"Civic Virtue"

Republican values stress the concept of "civic virtue," even over considerations of individual liberty. Advocates of such values stress, in many (but not all) cases, the importance of the community over the rights of the individual citizen. The autonomous member of society acts destructively in isolation; the community can succeed only as a democratic, collective whole.[76] Many of these advocates also claim that the American Revolution and the political and constitutional institutions that it created were motivated by these republican, rather than more libertarian, values, as Gordon Wood asserts.

> The common interest was not, as we might today think of it, simply the sum or consensus of the particular interests that made up the community. It was rather an entity in itself, prior to and distinct from the various private interests of groups and individuals. As Samuel Adams said in 1776, paraphrasing Vattel, the state was "a moral person, having an interest and will of its own."[77]

The claim that classical Lockean liberal values prevailed during the development of the American constitutional tradition is one that continues to dominate the opinions and practices of a preponderance of American scholars and jurists, despite the aggressive republican challenge.[78] It also has been credited with influencing the development of the common law that has been established as the dominant legal system of England, the United States, and among most countries that formerly were part of the British Empire.[79] However, the degree of success that republican values have enjoyed within American society cannot be discounted, entirely. This "residual influence" may explain the seemingly "unliberal" approach of federal courts towards free speech in the areas of obscenity, pornography, and upholding "community standards," especially since the normally acceptable liberal standard of the "harm principle" has not been invoked within this federal jurisprudence.[80]

Utah's Jursiprudence—Historic Experience

Utah's jurisprudence is inconsistent, in this respect, because federal jurisprudence is inconsistent, and *not* because of a Mormon theological or cultural challenge to liberal ideological norms and practices.[81] Ironically, it is the historic experience of the Mormon population that established Deseret and, later, Utah that appears to have motivated this jurisprudential approach. The persecution that Mormons experienced during their odyssey from New York, through the Midwestern United States, and into the desert terrain of the Rocky Mountain region, and the fierce opposition of the federal government to their attempts to achieve political autonomy, influenced the process of Utah's constitutional development.[82] Many historians have noted this strong sense of caution and awareness among the religious and political elites who led the movement for Utah statehood. Justice Zimmerman's lengthy historical analysis that is found within his majority opinion in *Society of Separationists vs. Whitehead* concludes with an acknowledgment of the importance of this fact to the development of strict libertarian guarantees by the framers of the Utah Constitution.

> Mormon delegates [to the Utah constitutional convention] likely viewed the territorial government—controlled by federally appointed non-Mormons—as oppressive. They had experienced the attempted control and suppression of their religious beliefs and practices by federal government. . . . On the other side, non-Mormon delegates had lived under social, economic, and political domination by the Mormon Church. . . . Both groups of delegates could claim that some sort of authority, be it federal or local, had denied them freedom of conscience, and both were acutely aware of the threat government power presented to that freedom.[83]

This desire to avoid conflict with federal authorities, coupled with the relationship between humanism and Mormonism that allowed Mormon theoc-

racy to avoid being entirely incompatible with liberal ideology, may account for this seemingly "conventional" Utah jurisprudence that appears to follow federal precedents and guidance, readily. Furthermore, similarities also have been noted between Utah's constitutional norms and the norms of states from which most early Mormons migrated, including New York and Illinois—states that also tended to conform, or even lead, federal constitutional development.[84] Joseph Smith, Jr., Brigham Young, and other Mormon leaders were, after all, products of the industrializing social and cultural environment in which they were raised, and that experience may have helped to shape both their religious and secular beliefs.[85]

However, that fact does not eradicate any influence of the unique, if still humanistic, Mormon culture upon Utah's constitutional, legal, and jurisprudential tradition. One interesting point that should be noted, in this respect, is the frequent tendency of Utah jurists to embrace an interpretivist approach to constitutional interpretation[86]—a tendency that may be more frequently found within cases arising under the Utah Constitution than it is found under other state constitutions.[87] The fact that Utah's history is so unique and has led to the inclusion of equally unique clauses within its constitutional text accounts for much of that impetus. Indeed, the preamble to the Utah Constitution allegedly implies that relationship.

> Grateful to Almighty God for life and liberty, we, the people of Utah, in order to secure and perpetuate the principles of free government, do ordain and establish this CONSTITUTION.[88]

"Principles of Free Government"

The preamble has never been cited directly within a Utah constitutional decision. Indirectly, however, it has suggested an idea that has been considered within the general meaning and values of the Utah Constitution. This sort of overview usually has resulted in a confirmation of the fact that Utah's legal and political values do not appear to deviate considerably from the broader American perspective in most key areas. However, in the 1990 Utah Court of Appeals case of *State of Utah vs. Jacky Bobo* (where the preamble of the Utah Constitution was indirectly cited), the court ruled that the "principles of free government" that have been embraced by Utah society need to be demonstrated, and not merely asserted, in support of a genuine and meaningful Utah constitutional adjudication.[89] Judge Gregory K. Orme specified the conditions that are necessary in order for that analysis to occur—in this case, in response to a suggestion that ART. 1, SEC. 14 of the Utah Constitution provides more stringent protections for citizens than does the Fourth Amendment of the United States Constitution.

> While we welcome arguments of the general sort advanced by defendant, we decline to adopt the rule urged by defendant in this case. Defendant's brief and

> arguments reflect little more than the "nominal allusion" to state constitutional rights condemned in *State v. Johnson,* 771 P.2d 803, 806 (Utah Ct. App. 1989). Until such time as attorneys heed the call of the appellate courts of this state to more fully brief and argue the applicability of the state constitution . . . we cannot meaningfully play our part in the judicial laboratory of autonomous state constitutional law development. . . .
>
> It may be helpful to note that in most cases where an argument is made for an innovative interpretation of a state constitutional provision textually similar to a federal provision, the following points should be developed and supported with authority and analysis.
>
> First, counsel should offer analysis of the unique context in which Utah's constitution developed. . . .
>
> Second, counsel should demonstrate that state appellate courts regularly interpret even textually similar state constitutional provisions in a manner different from federal interpretations of the United States Constitution and that it is entirely proper to do so in our federal system. . . .
>
> Third, citation should be made to authority from other states supporting the particular construction urged by counsel.[90]

Interpretivist Approach

The Utah Court of Appeals strongly encouraged the continuation of a jurisprudential trend that favors the inclusion of an interpretivist approach to Utah constitutional adjudication. The court recommended this approach, even in situations that demand, ultimately, an alternative (including an innovative and activist) interpretation.[91] This insistence upon the importance of history to a unique Utah constitutionalism remains a strong theme within this often frustrated jurisprudential quest.[92]

Another possible impetus for favoring an interpretivist approach to much of the state's constitutional analysis may be derived partially from the theological emphasis that Mormons traditionally place upon ancestry and heritage. This emphasis provides a sense of continuity in which the relationship of the past to the present allows each period to reinforce the other one.[93] Critics of this constitutional approach insist that such an historical analysis imposes the imperfectly known wishes of a "dead majority" upon a living population that cannot amend them without great difficulty.[94] This criticism may be significant from a Utah perspective, since the Mormon majority of that state believes that both living and dead members remain viable parts of a perpetual community, as symbolized through practices such as "temple work" and "sealing" that are performed on behalf of departed Mormons.[95] This sense of continuity permeates both the religious and secular aspects of the life of the Mormon community, so its influence upon an individual member of that community (including one who becomes a jurist and serves the secular society), as Paul Edwards explains, could be potentially profound, though very subtle.

> The God of time is the God of history. In such a view persons leave the natural world of creation and of control and become part of the prophetic progress which is where God is identified with the whole. Both the design of direction and the process of justice would belong to a God who acts in time. Moreover, humans mimic God in the balancing and regenerating nature of moving themselves, of leaving one space for another, taking themselves from epoch to epoch. Like God, humans are creating and enlarging from a definite beginning to a definite ending.[96]

History and Proper Legal Interpretation

Mormon constitutional scholarship emphasizes this relationship of history to proper legal interpretation. This approach was favored strongly by J. Reuben Clark, an enormously influential President of the Church of Jesus Christ of Latter Day Saints. According to constitutional scholar Martin Hickman, he followed the example of Smith, Young, and other Mormon presidents by extolling the virtues of American constitutionalism, in general, and by preserving a sense of freedom that makes the continuing process of Mormon history, and its relationship to revealed and inspired secular law, possible.

> While President Clark's sense of history led him to see the relevance of the past to the emergence of the [United States] Constitution, he did not survey history with the naturalistic eye of the secular historian. Rather, he viewed history through the lens of faith, and for him the Constitution was simultaneously a beginning and an end. As an end, it was the culmination of the effort to find the political framework for assuring the continuing development and protection of human freedom. As a beginning, it marked the birth of the "first new nation" which had shed the unwanted baggage of the past, while taking from the past the best of its lessons.[97]

But this sort of speculation lacks a clear grounding in the evidence of legal and constitutional practice. Furthermore, a Mormon interpretation of history can be a highly subjective one. Jan Shipps suggests that history can be used as a means for confirming preconceived values and conclusions.

> When religion is the subject matter, the sacred is as important as the not-sacred. But since the sacred and the not-sacred are simply "different modes of being in the world," empirical evidence does not always discriminate between them. Therefore, historians who have attempted to abide by the canons of historical scholarship while at the same time attempting to reconstruct the past history of religious movements have developed a two-step procedure that makes getting around this difficulty possible. Belief statements, descriptions of worship activity such as participation in public and semi-public rituals, documented and thus demonstrable compliance with cultic demands, and acceptance of clearly articulated ethical systems are used to demonstrate that the reality of the sacred was accepted by the participants in the historical drama. With that established, historians move on to

> explicate the historical situation, treating the sacred and profane . . . with essentially the same set of narrative and analytic tools.[98]

Relationship of Church and State

The examples of Utah constitutional interpretation that have been provided to this point do not offer any clear indication of the influence of Mormon theological values, especially since many of those values are not inconsistent, in tone, with broad liberal assumptions regarding human nature and the relationship of people to their community. A more obvious source for this sort of analysis can be derived from cases that arise from the specific Utah constitutional prohibitions regarding the relationship of church and state. The need to disavow the control that the Church of Jesus Christ of Latter Day Saints exercised over Utah's political system led, in part, to the drafting of constitutional clauses that exceed the provisions found within the constitutions of other states and the United States Constitution in specificity and definitiveness.[99] The most notable clause in this respect is found in ART. 1, SEC. 4 of the Utah Constitution.

> The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution.[100]

Additional emphasis upon this relationship, in terms of education, is provided in ART. 3, SEC. 4 of the Utah Constitution.

> The Legislature shall make laws for the establishment and maintenance of a system of public schools, which shall be open to all the children of the State and be free from sectarian control.[101]

This educational status also was reemphasized within the Utah Constitution in ART. 10, which added greater specific guidance to the state's educational administration.

> The Legislature shall provide for the establishment and maintenance of the state's education systems including: (*a*) a public education system . . . (*b*) a higher education system. Both systems shall be free from sectarian control.

SEC. 8. No religious or partisan test or qualification shall be required as a condition of employment, admission, or attendance in the state's education systems.

SEC. 9. Neither the state of Utah nor its political subdivisions may make any appropriation for the direct support of any school or educational institution controlled by any religious organization.[102]

This constitutional preoccupation is understandable within the context of Utah's tumultuous history, especially considering the antagonistic relationship between the federal government and the Church of Jesus Christ of Latter Day Saints that delayed Utah's statehood for decades. However, much of this antagonism has been interpreted from an institutional, rather than a theological, perspective. The political control of Brigham Young and other, allegedly authoritarian, leaders, the dominance of the People's Party and its Mormon constituency, and the system of exclusivity in contractual, and other, economic relationships that was practiced by Mormons and encouraged by their church, provided (with the exception of the general American repugnance towards the concept of legalized polygamy in Utah) the principal federal objection to Utah statehood.[103]

Cases and Opinions

Jesse B. Stone vs. Salt Lake City et al.—"High Degree of Scrutiny"

This perception is a crucial one, for it helps to explain the judicial interpretation of these key clauses of the Utah Constitution. The *institutional* separation of church and state has been strongly emphasized within Utah jurisprudence. Even incidental business dealings that occur between churches (including the Church of Jesus Christ of Latter Day Saints) and representatives of government within Utah are subject to standards of strict scrutiny by the state courts.[104] An excellent example of this type of scrutiny is provided by the 1960 case of *Jesse B. Stone vs. Salt Lake City, et al.* The defendants in this case included the corporation of the Church of Jesus Christ of Latter Day Saints, the Zion Securities Corporation (which is owned entirely by that Church), and the city council of Salt Lake City. A lower court dismissed the actions, which sought to prevent the subsequent resale of one of the parcels of property from Zion Corporation to the federal government for the purpose of constructing a government office building, as well as the sale of the other parcel for the purpose of building a junior college by the Church.[105]

The case was appealed to the Utah Supreme Court. The high court affirmed the decision of the lower court, except in the case of the sale of land by the city to the Church for constructing a junior college, in which instance the case was remanded to the lower court for further proceedings. In the latter instance, the Supreme Court determined that procedural needs had not been met. However, the constitutional challenge regarding an unnecessary entanglement of church

and state provides the most significant aspect of the court's opinion in this case. The court confirmed the fact that both Zion Corporation and the Church of Jesus Christ of Latter Day Saints qualified as private persons that could be party to a contractual arrangement. It also confirmed the lower court ruling that this sort of transaction did not constitute an unconstitutional entanglement of church and state, as Justice J. Allan Crockett's majority opinion demonstrated.[106]

> It is argued that the Church, directly or through its arm, Zions Securities Corporation, in purchasing said property for the purpose of turning it over to the federal government, is attempting to control the location of the Federal Building and thus intrude into the affairs of government. Assuming that the Church's purpose in obtaining this property was to sell it to the federal government, we fail to see how this can be construed as a violation of the above [ART. 1, SEC. 4] constitutional provision. There is no doubt that the Church can legally purchase and sell property. And just as any other property owner, it can use any legitimate means to persuade a prospective buyer to purchase from it. The transaction does not take on a taint of illegality merely because the solicited purchaser happens to be the federal government or its agency.[107]

Therefore, the court determined that this relationship between church and state was only "incidental," so that it did not violate the state's constitutional prohibitions or establish more than a private transaction with a public institution.

> While the City may have followed some other method than it did, its procedure in publicizing the proposal, holding a public hearing, adopting a resolution declaring the property obsolete and soliciting bids for its sale encompasses the basic elements of propriety in dealing with such public business. There is no allegation that there was any secrecy, subterfuge, fraud or other impropriety, and we therefore see no basis upon which the transaction could be declared invalid upon the grounds under consideration.[108]

Nonetheless, the court subjected this arrangement to a high degree of constitutional scrutiny. Justice Crockett's declarations regarding the second cause of action revealed a heightened sense of concern regarding even an otherwise private transaction. He expressed constitutional concern that such a relationship should remain subject to a high degree of scrutiny, in order to guarantee that it remain merely "incidental."

> In this second cause of action the sale of the Park to the Church is attacked on two of the grounds herein above discussed which related to the first cause of action, that is, C, that the city commissioners were members of the Church and, D, that the sale was not made by proper procedure and by ordinance.
>
> In considering whether the granting of the motion to dismiss the Church from the second cause of action was proper, it is to be borne in mind that one should

> be a necessary party to a law suit if he has rights or interests involved in the subject matter in such a way that his presence is essential to a full, fair, and equitable determination of his rights and those of other parties to the suit. It has been held, and we think correctly so, that this includes the grantees of deeds, the validity of which is under attack.[109]

The preoccupation with procedure led the court to order this second cause of action to be remanded to the lower court, in order to determine the propriety of the procedures that were used, especially considering the dominance of Mormons among the membership of the city commission. But this action obscures the underlying constitutional concern. This heightened scrutiny largely was motivated (as evident from the tone of the entire case) by the desire to avoid a violation, or the appearance of a violation, of the state constitutional prohibition of state/church relations.

Benign Religious Expression

However, this concern focused upon institutional relationships of a political or, especially, an economic nature. In the area of religious values and "public morality," the constitutional approach of the Utah judiciary has proven to be remarkably different. The structural consequences of a formal theocracy, according to the Utah Constitution, must be avoided, but that *political* separation does not, necessarily, mandate a *moral* separation. This distinction is made apparent within the seminal 1993 case of *Society of Separationists, Inc., et al. vs. Ron Whitehead, et al.*, in which the Utah Supreme Court upheld the practice of opening meetings of the Salt Lake City Council with a nondenominational prayer.

An overwhelming majority of the court regarded this type of religious expression as being benign and constitutionally acceptable. Justice Michael D. Zimmerman's opinion reflected certain themes that had been expressed within other American judicial venues. However, the focus of this opinion clearly was directed by the uniqueness of Utah's specific constitutional references to religion and the unusual historical context within which it was created. The Utah high court referred to federal precedents in support of its opinion, including the 1983 United States Supreme Court case of *Marsh vs. Chambers*[110] and, especially, the 1971 case of *Lemon vs. Kurtzman*.[111] But the "three-pronged test" that this latter federal decision established for the purpose of determining the constitutional limits of church and state relations was found to be unapplicable to Utah's context.

"Three-Pronged Test"

Justice Zimmerman constructed an alternative three-pronged test that established a Utah constitutional threshold that a government would need to overcome to justify activity that appeared to use, or endorse, religion. This sort of activity is

acceptable, Justice Zimmerman argued, under three circumstances: (*a*) government should distance itself from involvement with religion; (*b*) when involvement does occur, it must be of a "nonsectarian" nature; (*c*) government must be neutral in all of its dealings with religious groups.[112] This test emphasized the institutional dimension of church/state relations and ignored the issue of promoting *particular* religious beliefs and values. The historical rejection of theocratic government, rather than theological principles, was found to be at the center of this area of Utah constitutional law.[113] Justice Zimmerman stressed this point towards the end of his lengthy historical analysis within his majority opinion.

> We also conclude that the Mormon majority at the 1895 [state constitutional] convention acted deliberately to distance itself from any suggestion that the new government of Utah could justifiably be viewed as theocratic. Having struggled for statehood for nearly fifty [years], Mormons had come close to seeing the legal destruction of their church and ultimately had been forced to abandon polygamy before the federal government would consider making Utah a state. Having been seriously threatened in the prolonged confrontation with the federal government, the Church . . . had worked to convince Congress of the sincerity . . . of its intent to forswear control of civil affairs. Statehood was obtained, but at a high cost.
>
> The convention's delegates manifested a parallel intention to put behind them the struggles of the preceding half-century and to bring all Utahns together.[114]

Therefore, he concluded that the Utah Constitution was not drafted with the intent of prohibiting the state government or its agents from the expression or promotion of religious beliefs and values.

> Rather, the language [of article I, section 4] is a particularistic command directed at the Mormon Church as an institution and was intended to forever bar the sort of theocracy that existed in the early days of the State of Deseret by preventing that church, or any other church as an institution, from "interfer[ing]" directly in or "dominating" state government. Based on this reading, we conclude that the union-of-church-and-state ban applies only to circumstances that join a particular religious denomination and the state so that the two function in tandem on an ongoing basis. There is no evidence in the record to support a claim that such a union exists or, alternatively, that the City Council's policy could be construed as allowing one religious denomination to dominate or interfere with city business. . . .
>
> Such a result is clearly unnecessary . . . [and] is one that would produce consequences unintended by the framers [of the Utah Constitution] and unheralded by our history. This is a state, after all, that was settled by people with primarily religious motivations. Our early history is of the struggle between those with deeply held views on matters of conscience, whether grounded in orthodox religion or otherwise. The state that was created by the parties to this struggle plainly was not intended to be hostile to the foundation upon which most of its creators grounded their values systems—religion.[115]

The opening prayers of the Salt Lake City Council satisfied the criteria of this Utah three-pronged test, even though they did constitute an involvement of government in religion through the use (albeit a minor use) of city funds in support of these prayers. The prayers satisfied the three-pronged test, because they were required to be of a "nonsectarian" nature and the city was neutral in making available funds in support of a broad spectrum of religious persons who offered them. However, Utah Supreme Court Justice I. Daniel Stewart's lone dissent also emphasized the unique experience of the framers of the Utah Constitution, "most of whom were Mormon."[116] He warned his fellow jurists about the possible implications of this sort of religious entanglement by comparing and contrasting Utah history to the general American experience the promotion of religious values by, or through, the state.

> [T]he inalienable right of freedom of religion and conscience could easily be eroded by well-meaning people who fervently believe that the truths that provide guidance and ultimate meaning in their lives ought to be promoted by the State, especially when they are in the majority and it is their beliefs that would be espoused by the State. For such people, it is altogether natural, in one sense, to think that the State should do what they deem consistent with God's will.[117]

These religious values that this particular "majority" might impose upon the political and constitutional order may not be readily distinguishable from many of the secular values that are reflected by Utah's jurisprudence. Of course, the most conspicuous area within which Utah's Mormon heritage seems to have influenced the state's constitutional tradition is the section that prohibits the "peculiar" religious practice of "plural marriage," otherwise known as "polygamy."[118] Ironically, the most notable Utah case that addresses this constitutional sanction is not significant because of insights that it offers into the legal ramifications of this particular practice, but because of other values that the case reveals, which may be relevant to the Mormon influence upon Utah constitutionalism.

In re State of Utah ex. rel. Elsie Johnson Black et al.—Family Law

The 1955 Utah Supreme Court case of *In re State of Utah ex. rel. Elsie Johnson Black, et al.* involved a matter of family law that was directly affected by ART. 3 of the Utah Constitution. This clause was created in response to the most notorious obstacle to Utah statehood. Interestingly, the practice of polygamy was controversial among many Mormons, and its practice was not widely regarded as being a fundamental tenet of faith within that church.[119] Nonetheless, the practice needed to be banned by the Manifesto of 1890, which was issued by the President of the Church of Jesus Christ of Latter Day Saints, Wilford Woodruff, before a Utah constitutional convention proceeded to draft the state's constitutional prohibition of polygamy that is found in ART. 3.[120]

> SEC. 1. Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person of property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.[121]

Leonard Black and Vera Johnson Black had eight children (ranging from four to seventeen years of age) who were declared to be "neglected" by the Juvenile Court of Utah's Sixth District. Consequently, the parents were denied custody and the children were placed under the control of the Utah State Department of Public Welfare as wards of the state. The basis for the finding of parental negligence (despite the lack of evidence to suggest any other form of neglect, maltreatment, or disadvantage) was the fact that Leonard Black had additional children through two other current marriages.[122] The relevant section of Utah's family law code provided the statutory guidance for this decision.

> No child shall be taken from the custody of its parents without the consent of such parents unless the court shall find from the evidence introduced in the case that such parent is incompetent, or has knowingly failed and neglected to provide for such child the proper maintenance, care, training and education contemplated and required by both law and morals, or unless the court shall find from all the circumstances in the case that public welfare or the welfare of a child requires that his custody be taken from his parents.[123]

The decision was appealed to the Utah Supreme Court, which affirmed the decision of the juvenile court. The most significant result of this appeal was not the fact that the ban on polygamous marriages was confirmed; that determination was reached easily, despite the defendants' claims that it was constitutionally vague and it violated their freedom of conscience as guaranteed by ART. 1, SEC. 4 of the Utah Constitution. But the confirmation of the ruling that the defendants were guilty of parental neglect, which finding necessitated this loss of custody, reflects two thematic relationships within Utah's Mormon heritage: the sanctity of the family within the larger community of Utah society; a general deference to political authority that assumes a broader, moral dimension.[124]

Most of the text of the majority opinion of Justice Worthen emphasized both the transcript of the previous testimony of Leonard Black and the historical context of Utah's constitutional development. The centrality of the family (both structurally and spiritually) that he invoked echoed similar theologically based attitudes regarding the role of the family within the Mormon religious community. His reasoning was consistent with the jurisprudence of other American states, but Justice George W. Worthen's invocation of the seminal precedent of *In re Bennett* provided a succinct declaration of supporting values that seemed to transcend a mere secular concern with regulating the interests of minors and the well-being of civil society.

> It has always been the policy of both the [Utah] Legislature and the courts of the various states not to deprive or interfere with the important and sacred relation of parent and child unless absolutely necessary for the welfare of the child or for the protection of society. When it is made to appear that a parent or parents of a child know that said child is committing acts of delinquency and that they are unable to control such child and prevent him from further wrongdoing, the interest of the child as well as the protection of society may well demand that the parents surrender their custody of their child to the state so that, if possible, the child's evil tendency may be corrected and society protected.[125]

This quote appears to be conventional when compared to similar jurisprudence in other states. However, when it is considered within the context of this particular case and the specific circumstances that were deemed to constitute a threat "for the welfare of the child or for the protection of society," it is possible to argue that the religious influence of Utah's Mormon heritage may have contributed to this conclusion. The sense of collective responsibility that the community assumes for the proper and correct raising and moral training of its potential members seems to negate the need for specific evidence of harm to these children. The sole fact that the parents advocate, and one of them practices, a marital principle that is regarded as being contrary to moral conventions and banned by constitutional entrenchment motivates a sense of duty for the community to intervene, despite its repugnance of such interference with this "sacred relation[ship]."[126]

This sense of moral certainty pervades the majority and concurring opinions of this case. However, it is the fact that the parents defied lawful authority in advocating and practicing plural marriage that confirmed, for Justice Worthen, the appropriateness of the juvenile court's decision.

> They [Leonard Black and Vera Johnson Black], after such [marriage] ceremony was used, if any, without benefit of clergy . . . proceeded to "multiply and replenish the earth." Marriage licenses were not for them; legal ceremonies were passe; they ignored every law established for the orderly behavior of decent people. Why should it be assumed that Leonard Black and Vera Johnson are the proper persons to have the custody and control of these children? Is it possible that the best interest of the children will be secured? Is it likely that these children will be saved to useful citizenship by being left with the appellants?
>
> We cannot ignore the statement of a wise man, who said "Train up a child in the way he should go and when he is old he will not depart there from." If public welfare and the best interest of these children will be served by training them in the way of immorality and crime, then the Juvenile Court is wrong.[127]

The vague equation of civil with moral authority becomes the lynchpin for this judicial reasoning. The tone of Justice Worthen's opinion, including some of the expressions that he used, captures the spirit of this association in support

of the decision against Leonard Black. This tone is more clearly explicable when it is considered in the context of the traditional Mormon respect for civil authority and the association of secular authority with moral guidance, though moral bearing remains an individual responsibility.[128] The belief that the United States Constitution was, indeed, inspired by God (because of its guarantee of human liberty in the pursuit of virtue and happiness) has remained a central assumption of Mormon political thought. This belief is a libertarian one, since political liberty makes the practice of religious virtue by individual people and their respective communities possible.[129] Therefore, an upright person (one who is capable of accepting the burden of raising a family) should "render unto Caesar" as a matter of moral, and not merely political, necessity.[130]

Allusions to this theme are expressed sporadically throughout the Book of Mormon, such as within the description of the righteous secular rule of the high priest, Melchizedek.

> Now this Melchizedek was a king over the land of Salem; and his people had waxed strong in iniquity and abomination; yea, they had all gone astray; they were full of all manner of wickedness;
>
> But Melchizedek having exercised mighty faith . . . did preach repentance unto his people. And behold, they did repent; and Melchizedek did establish peace in the land in his days; therefore he was called the prince of peace, for he was the king of Salem; and he did reign under his father.
>
> Now, there were many [kings] before him, and also there were many afterwards, but none were greater; therefore, of him they have more particularly made mention.[131]

A people are fortunate if such a king imposes his moral authority upon them; otherwise, chaos can ensue and individual virtue will suffer, as it did for the people of Nephi when this sort of rule was disrupted.[132] This theme was given doctrinal authority by Joseph Smith, Jr., in his explanation of the proper attitude that Mormons should adopt towards civil government.

> 1. We believe that governments were instituted of God for the benefit of man, and that he holds men accountable for their acts in relation to them, either in making laws or administering them, for the good and safety of society. . . .
> 5. We believe that all men are bound to sustain and uphold the respective governments in which they reside, while protected in their inherent and inalienable rights by the laws of such governments; and that sedition and rebellion are unbecoming every citizen thus protected, and should be punished accordingly; and that all governments have a right to enact such laws as in their own judgment are best calculated to secure the public interest . . .
> 7. We believe that rulers, states, and governments, have a right, and are bound to enact laws for the protection of all citizens in the free exercise of their religious belief; but we do not believe that they have a right in justice, to

> deprive citizens of this privilege, or proscribe them in their opinions, so long as a regard and reverence are shown to the laws, and such religious opinions do not justify sedition nor conspiracy.[133]

The Mormon perspective regarding political authority over a people parallels its attitude towards parental authority over children, since both demand a high degree of virtuous character in order to achieve success. Therefore, the mere fact that Leonard Black defied proper authority made him, and his actions, *immoral*, as well as because he violated the "sacred" character of marriage.[134] This sort of belief appears to dominate Justice Worthen's opinion on behalf of the court.

> If we now ignore our duty to the state, to society, to decent citizenship and to these children and to others who will undoubtably be born to these appellants, if no bars are put in place, the task will be still more difficult for our successors to cope with.
>
> It is true that taking these children from their parents does seem harsh, and visits the sins of this father upon these children. That is quite true but unless we are genuinely concerned for the welfare of these children and for the public welfare and apply the harsh treatment required and stop the spread of this immoral and illegal practice the sins of this father will be visited upon the children of these children to the third and fourth generations.
>
> Under the first part of Section 55–10–32 these parents have forfeited the right to have the children left with them. They have not only "failed and neglected to provide [the children] with proper maintenance, care, training and education required by both law and morals," but have affirmatively and knowingly provided the children with the care, training and education violative of law and morals.[135]

The Utah Supreme Court reacted in a way that was not consistent with a libertarian approach to this issue. However, the majority opinion expressed a concern with the promotion of civic virtue that is associated with republicanism but, also, is consistent with the liberal humanism of the Enlightenment, even though it arguably reflects a Mormon concept of individual virtuousness, the sanctity of the family, and the responsibility of the community for the moral and physical well-being of all of its members.

> The court's findings in this case would seem to be a positive answer that what these parents have done is inimical to the public welfare. A review of what has heretofore been observed establishes that the conduct of these parents over the past 20 years has been very much against the public welfare. . . .
>
> The good name of this State and its people, committed to sustaining a high moral standard, must not be obliged to suffer because of the unsavory social life of appellants and others claiming the constitutional right under the guise of religious freedom to bring shame and embarrassment to the people of this state. It is against the public welfare to permit such conduct as appellants indulge in to justify

> the people of this great nation in referring to us as a people high in religious adherence but low in morals and law observance.
>
> In our opinion public welfare demands that the state take all proper steps available to protect itself against the social life advocated by appellants.[136]

Mormon Exclusions From Legal Protection

It has been charged that similar attitudes of those Mormons who continue to dominate the Utah political system have been responsible for the exclusion of gays and lesbians from legislative protection under Utah's hate crime statute.[137] But it is very difficult to distinguish clearly between political and legal values that are motivated by Mormon faith and practice and those values that are motivated by a liberal democratic heritage that is as strong and diverse in Utah as it is elsewhere in the United States. The original Mormon settlers of Deseret were migrants from the industrializing states of the American northeast and converts from conventional (generally Protestant) denominations.[138] Given many similar humanist assumptions that are shared by both Mormon theology and liberal ideology, it is not surprising that the source of many of the values that have been expressed within the Utah legal and constitutional traditions also would be similarly shared.

That similarity can be noticed within relatively recent Utah jurisprudence, including within the area of abortion. The 1992 federal district court (District of Utah) decision of *Jane L., et al. vs. Norman Bangerter, et al.* suggested, for example, that religious values may have motivated, but only indirectly, those politicians who drafted, and those jurists who upheld, restrictive Utah abortion statutes.[139] But that suggestion is not an unusual one within the broader American context; it is an influence which American courts have been loathe to acknowledge, and the Utah Supreme Court is not an exception to that trend.[140] The few cases in which the issue of abortion has been addressed by Utah courts have focused exclusively upon the United States Supreme Court's ruling in *Roe vs. Wade* and other relevant federal precedents.

Conclusion

Utah constitutional law generally does not depart radically from the fundamental ideological orientation that has dominated the broader American constitutional tradition. But its deference to federal standards within many constitutional areas (especially matters of civil rights and liberties) may reflect an historic reticence that has not yielded to judicial requests for the development of an interpretation that reflects the unique social and cultural experience of Utah and Deseret. Those areas of specific divergence (particularly in the unique "plural marriage" clause, as well as in the detailed pronouncements upon church and state rela-

tions) also may owe more to the state's institutional experiences than to profound ideological or theological differences in fundamental values.

However, that observation should not discount more subtle influences of interpretation that may be apprehended, in this respect. The fact that the Utah Constitution was drafted, and continues to be amended and interpreted, by the members of a society with a large and active Mormon population (and most of these politicians and jurists are, indeed, Mormons) suggests strongly that specific liberal values and practices that coincide with the basic thrust of a Mormon community may supplement the process of legal reasoning within that state.[141] The underlying humanist assumptions that liberal ideology and Mormon theology seem to share may provide a common ground which an experience of persecution, economic and political success, and accommodation has transformed into a viable and, apparently (at least superficially), conventional constitutional jurisprudence that will continue to dominate Utah law and society.

Chapter 8

Vermont
A Republic Apart

A United, Political, and Social Community

Records indicating the philosophical motivations of the delegates to the Vermont constitutional convention in Windsor, in 1777, do not exist, unlike the prolific writings and pronouncements of the delegates to the American constitutional convention in Philadelphia in 1787. Letters and pamphlets, written by leading Vermont figures, echo certain ideals of natural law, deism, and republicanism, but they differ little from the formal assertions and reflections offered by Thomas Jefferson, Thomas Paine, or the authors of *The Federalist Papers* and *The Anti-Federalist Papers*.[1]

Peter S. Onuf has noted that the reference to charters as the basis for much of the political propaganda in defense of Vermont independence "was a tribute to the prestige of charters in defining rights during the revolutionary era."[2] But, more importantly than that perception, it was a tribute to the importance of the very idea of contract and its inviolability to these Vermonters. Much of this literature defending Vermont's movement towards independence and the establishment of a separate government was devoted to establishing the validity of land titles and grant claims, especially against the claims of the New York government.[3] In fact, those concerns dominated the preamble to the Vermont Constitution.[4] The right of one person to transact business with another person was treated as being, literally, "self-evident." The factor which Vermont leaders *did* regard as requiring demonstration was the evidence regarding these property related contracts—the sort of evidence that Sir William Blackstone and other influential legal scholars of the time regarded as the necessary focus for resolving such claims to individual property rights.[5] Onuf summarizes this attitude in the course of explaining the difference between rhetoric and action among Vermont leaders.

> The "Vermont doctrine" that the people had a natural right to establish new states as well as new governments was widely perceived as the basic premise of Vermont's pretensions to independent statehood. Certainly that right was routinely invoked. But Vermont propagandists—conscious of a skeptical audience in Vermont as well as elsewhere—did not dilate on natural law claims. Instead, they attempted to show that Vermont had existed as a political community long before the Revolution and so had earned a prescriptive right to self-government within determinate territorial limits. Because the other American states would not recognize these claims, Vermonters could not make the conventional argument that a colony became a state by virtue of participation in the common cause and membership in Congress. They had to demonstrate that Vermont's independence was not essentially linked with the independence of the United States.[6]

One way to accomplish this objective was to demonstrate that Vermont, indeed, was a united, if not homogeneous, political and social community. Another (and, perhaps, similar) way was to assert that Vermonters, individually and as a whole, needed statehood in order to create a government that could serve the only legitimate function that any government should serve—the protection of individual liberty and property.

Influence of British Liberal Thought

Thus, the pattern of Vermont's political development reflects the influence of British liberal thought at this time. In particular, it is possible to perceive the reflection of the "whig" tendency that shaped attitudinal changes within the British Parliament and, especially, within the English judicial system. However, in order to consider and analyze this comparison, it is necessary to explore briefly the nature of the ideological revolution at the center of the American rebellion.

The ideologues of the American Revolution professed to deemphasize the overt elitism and class bias of liberalism by rejecting much of its "whig" tendency and appealing to a more populist vision, although one that preceded the utilitarian and liberal democratic ideals made popular by Jeremy Bentham and John Stuart Mill.[7] Part of this difference in emphasis may have been due to the influence of Montesquieu and his particular conception of the separation of powers, which differed in tone from the more strictly atomistic John Locke.[8] However, Locke's attempt to reflect the human condition within the ideal "state of nature" that preceded the creation of civil society through his theory of the state (a theory that served as the basis for the liberal democratic tradition) was a critical part of the philosophical appeal of the idea of limited government and maximum individual liberty.[9] But when individual persons came together to enjoy the advantages of civil society, government became a necessary, though undesirable, part of this arrangement. Thus, it became necessary to establish

limits upon the state through the imposition of limits on governmental authority and the enforced respect for individual rights and liberties.[10] This idea appealed to Americans as an expression of their conflict with British governmental and commercial dominance.[11]

Land Claims and Natural Rights

The state of nature represented, for Vermonters, the absence of New York officials who attempted to invalidate their land titles originally granted by New Hampshire. They believed that the problem of land claims was a problem created by government at the expense of individual landowners who, otherwise, existed peacefully and securely with their neighbors and fellow landowners. It is not surprising that Vermont's Declaration of Independence idealized this condition.

> Whereas the Honorable the Continental Congress did, on the 4th day of July last, declare the United Colonies in America to be free and independent of the crown of Great Britain; which declaration we most cordially acquiesce in. And whereas by the said declaration the arbitrary acts of the crown are null and void, in America, consequently the jurisdiction by said crown granted to New York government over the people of the New-Hampshire Grants is totally dissolved.
>
> We therefore, the inhabitants, on said tract of land, are at present without law or government, and may be truly said to be in a state of nature; consequently a right remains to the people of said Grants to form a government best suited to secure their property, well being and happiness.[12]

This theme was repeated, in support of the legitimacy of the creation of the new government, in the preamble to the Constitution of the Vermont Republic that was drafted later that same year.

> Whereas all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights, and the other blessings which the author of existence has bestowed upon man; and whenever those great ends of government are not obtained, the people have a right by common consent to change it, and take such measures as to them may appear necessary to promote their safety and happiness.[13]

Vermont Constitution and Property Rights

The Vermont Constitution was consciously patterned after the state constitution of Pennsylvania, but interest has been directed towards certain significant (though, often, subtle) differences between these two documents.[14] The most interesting difference relates to property rights and, especially, the role and position of government in relation to citizens and their property. The Vermont Constitution, like the constitutions of the other rebelling colonies, made especially explicit reference to property rights—much more strongly than the United States Con-

stitution or its Bill of Rights would come to emphasize.[15] Such an attitude was expressed in the very first article of the Vermont Constitution as part of that rejection of the institution of slavery that begins its Declaration of Rights.

> That all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.[16]

Contrasts with the Pennsylvania Constitutional Model

Several significant changes were made (including the omission in the Vermont Constitution of a section detailing the structure and functions of the judiciary) from the Pennsylvanian model that may reflect possible ideological distinctions between these two societies.[17] The Vermont Constitution made no franchise restriction based on property or poll tax—at least, not originally. It also inserted the stipulation that only "Protestants of good character" would be guaranteed the protection of their civil rights and liberties.[18] An even more significant difference could be discerned regarding the basis for representation in the legislature. The Pennsylvania Constitution made provisions for weighted representation based upon the population of towns and counties, while the Vermont Constitution established that each town would be granted equal representation.[19]

However, it is the way in which the Vermont Constitution established a relationship between the executive and the legislature that marks the true character of that document and the government it created. Despite an appearance, on the surface, that Vermont had established a "radical" populism as the basis for its constitutional tradition, the reality (especially in contrast to the Pennsylvania and United States Constitutions) was somewhat different.

> But the Vermont convention made just enough changes in its final product to make the government, in operation, about as conservative as that in any of the states. In contrast to Pennsylvania, which had no officials elected on a statewide basis, fifteen executive officers were elected directly by the freemen of Vermont—the governor, the lieutenant governor, the treasurer, and the members of the council. The twelve highest in the votes for the council were declared elected, whereas in Pennsylvania two councilors were chosen by each county. Also in contrast with Pennsylvania, there was no prohibition on re-election to any executive office in Vermont, and the incumbents had a distinct advantage in the statewide, popular elections. With no constitutional bar to re-election, the incumbent executive officers and most of the council were returned year after year. Chittenden served as governor for all but one of the first twenty years, and Ira Allen remained treasurer continuously until 1786. . . . The Vermont constitution thus created a distinctively different executive branch, not at all like the council in Pennsylvania.[20]

The Council served, in practical terms, as a legislative upper house, as well as an advisory body to the governor. It combined the functions in Vermont that were fulfilled in the United States government by the Senate and the Cabinet. In this respect, the Vermont government resembled the system established in Upper and Lower Canada in the early and mid-nineteenth century, as these colonies moved from the colonial administration of an imperial-appointed governor towards a system of limited political autonomy and domestic self-government.[21] The Vermont Assembly deferred many matters of policy to the Council, including foreign relations, federal negotiations, and certain issues of commerce.[22]

Certain contradictions are presented by these aspects of Vermont's constitutional tradition, and they are difficult to categorize in terms of ideological origin and influence. Some differences, such as the exclusion of non-Protestants from the enjoyment of civil rights, may be explained by a simple lack of tolerance (as found in Britain) despite the ideals otherwise expressed.[23] However, in other respects, it may be possible to detect two broad ideological themes emerging from the pattern established by the Vermont Constitution. The first theme relates to the eighteenth-century idea of "whig" liberalism, and the second reflects a libertarian and republican dichotomy that may indicate a theoretical conflict of centralized, as opposed to decentralized, government.

Vermont Revolution

Vermont's political revolution had immediate concerns to address, especially regarding the protection of the New Hampshire Grants from the claims of New York and those persons to whom it had granted title to the land between the Hudson and Connecticut Rivers.[24] This economic concern was extremely compatible with the ideological tenor of the eighteenth century. Liberalism had developed as the ideology of "property," both as an economic response to the stagnation of feudalism and the accompanying changes in the perceived place and role of the individual person within society. John Locke's words must have appealed to colonial Vermonters when he argued that individual persons enter into a "social contract" in order ". . . to unite for the mutual Preservation of their Lives, Liberties, and Estates, which I call by the general Name, Property.[25]

Whig liberalism and its effect upon eighteenth-century Britain have been well-chronicled by the eminent historian, E. P. Thompson. It provided a strong justification for the protection of the interests of the economically privileged members of society, including, ironically, the landed gentry and aristocracy. It also provided much of the rationale behind the infamous "black acts," and it was selective in its appeal to the rights of property.

> The British state, all eighteenth-century legislators agreed, existed to preserve the property and, incidentally, the lives and liberties, of the propertied. But there are

> more ways than one of defending property; and property was not . . . trenched around on every side by capital statutes.[26]

The same statement could be made about the Vermont state, for the defense of property was not conducted through statutes alone, and certainly not "capital" statutes. Like Britain at this time, the very institutions entrenched by the Vermont Constitution were, themselves, oriented towards this ultimate endeavor. Thus, it may be tempting to characterize the motivation behind Vermont's constitutional convention as being grounded in the immediate economic interests of those political elites who dominated its proceedings. Such a characterization would parallel the famous claim made by Charles Beard that the framers of the United States Constitution were largely influenced by personal economic considerations—a claim that was embraced by many constitutional scholars, as a definitive interpretation, for several decades of the twentieth century.[27]

However, Vermont's circumstances were somewhat different, for the economic concerns regarding property claims were widespread, and they affected both small and large owners. It is possible to conclude that a fairly broad approval of this sort of emphasis existed in terms of constitution making in Vermont, even if certain citizens would benefit more than other citizens. But this approval would require the provision of a sense of security to the small property owner, in order to counter any dominance of the structure of government on the part of Vermont's more affluent citizens, including such powerful personalities as Thomas Chittenden, Nathaniel Chipman, and the Allen brothers.[28]

Vermont Government

Government in Vermont came to be controlled by those elites who held the biggest stake in its success. The fact that these leading figures were so frequently reelected to office may reflect, in part, a certain approval of this situation and a willingness to defer responsibility to those leaders whose economic status and position in society made them seem most fit to direct the affairs of the republic-turned-state.[29] Despite Ira Allen's enthusiastic rhetoric on the anti-aristocratic populism of Vermont democracy in the late eighteenth century,[30] this elite domination of government suggests that Vermont had its own economic aristocracy, though with a lack of ennobling titles which reinforced this populist, anti-European illusion.

The relationship of executive to legislature in Vermont was, in certain respects, similar to the same relationship found within Britain's parliamentary system, as it was developing at that time, especially in terms of those factors previously discussed. Unlike Britain, however, the Vermont system rejected any inclinations towards a unitary political system. Therefore, consistent with the constitutional theory of checks and balances, there was an expectation that towns would enjoy a strong degree of autonomy in those areas most directly affecting

the everyday lives and interests of their respective citizens.[31] Furthermore, the equal representation of towns within the Assembly seemed to be designed to allow smaller towns a degree of protection from the dominance of larger towns that might use their larger populations to gain control of the legislative machinery and exert a stronger centralist influence for their own, ultimate benefit.[32] This interpretation is consistent with Peter Onuf's description of the apparent rationale and motivation that lay behind populist appeals among Vermont political leaders.

> In the long run, however, Vermont stood to gain most by the delegitimation of state authority and the related collapse of congressional prestige. What was being destroyed, after all, was the notion that political community was a given and that states had legitimate claims to obedience under all circumstances. Lacking recognition and a given status as a state, Vermont was forced to rely entirely on popular consent. And nowhere in America did local communities become so thoroughly accustomed to such a high degree of political self-determination. At the same time, political imperatives were clarified to an unusual degree. Americans in the greater Vermont region needed to secure a modicum of law and order; they needed to be protected from foreign invaders and, most of all, from each other.[33]

Libertarians and Republicans

The political struggle between libertarians and republicans within Vermont assumed these characteristics. It reflected an internal ideological conflict regarding the direction of democratic theory that would shape both government policy and the future of Vermont's constitutional tradition.[34] The suspicion of centralized government was grounded in a concern for the protection of property rights. That suspicion would be intensified by the inevitable intrusions imposed by the reform liberalism of the twentieth century and the activism of the interventionist state that it inspired.

The republican tradition could be observed within the language of certain constitutional clauses. Perhaps, the most striking of these clauses is found in chapter one, ART. 16 of the Constitution of the Republic of Vermont. This article (which now is CHAP. 1, SEC. 18 of the state constitution), established guidelines for political participation that would appear to be more appropriate for a constitutional preamble, especially in the way that it appears to express the ideal of "civic virtue."

> That frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry and frugality, are absolutely necessary to preserve the blessings of liberty, and keep government free; the people ought, therefore to pay particular attention to these points, in the choice of officers and representatives, and have a right, in a legal way, to exact a due and constant regard to them, from their legislators and magistrates, in making and executing such laws as are necessary for the good government of the State.[35]

The republican perspective of figures such as Nathaniel Chipman and Isaac Tichenor was not merely concerned with Vermont's relationship to the federal government and the central vision that it wished to impose, but it was concerned, also, with a vision of Vermont as a unified political community guided by coherent and coordinated policies. Chipman expressed, from his judicial post, a perspective that, while it contrasted with the professed orientation of most of Vermont's ruling elites[36] (and probably most of Vermont's population, as well), it remained, nonetheless, a persistent and, occasionally, persuasive theme, at least among the legislative "opposition."[37]

> First then, suppose a number of men, in what is called a state of nature, collected together, and a large majority of them agreeing to unite in a civil society,—a few dissent, and retain each his independent state. What will be the situation of such dissenting individuals in relation to that society? Certainly the society and the dissenting individuals are to each other in a state of nature, a state of independence, the same as independent nations,—each party is the judge in its own cause, and the avenger of its own wrongs. Suppose any dissentient to remain in the midst of the society and to commit an act of violence on the person or property of one of the members. Considered as independent, he has committed an act of hostility against the society, which is bound to protect its members; the society have, therefore, against the aggressor a right of war, the same as though the aggression had been made by an independent nation.[38]

Likewise, Vermont libertarians were not merely anti-republicans who were concerned with strengthening individual autonomy, but they also were defenders of a decentralized state government that allowed for as much autonomy of towns and individual persons as possible. The Vermont Constitution established a structure for this ideological conflict to be articulated, politically.[39]

It seems reasonable to associate these democratic perspectives with certain fundamental ideological values arising from the liberal tradition. Libertarians were likely to adhere to a "classical" vision of liberal society—one that focused on a society of atomistic persons, in which the only legitimate role of government was the protection of property and the system of rights and liberties derived from this relationship of individual persons to their property. However, republicans adhered to a broader liberal vision that focused on the interactions of individual persons as part of a growing society. This vision would evolve into an activist interpretation of the liberal tradition that attempted to meet the socioeconomic needs of individual persons and address the inadequacies of fundamental liberal theory in addressing its own ideals of true freedom, equality, and the capacity for meaningful "self-actualization."[40] This approach to government and society provided an impetus for the development of a philosophical movement that advocated the active pursuit of democratic values and conventions and the benefit of all members of society through experimentation, including the creative application of public policy

for achieving that goal. This movement, known as "pragmatism," arguably offered an amalgamation of libertarian and republican values and aspirations that appears to reflect these two traditions as they have interacted within the context of Vermont's legal, constitutional, political, and social development.

Pragmatism and John Dewey

The pragmatist movement developed in the United States in response to the growing complexity and needs of American society during the late nineteenth and early twentieth centuries. This approach denied the existence of *prima facie* "truths" or any claim regarding "self-evident" propositions. Ideas are valid, for pragmatists, only when they achieve their predicted results. Therefore, the implementation of a system of public education promotes benefits for society only when it is demonstrated that well-educated people make contributions that improve, in some predictable fashion, the welfare of the community, in general. This approach provided a scientific method that could be applied to many fields of endeavor. However, its application to politics, democratic practice, and public policy (in its broadest sense) offered the most conspicuous contribution of pragmatism for modern Americans.[41] The most influential American pragmatist was the native Vermont educator, philosopher, and political activist, John Dewey.

The seemingly conflicting liberal democratic goals of achieving individual autonomy within the collective environment of a political community were addressed impressively within Dr. Dewey's political philosophy. Dewey's emphasis upon education and the importance of democracy at the most local level possible arguably were inspired by his experiences as a child and young teacher within his native state.[42] He believed strongly that individual liberty and autonomy were important goals, but he also believed that liberal democratic ideas did not offer an effective strategy for achieving that goal (or for addressing a failure to achieve it), nor for evaluating its success. He argued that the reinforcing effect of an enlightened and active polity promoted *both* individual and collective goals, and strengthened the success of each end. In that way, he confirmed the approach of classical liberals like John Stuart Mill, who argued that an isolated person could not achieve true freedom or fulfillment, but the benefits of a plural society, in which individual members pursue personal goals through group participation, would make individual "self-actualization" a reality.[43] Therefore, Dewey offered an explanation for the harmonization of the individual person and community that can be applied to the social, political, and constitutional maturation of Vermont.

> The common criticism is that the liberal school was too "individualistic"; it would be equally pertinent to say that it was not "individualistic" enough. Its philosophy was such that it assisted the emancipation of individuals having a privileged antecedent status, but promoted no general liberation of all individuals.

> The real objection to classic Liberalism does not then hinge upon concepts of "individual" and "society."
>
> The real fallacy lies in the notion that individuals have such a native or original endowment of rights, powers and wants that all that is required on the side of institutions and laws is to eliminate the obstructions they offer to the "free" play of the natural equipment of individuals. . . . The notion that men are equally free to act if only the same legal arrangements apply equally to all—irresepective of differences in education, in command of capital, and the control of the social environment which is furnished by the institution of property—is a pure absurdity, as facts have demonstrated. Since actual, that is, effective, rights and demands are products of interactions, and are not found in the original and isolated constitution of human nature, whether moral or psychological, mere elimination of obstructions is not enough. . . . The only possible conclusion, both intellectually and practically, is that the attainment of freedom conceived as power to act in accord with choice depends upon positive and constructive changes in social arrangements.[44]

Dewey's approach not only seemed to reconcile libertarian and republican aspirations, but actually made them complementary. Indeed, this approach would provide philosophical motivation and justification for the seminal activism of the New Deal era. Therefore, a vigorous defense of individual rights and liberties did not, necessarily, undermine the pursuit of public virtue, especially if the onus of this virtuous participation is placed upon the public sovereign, rather than separate, private persons.[45] Given the proper institutional tools (including a high quality education, access to essential services, and opportunities for interactive democratic participation), a person will choose to fulfill "virtuous" duties to the community. But, if that choice is not available, and if persons are forced to participate (in violation of their liberty), both ends, ultimately, will be lost.[46] Dewey used this approach to explain the reconciliation of the contradictory traditions within liberal democracy, especially regarding the active participation of an interventionist state in pursuit of those liberal values and goals.

> The commitment of liberalism to experimental procedure carries with it the idea of continuous reconstruction of the ideas of individuality and of liberty in intimate connection with changes in social relations. It is enough to refer to the changes in productivity and distribution since the time when the earlier liberalism was formulated, and the effect of these transformations, due to science and technology, upon the terms on which men associate together. An experimental method is the recognition of this temporal change in ideas and policies so that the latter shall coordinate with the facts instead of being opposed to them. Any other view maintains a rigid conceptualism and implies that facts should conform to concepts that are framed independently of temporal or historical change.[47]

It is possible to observe, in the trend towards central decision making in Vermont politics, an acceptance (if not an embracing) of this "liberal

reconstruction." But problems also exist that are associated with making such a rapid transition of historical examination from the struggles of eighteenth-century republican and libertarians to twentieth-century pragmatism, and much more historical examination is needed of Vermont's political development (especially in the nineteenth century) to establish a clear line of ideological evolution. However, it is, nonetheless, possible to observe the influence of this ideological tradition at work within certain modern political controversies in Vermont.

Many conflicts have occurred between the desire of the state government to regulate development (in the interest of maintaining an overall ideal of Vermont as a political, economic, and cultural community) on the one side, and the desire to preserve individual interests and the local government (regarded as being most responsive to such libertarian desires) on the other side—a desire frequently expressed in terms of the classical liberal language of autonomous individualism and the fundamental right to have, and dispose of, property.[48] Frank Smallwood has commented upon these seemingly contradictory values that Vermonters, and their constitutional and political system, have tried equally to embrace.

> Vermont originally developed a unique mix of progressive, almost radical, conservatism as a result of its historical evolution. . . .
>
> The progressive political strain is seen in the 1777 Constitution of the Republic of Vermont the first in the nation to outlaw slavery, to abolish the requirement that voters must be property owners, and to provide for a uniform system of public school education. Yet, during its formative years to 1791, Vermont was also forced to develop a sense of more cautious conservatism in order to conduct the affairs of state of an autonomous independent republic . . .[49]

One way to enter upon such an examination is through the consideration of a political conflict with perceived constitutional implications. A visible controversy regarding state zoning and land management was challenged upon political and legal grounds, during the late 1980s and early 1990s, as a threat to certain "fundamental values" which were popularly perceived as relating to Vermont's unique history and constitutional tradition. This incident offers, in lieu of a more specific judicial controversy, an interesting and relevant perspective upon this broader theoretical issue.

Vermont's Act 200

The controversy surrounding Vermont's Act 200 is one of a long line of political conflicts between perceptions of public acquisition and private interests. This act of the Vermont legislature was created as part of the ongoing desire to control and regulate development within the state, ostensibly by encouraging greater

regulatory participation of local government, in cooperation with regional planning authorities within the state. It also was intended to promote uniformity of land use policy and to protect its citizens and local governments from potentially uncontrolled or abusive development projects, especially in response to the dramatic, and often undesirable, long-term effects of the state's image as a tourist haven. This ultimate aim is revealed in part of the report of the commission established to study it.

> Act 200 was adopted to facilitate the process whereby towns and cities can adopt their own plans and regulations, and the consequence of achieving that objective will be more control by towns and cities over land uses. . . .
>
> [However,] we concur with the reliance of the General Assembly on the existing statutory requirement, that municipal by-laws be in accord with municipal plans, to ensure that the local regulatory process will not be used unfairly against other citizens of the town or city, or against adjacent municipalities in the region who have participated with that municipality in the planning process.[50]

The language employed by both proponents and opponents of this act is instructive towards understanding the broader basis for this political controversy. The division of opinion on this issue represents a deeper historical divergence within the constitutional tradition of Vermont—one which can be traced back to the foundations of that tradition, in terms of the political creation of the Republic of Vermont and its transition to statehood. It relates to the revolutionary spirit that dominated the age and influenced the political changes that took place throughout North America, and it reflects the ideals of this constitutionalism and the ideology that informs the fundamental understanding of these ideals.

An Emerging Liberalism

Few educated members of the eighteenth-century Western European tradition remained uninfluenced by this emerging liberalism, whether in support or opposition to its tenets. This influence was equally strong for the economic social, and political elites of Vermont in the middle of that century. The fact that they stood to gain personally from their political actions does not diminish the reality and sincerity of the intellectual justification offered for those actions. The problem is that, unlike the situation found within the federal context, those justifications were not widely expounded—at least not explicitly.

This unique ideological heritage, which Dr. Smallwood describes as "radical conservatism," found political expression in a political "localism" until World War II. At that point, this tradition began to evolve in order to accommodate increasing demands for state governmental intervention in the areas of human services, economic development, and environmental protection.[51] It represented a shift from a political participation which focuses upon personalized local politics

to one which focuses upon systemic state politics. However, the interplay of both political approaches actually is consistent with the sort of ideological accommodation which helped to characterize the formative years of Vermont's constitutional development.[52]

Conflicting Goals—Controlling Economic Development and Defending Local Governance

The desire to control economic development is a theme that has been present for a long time in Vermont, making itself felt (both legally and politically) within the context of controversies regarding the creation and growth of the ski industry, the ban on commercial billboards, and the environmental protection sought under Act 250.[53] An excellent example of this theme is Act 200. This act of the state legislature (promoted vigorously under the administration of Governor Madeline Kunin, in the late 1980s) sought to subject plans for commercial and residential development under the control of "regional" authorities, in cooperation with local authorities. It is clear from the rhetoric in support of this act that it supported a larger vision of preserving the economic and cultural integrity of the state from negative (and, generally, outside) influences of unregulated development.

> Act 200 asks towns in Vermont to adopt a comprehensive planning document and a complementary implementation process. These will provide developers with specific information about the town's expected standards of development, the ground rules which developers can rely on while planning their projects. . . .
>
> A good town plan will help a developer identify areas where development may be inadvisable because of environmental conditions. . . . Act 200 actually makes it easier for the developer to comply with Vermont's environmental laws.[54]

These aims are consistent with a broader approach to state planning in the interest of a statewide desire for growth and stability, but one that still appeals to the popular theme of "local control."

> The old planning law was vague and easily ignored. Too many elements were optional—such as affordable housing, infrastructure improvements, energy considerations and cooperation with other towns in the region. Furthermore, state agencies were not forced to plan in compliance with local plans. Important decisions were being made in the regulatory arena without local input.
>
> The result was rapid growth emerging from poor land use decisions.[55]

However, opponents of Act 200 interpreted the matter entirely differently. They objected to the perception that it was just another example of unnecessary and burdensome interference from the central state government into matters that properly belonged to individual control. Critics, like Vermont political scientist Frank Bryan, were openly skeptical that Act 200 would grant such regulating

authority to local government. Instead, the regional councils that would bear this responsibility were regarded as being a superfluous extension of bureaucracy that would usurp the traditional control of town governments and their accessibility to citizens through the direct democratic process of town meetings and the smaller size and scope that made such governments generally more approachable and manageable.[56] Dr. Bryan's comments on the findings of the Costle Commission Report that advocated Act 200 provides a good example of this theme.

> Asking most Vermonters if they like "growth" is like asking them if they like April snowstorms.
>
> The report itself provided no new findings, and was only mildly interesting as a policy proposal. . . .
>
> In this case the governor's original bill was touted as "local control" when precisely the opposite was the case. . . .
>
> [The report] Tell[s] the legislature to write a law to rebuild society by creating new regional governments complete with taxing power and broad policy prerogatives.[57]

The fundamental values of republicanism and classic liberalism are echoed within these excerpts. A further example of this reflection can be observed within the report of a debate in which he and other advocates argued the underlying merits of these two conflicting positions.

> "Vermonter's are irascible democrats with a lower case 'd'," said Bryan, known for his views against centralism. "If we give up town meeting and local control, in 50 years we'll be trying to get it back." He complained that the state has long been going down the road of centralized control—in education, highways, welfare "and a whole series of things."[58]

It is instructive to contrast this response with the remarks of Mark Snelling, who was a member of the Governor's Commission on Vermont's Future and a strong advocate of the sort of statewide planning that Act 200 would promote. It is especially interesting to note his invocation of the theme of popular participation and control within this context.

> Snelling defended Act 200, the law that evolved from the Growth Commission's study, saying it "provides the framework for people to participate and take part. . . ."
>
> Growth in the state has been for the better, said Snelling, but growth means change. Whether one is happy about change depends on where he stands, he said. "If you are happy with the way things are, change is a threat. If you are unhappy, then you are eager for change," he said.[59]

This sort of debate is not merely a Vermont version of the common American theme of "conservative" versus "liberal."[60] This controversy reflects a conflict that, in many ways, actually defines the Vermont Constitution and describes the

state's constitutional tradition. Still, this comparison should not be overstated. It has been argued that Vermont never possessed a homogenous political and cultural community.[61] However, if it ever did constitute such an ideologically united community, that homogeneity certainly has been diluted, during its history. Such a transformation has been particularly true since the developments in communication and transportation, during the latter half of the twentieth century, have increased mobility and made the American population more heterogeneous and transient, including within Vermont. Therefore, such a constitutional tradition lacks the strength of continuity to be as subtle as it was, originally.

Constitutional Legacy of the Vermont Republic

Nonetheless, it is useful to examine Vermont's constitutional tradition in this way. It is especially interesting to compare this interpretation of republicanism (one that is not as preoccupied with imposing standards of private morality or "family values" as other versions, including ones found within the American Deep South) with the Jeffersonian model that was applied to the federal level. Hannah Arendt extended this interpretation to the twentieth century and applied it to an ideal vision of Jefferson's concept of government based upon a "ward system." This concept envisions American republican liberalism rooted in the actions of the free citizen and expressed at the most local level of political activity. That vision arguably also reflects part of the underlying theme that can be discerned within the Vermont Constitution.

> Jefferson himself knew well enough that what he proposed as the "salvation of the republic" actually was the salvation of the revolutionary spirit through the republic. His expositions of the ward system always began with a reminder of how "the vigor given to our revolution in its commencement" was due to the "little republics," how they had "thrown the whole nation into energetic action," and how, at a later occasion, he had felt "the foundations of government shaken under his feet by the New England townships," "the energy of this organization" being so great that "there was not an individual in the States whose body was not thrown with all its momentum into action." Hence, he expected wards to permit citizens to continue to do what they had been able to do during the years of revolution, namely, to act on their own and thus to participate in public business as it was being transacted from day to day.[62]

It is thus possible, upon this basis, to construct a model describing the particular vision of liberalism that motivated Vermont's constitutional tradition and history. Like other state constitutions, the Vermont version emphasized a "classical" liberalism based upon the "inalienable" relationship of person to property which sought to limit the scope of government through an emphasis on the role of the "most local" level of government, and the Vermont Constitution sought to accomplish this objective through such devices as equal town repre-

sentation in the assembly, statewide election of executive officials, and an explicitly strong emphasis on property rights.[63]

However, at the same time, there was a desire to protect and promote the interests of those landowning elites who had the greatest stake in the success of this arrangement. Therefore, the Vermont Constitution also promoted a governmental system that encouraged executive control over the legislature, continuity of control by a particular "ruling elite," and the capacity to pursue matters of interest to the whole of Vermont society through universal standards and application.[64] This former vision could be labeled as a "classical/republican/decentralist" liberalism, as opposed to the "reform/republican/centralist" liberalism of the latter vision. The former vision remained "dominant" among many of the inhabitants of Vermont, while the latter vision often provided the necessary machinery for officials at the state level to impose certain policies that would remain, ultimately, consistent with that particular liberalism of Vermont society.[65]

A popular resistance existed in Vermont, as in many states in the early and middle nineteenth century, including the use of state constitutional conventions as a means of stopping this centralizing trend that was perceived to be a threat to liberty and property. The Vermont Council of Censors was a body that had been created for that purpose. It existed from the late eighteenth century and throughout much of the nineteenth century, although its greatest activity and influence was achieved during the early part of that century. Its purpose was the review of legislation and the censuring of laws that it deemed to be unconstitutional. It could report to the state legislature and recommend the amending or rescinding of the laws that it found to be objectionable, thus assuming the role that traditionally belongs to the judiciary as the "third branch of government."[66] It demonstrated a libertarian, and elite, bias that was intended to counterbalance ill-advised popular measures.[67] Its achievements included the persuasion of the state legislature, in 1799, to repeal taxes that were imposed for the local support of the Gospel, meeting houses, and "first settled ministers." This 1797 act, and the council's objections to it, demonstrate the conflict of libertarian and republican values that has influenced the development of Vermont's constitutional tradition, as the proceedings on this specific controversy indicate.

> The framers of the [state] bill of rights . . . indisputably meant to convey the idea, that man necessarily possesses natural knowledge, or simple reason, which they have designated by the name of conscience. This they declare is inalienable, clearly conveying the idea, that one man cannot convey to another man his individual right of worshipping God according to the dictates of his conscience, any more than he can convey to him his right of breathing; for it is impossible in the nature of things, that one person can be profited intellectually, by a conveyance to him of another person's right of thinking; and if these premises are correct, it certainly follows, that the rights of conscience cannot be deputed; that religion is a concern personally and exclusively operative between the individual and his God; and that whoever attempts

> to control this sacred right, in any possible way, does it by usurpation and not by right. . . .
>
> Could not the legislature as well declare, that the inhabitants of every town in this state, should build a house for public worship, and settle and support a congregational minister, provided a certain number thereof were not possessed of a certificate, that they supported a minister of a different denomination? This would only support the same ground that the law contemplates, as in both cases the minority are only subjected by the majority. But in no case have civil power any constitutional right to interfere in religious concerns, except to bind persons or communities to discharge their civil contracts, individually entered into, for the mutual support of religious social worship.[68]

Perhaps, at its most basic level, the controversy over Act 200 also represents a more recent echo of that ideological struggle and a continuing example of the dominant ideology of the Vermont Constitution within the context of a modern and heterogeneous population that still may experience a relationship with its history and political heritage. This theme warrants further study, since it could contribute significantly to a greater understanding of popular opinion, political legislation, and judicial decision making at the state level, especially in states with a history and culture as distinctive as the former Republic of Vermont.

Cases and Opinions

State of Vermont vs. Raymond A. Jewett

Perhaps, the closest that the Vermont Supreme Court has come to considering such an interpretive approach is the 1985 case of *State of Vermont vs. Raymond A. Jewett*. The state Supreme Court heard an appeal from a defendant who had been convicted of driving a motor vehicle while intoxicated [DWI] and who was challenging that conviction upon the basis of a violation of both the "searches and seizures" clause of the Fourth Amendment to the United States Constitution and a similar clause (which, his attorneys argued, provides more stringent protection) found in CHAP. I, ART. 11 of the Vermont Constitution.

> That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.[69]

The opinion, written by Justice Thomas L. Hayes, expressed interest in the state constitutional claims. However, he also warned that such claims require substantiation. The "fundamental" basis for an interpretation of state constitu-

tional rights as being significantly "broader" than federally guaranteed rights must, he asserted, be demonstrated.

> The fact that law clerks working for state judges have only been taught or are familiar with federal cases brings a federal bias to the various states as they fan out after graduation from "federally" oriented law schools. The lack of treatises [or] textbooks developing the rich diversity of state constitutional law developments could be viewed as an attempt to "nationalize" the law and denigrate the state bench.[70]

Justice Hayes appealed, beyond this particular case, for a consideration of the nature and effect of this state constitutional tradition. The lack of such a substantive analysis was obvious and he suggested, among other possible approaches, an historical interpretation of that tradition might yield a meaningful insight into the beliefs, ideals, and values which shaped that document.[71]

Justice Hayes used his opinion to urge the legal profession to explore this issue, meaningfully. For that purpose he recommended the application of the same jurisprudential approaches to an interpretation of the Vermont Constitution as it has been used for declaring the larger philosophical and ideological meaning of the United States Constitution, throughout its judicial history.

> This generation of Vermont lawyers has an unparalleled opportunity to aid in the formulation of a state constitutional jurisprudence that will protect the rights and liberties of our people, however the philosophy of the United States Supreme Court may ebb and flow. . . .
>
> The development of state constitutional jurisprudence will call for the exercise of great judicial responsibility as well as diligence from the trial bar. It would be a serious mistake for this Court to use its state constitution chiefly to evade the impact of the United States Supreme Court. Our decisions must be principled, not result-oriented.[72]

The Vermont Supreme Court directed both parties in the case to submit additional briefs exploring this issue and set the case for reargument. Unfortunately, when the case was heard again, in 1986, the court ruled that those claims raised under the Vermont Constitution lacked the establishment of "a causal nexus" and were, therefore, rejected.[73]

State of Vermont vs. Robert Kirchoff—privacy rights

However, this issue was raised, again, within the 1991 case of *State of Vermont vs. Robert Kirchoff*. This appeal before the Vermont Supreme Court arose from a conviction for cultivating marijuana. The defendant had been charged with this offense after local police authorities, acting upon an informant's tip, had walked onto the defendant's posted land to an area that was not visible from any road

and, eventually, discovered a marijuana patch. Once they had made their discovery, the police left the site in order to obtain a search warrant. They acquired the warrant and, then, they confronted and arrested the owner of the property. A move to suppress the evidence that was seized during this search was denied during the trial.

The Vermont Supreme Court acknowledged that the United States Supreme Court had ruled that this sort of "walk-on" search was permitted by the federal constitution. That court had ruled, in the 1967 case of *Katz vs. United States*, that police could conduct a warrantless search of an area where a person does not possess, in Justice John Marshall Harlan's concurring phrase, "a reasonable expectation of privacy."[74] The federal high court elaborated upon this exception in the 1984 case of *Oliver vs. United States*, when it held that a reasonable expectation of privacy did not extend to "open fields" that a person might own or, even, inhabit.[75] However, the Vermont high court expressed grave reservations regarding this exception, particularly in respect to CHAP. I, ART. 11 of the Vermont Constitution. Initially, Justice James Morse, on behalf of the court, focused upon differences in the construction of the respective clauses of the federal and state constitutions.

> [T]he Vermont Constitution protects persons, houses, papers, and possessions, while the Fourth Amendment protects persons, houses, papers, and effects. . . . While our research suggests that, at the time the Vermont Constitution was adopted, the word "possessions" in certain contexts would have included all real estate over which an individual exercised a certain degree of control, . . . it also suggests that the word "effects" would have been susceptible to a similar definition. . . .
>
> Perhaps such endeavors would prove more useful if the drafters of the Vermont Constitution had left a more complete historical record. Unfortunately, the Vermont Constitution was adopted with little recorded debate.[76]

Nonetheless, the court emphasized the "spirit" of this Vermont constitutional guarantee, regardless of the difficulties inherent in a constructionist examination of ART. 11. The majority opinion strongly implied that Vermont's history and culture has provided the basis for a more stringent protection of privacy than the federal Supreme Court had interpreted in terms of the broader American experience. Judge Morse noted that even the explicit exceptions to this guarantee provided by the Vermont constitutional tradition have reflected this particular Vermont perspective and experience.

> Vermont law allows persons to enter lands for certain purposes under certain conditions. CHAP. II, SEC. 67, of the Vermont Constitution grants [*sic*] the people of this state the liberty "in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed . . . under proper regulations." Furthermore, 10

> V.S.A. SEC. 5212 limits a landowner's liability in negligence when the owner "gratuitously gives another permission, either actual or implied," to enter upon unposted land for "recreational purposes," such as "hunting, fishing, trapping, hiking, gathering wildflowers or berries, birdwatching, horseback riding, picknicking, swimming, skiing, snowshoeing and similar activities." These provisions evidence the state's policy of providing the public with certain privileges and liberties not permitted under the common law. They evidence no intent, however, to limit the right of landowners to pursue their affairs free from unregulated intrusion by officials.[77]

Therefore, the comparison of CHAP. I, ART. 11 of the Vermont Constitution and the Fourth Amendment of the United States Constitution must not, in the Vermont Supreme Court's opinion, dwell upon the construction but, rather, upon the specific "spirit" that provides the more meaningful basis for understanding this fundamental right and principle.

> Our decision, however, need not rest on the drafters' choice of one word over another. Even if we cannot say with confidence that the scope of the term "possessions" mandates a right of privacy in real estate, it certainly does not rule out such a right. We strive to honor not merely the words but the underlying purposes of constitutional guarantees, and to give meaning to the text in light of contemporary experience. . . . Instead, our duty is to discover and protect the core value that gave life to Article 11.[78]

Nonetheless, Justice James Morse seemed to have difficulty in identifying the precise source for this Vermont constitutional understanding. However, Judge Lewis E. Springer, in his concurring opinion, was not as reserved as his colleagues appeared to be in this respect. Indeed, he criticized them for failing to pursue this issue in order to arrive at the larger conclusion which the opinion of the overwhelming majority of the court clearly inferred.

> Our constitution differs both "historically and textually" from the United States Constitution. To comprehend the difference between the Fourth Amendment use of "effects" and the Article 11 "possessions," we should examine other provisions of those respective documents. The Court does this to a certain extent in its introductory portion of Part II by referring to McCabe, "State Constitutions and the 'Open Fields' Doctrine: A Historical-Definitional Analysis of the Scope of Protection Against Warrantless Searches of 'Possessions,' " 13 *Vt. L. Rev.* 179 (1988). Although McCabe, after careful and scholarly analysis, concludes that the ordinary person of 1777 would have understood that "possessions" included land, the Court needlessly abandons this understanding of possessions as a ground for its decision.[79]

Judge Lewis E. Springer's emphasis upon the "libertarian" character of the Vermont constitutional tradition, although based upon an historical analysis, was

not narrowly interpretivist. Instead, his analysis sought to ground this issue within the continuing ideological development of Vermont.

> When Article 11 is viewed in conjunction with the liberal provisions of other articles of the 1777 Vermont Constitution, there is solid ground for construing Article 11 broadly to hold that "possessions" intentionally included land as well as houses and papers within its protection. . . .
>
> Other provisions in Vermont's Constitution show a similarly expansive approach to political rights. The original document was adopted on July 8, 1777, entitled "A Declaration of the rights of the Inhabitants of the State of Vermont." The nineteen sections of Chapter I provide a unique and broad panoply of rights found in neither the constitutions of most of the thirteen states, nor in the original United States Constitution until the separate adoption of the first ten amendments known as the Bill of Rights.
>
> Further evidence of the libertarian focus of the Vermont Constitution is found in its preamble . . . [which] recites the land claim disputes between New York and the inhabitants of Vermont . . . for the purpose of making clear that the claims of New York, which that state had sought to enforce by invasions by law enforcement officers, were invalid and in violation of the rights of the owners of land involved. Protection of citizens' rights to security in their land was a key motivating force in creating the Vermont Constitution.[80]

Judge Springer concluded that the fundamental "spirit" of Vermont and its constitutional tradition has led to the development of an ideological tradition that continues to be more libertarian and "absolutist" regarding rights such as privacy and the protection against unlawful searches and seizures than the general American tradition.[81]

Property and Recreational Rights—Hunting and Fishing

Other cases have reflected the idiosyncrasies of Vermont's cultural and constitutional development. The 1986 case of, *Powell M. Cabot, et. al. vs. Robert G. Thomas, et. al.,* provided the Vermont Supreme Court with the opportunity to express the opinion that the issue of property rights is limited by a constitutional right to access that has been tied to the traditional importance of hunting and fishing within Vermont's history.[82] Hunting and fishing in Vermont has assumed a cultural significance that is, arguably, mythical in its scope; these activities have become a source of cultural identity (particularly among native Vermonters of European descent and Abenaki inhabitants of indigenous origins), as well as a source of recreation and, for many inhabitants of the state (until relatively recent times), a means of physical survival.[83] A noted author of popular histories, W. Storrs Lee, has expressed this traditional Vermont sentiment particularly well.

> The opening day of trout season on May 1 and the opening of deer season, middle of November, are not legal holidays in Vermont, but they are "taken off" with as clear a conscience as if they ranked with the Fourth of July and Christmas, and are observed with greater fidelity than any national or holy day on the calendar. They are the two days of the year when no property owner, regardless of her distinction, can afford to develop an emergency, for the plumber's telephone will ring unanswered hour after hour, the garage mechanic is out on a job, neither the electrician nor the carpenter is available, and the hired man simply faded away without a word after the morning chores.
>
> By any conciliatory Vermonter, absenteeism on either of the days is prudently overlooked. The big boys in school, for example, are playing hooky, but oddly enough the principal isn't in his office to call them to account. No one who fails to be where he ordinarily is on other days expects to be called upon for an explanation. It's just one of those things.[84]

This fundamental perspective is reflected within CHAP. II, SEC. 67 of the Vermont Constitution.

> The inhabitants of this state shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not enclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly.[85]

That significance prompted a unique development within the Vermont constitutional tradition. It was examined carefully within this case, which involved a controversial waterway known as Charcoal Creek. Despite the fact that "private property" was specifically exempted within the provisions of CHAP. II, SEC. 67, the lower court conviction of the defendants (who were supported by the Vermont Agency of Environmental Conservation as *amicus curiae*) for trespassing upon private lands was modified, although it was not overturned. The Vermont Supreme Court removed that portion of the lower court's injunction order that prohibited boat access to waters overlying private lands, including the plaintiffs' land. The state high court ultimately conceded that the right to control access to areas identified as "navigational easements" (such as water access points) across such property on the part of the individual owners (especially when they are incompletely enclosed) could not be regarded as absolute when found to be in conflict with a "collective" right of access which reflects the history of Vermont, as well as certain beliefs and values which differ, in this respect, from general American interpretations of specific and abstract notions of property rights.

> The questions raised in this case and in prior Charcoal Creek controversies lie at the crosscurrents of two important concerns: the individual's desire for private

> enjoyment of privately owned land and the public's wish for sporting access to the forests, fields, and waterways of this state. These are concerns that have long been in conflict.
>
> In the colonial period, residents of the New Hampshire grants (what was later to be Vermont) were well aware of the history of abuses that had occurred in England under authority of fish and game laws . . .[86]

Chief Justice Frederic Allen cited an 1896 fishing access case, *New England Trout & Salmon Club v. Mather* in which these English (and, later, British) fish and game laws of the seventeenth and eighteenth centuries were specifically criticized.[87] The dissenting opinion of Justice Duke G. Thompson asserted these laws had invoked the individual right to property as a means for an economic elite to inhibit the "individual development of the common people."[88] Those Vermont colonists who founded the republic and state had "smarted" under that sort of manipulation of the liberal rights tradition, and modified it, accordingly.[89] It is this modification that Chief Justice Allen felt was instrumental for understanding the Vermont constitutional tradition respecting this case and the fundamental issues that it raised.

> One response to the sometimes conflicting concerns of the individual and the larger group of society was Chapter II, Section 39 of the Vermont Constitution of 1777. Now found at Chapter II, Section 67, this provision guarantees to the public the "liberty" subject to legislative regulation, to hunt and fish in certain places. . . .
>
> Section 67 is an accommodation of competing goals. It offers a general delineation of not only the respective rights of landowners and sportsmen but also the authority of government to regulate those rights in the context of hunting and fishing.[90]

Approach to Constitutional Issues

Other cases deal with a uniquely Vermont approach to constitutional issues (especially those cases that expand upon federally defined rights and liberties),[91] but determining a definitive connection between these constitutional interpretations and a dominant ideological tradition that is particular to this state frequently is difficult. However, a constitutional tradition is not limited to its judicial expression. Constitutions are created, after all, by politicians; they are also influenced by the other branches of government and the broader evolution of social consensus. If the ideological basis of the Vermont Constitution is to be revealed, this revelation must come, by necessity, largely from outside the experiences of the state's judicial tradition.

Landmark 1997 Decision—Public Education, Public Duty, and Civic Virtue

The Vermont Supreme Court's search for a case that could be used to articulate the fundamental value system of the state's constitutional jurisprudence resulted in

the landmark 1997 decision of *Amanda Brigham, et al. vs. State of Vermont*. The plaintiffs challenged the reliance of public education throughout the state upon local property taxes and the resulting disparities in levels of funding and substantive quality of this education. The *per curiam* opinion of the Vermont Supreme Court agreed with that assessment, and it justified that conclusion through an appeal to the "republican" values that provides a foundation for Vermont's political, legal, and constitutional traditions. The textual support for that constitutional argument was provided by CHAP. 1, SEC. 7 of the Vermont Constitution.

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.[92]

"Virtue Clause"

The specific constitutional focus of this issue was found in CHAP. 2, SEC. 68, which is known as the "virtue clause."

> Laws for the encouragement of virtue and prevention of vice and immorality, ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the General Assembly permits other provisions for the convenient instruction of youth; and one or more grammar schools be incorporated, and properly supported in each county in this State. All religious societies, or bodies of men that may be united or incorporated for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities, and estates, which they in justice ought to enjoy, under such regulations as the General Assembly of this State shall direct.[93]

After reviewing empirical evidence in support of the disparity claim, the court concluded that the obligation of the state to provide public education surpassed the normal requirements for providing a general service. Regardless of the specific jurisprudential technique that the court chose to apply,[94] the outcome would remain the same, because the fundamental values that guide this issue remain, in the opinion of the court, consistent.

> We now turn to the chief contention of this dispute, namely, whether the disparities in educational opportunities outlined above violate Vermont law. We find the law to be unambiguous on this point. Whether we apply the "strict scrutiny" test urged by the plaintiffs, the "rational standard" advocated by the State, or some intermediate level of review, the conclusion remains the same; in Vermont, the right to education

> is so integral to our constitutional form of government, and its guarantees of political and civil rights, that any statutory framework that infringes upon the equal enjoyment of that right bears a commensurate heavy burden of justification. The State has not provided a persuasive rationale for the undisputed inequities in the current educational funding system. Accordingly, we conclude that the current system, which concededly denies equal educational opportunites, is constitutionally deficient.[95]

This obligation reflected, for the court, a fundamental tenet of the theory of government that guided the framing, and continues to guide the evolution, of the Vermont constitutional tradition.

> From its earliest days, Vermont has recognized the obligation to provide for the education of its youth. That obligation begins with the education clause in the Vermont Constitution. A provision for the establishment of public schools was contained in the first Vermont Constitution of 1777. . . . The clause was amended in 1786 as part of a comprehensive constitutional revision. The amendment modified the language of the section and combined it with the so-called "Virtue" Clause which followed the Education Clause in the original Constitution, to read as follows "Laws for the encouragement of virtue, and the prevention of vice and immorality, ought to be constantly kept in force, and duly executed: and a competent number of schools ought to be maintained in each town, for the convenient instruction of youth. . . . "
>
> Two points are striking about this constitutional provision. First and foremost is its very existence. It is easy to forget from the perspective of two centuries the daunting task that confronted the framers of Vermont's initial government and law. They were compelled to create an entirely new Constitution setting forth, at a minimum, a declaration of fundamental human rights and a basic frame of government. The fact that they chose, in this statement of first principles, to include a right to public education . . . is remarkable.
>
> The important point is not simply that public education was mentioned in the first Constitution. It is, rather, that education was the only governmental service considered worthy of constitutional status. The framers were not unaware of other public needs. . . .
>
> Despite the obvious public concern for those least able to care for themselves, the framers made no provision in the Constitution for public welfare or "poor relief" as it was then known. Indeed, many essential governmental services such as welfare, police and fire protection, transportation, and sanitation receive no mention whatsoever in our Constitution. Only one governmental service—public education—has ever been accorded constitutional status in Vermont.[96]

This originalist approach dominated this part of the opinion, although, again, the emphasis ultimately was placed upon the evolution of this right, rather than an evaluation of its meaning for a specific group of people that is "frozen" at a particular period of time. Furthermore, it is important to remember that the court emphasized the result of the state's policy in this area, rather than the

command of the law that created it. The influence of legal realism is evident within this decision, and it suggests, further, the influence of the pragmatist approach towards liberal democratic principles and values within the context of Vermont society and its constitutional law. The republican theme was pursued, in this context, by the court, and it provided the ultimate justification for the opinion and for an overall interpretation of Vermont constitutional law.

> Thus, the founders of the frontier Republic of Vermont to fostering of republican values, or public "virtue" as it was commonly known in the eighteenth century, was not the empty rhetoric it often seems today; it was an urgent necessity—a matter literally affecting the survival of the new Republic. . . .
>
> In 1786, as noted, the Virtue and Education Clauses were combined to form a single section. Nothing could be more indicative of the close connection in the minds of the framers between virtue and all that that implied—civic responsibility, ethical values, industry, self-restraint—and public education than this textual union within the Constitution. No explanation for the 1786 modification survives, but the logical connection is self-evident. The amalgamation was perfectly consistent with the commonly held view of the framers that virtue was essential to self-government, and that education was the primary source of virtue.[97]

It is very important to note, though, that the court's opinion emphasized the fact that education is an institution that provides citizens the tools that they need to attain virtue; it is not an instrument for dictating a particular set of values that the individual citizen would, then, be required to practice. That distinction offers a marked difference between this Vermont version of republicanism and more traditional interpretations of that variant of liberal democracy. The difference seems more apparent when considered within the context of the writings of Ira Allen upon the subject, which was quoted within the *per curiam* opinion.

> The greatest legislators from Lycurgus down to John Locke, have laid down a moral and scientific system of education as the very foundation and cement of a State; the Vermonters are sensible of this, and for this purpose they have planted several public schools, and have established a university, and endowed it with funds . . . to draw forth and foster talents. The effects of these institutions are already experienced, and I trust that in a few years the rising generation will evince that these useful institutions were not laid in vain; . . . our maxim is rather to make good men than great scholars: let us hope for the union, for that makes the man, and the useful citizen.[98]

The state argued that the decentralized tradition of Vermont constitutionalism mandated that the principle responsibility for education remained with local governments and their primary source of revenue, which is the property tax. The court acknowledged the arguable existence of a decentralizing tendency within Vermont's political tradition and its interpretive effect upon the Vermont

constitutional tradition, but it refused to confirm the state's broader contention that this implied tradition abrogated the state government's explicit constitutional responsibility for funding education, both equitably and adequately. Instead, it reemphasized the duty of the state government in this respect.

> Notwithstanding its long and settled history as a fundamental obligation of state government, the State contends that the primary constitutional responsibility for education rests with the towns of Vermont, that its funding must be derived from whatever sources are available locally, that the only substantial tax available to towns is the property tax, and therefore that funding inequities are an inevitable—but nevertheless constitutional—consequence of local disparities in property wealth. The State asserts that its only responsibility, if any, is to ameliorate inequities if they become too extreme, and that it has acted responsibly in this role. This argument fundamentally misunderstands the State's constitutional responsibility—outlined above—for public education. The state may delegate to local towns and cities the authority to finance and administer the schools within their borders; it cannot, however, abdicate the basic responsibility for education by passing it on to local governments, which are themselves creations of the state.[99]

Therefore, the state government was compelled to modify the funding structure for education within Vermont. However, in this respect, the court's imposition of "civic virtue" related only to the duty of the sovereign; no obligations, in this respect, were imposed upon the individual citizen. Indeed, no recourse to the "virtue clause" has ever been made by the Vermont judiciary in a manner that has imposed sanctions or prescriptions regarding private behavior. Rather, within that area of Vermont jurisprudence, libertarian principles have proven to be dominant. Consequently, it is possible to argue that the "republicanism" that has been identified by the Vermont Supreme Court actually reflects a subtly different variation upon liberal democratic ideology.

Stan Baker vs. State of Vermont, et al.— Marital Laws and the Inclusive Community

This reasoning also was apparent within the 1999 Vermont Supreme Court case of *Stan Baker, et al. vs. State of Vermont, et al*. The plaintiffs challenged the constitutionality of the state's marital laws, particularly the denial of benefits to gay and lesbian couples provided, otherwise, to heterosexual married couples. Although they based their challenge partially upon the "privileges and immunities" clause of the Fourteenth Amendment of the United States Constitution, the primary claim was based upon the "common benefits" clause, found in CHAP. I, ART. 7 of the Vermont Constitution.

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.[100]

The court determined, within Chief Justice Jeffrey Amestoy's opinion, that this clause is rooted in an understanding, consistent with the state's general constitutional tradition, that all "classes" of Vermont residents are entitled to share in the services and advantages provided by the state government, unless distinctions can be justified.[101]

> The words of the Common Benefits Clause are revealing. While they do not, to be sure, set forth a fully-formed standard of analysis for determining the constitutionality of a given statute, they do express broad principles which usefully inform that analysis. Chief among these is the principle of inclusion. As explained more fully in the discussion that follows, the specific proscription against governmental favoritism toward not only groups or "sets of men," but also towards any particular "family" or "single man," underscores the framers' resentment of political preference of any kind. . . . Thus, at its core the Common Benefits Clause expressed a vision of government that afforded every Vermonter its benefit and protection and provided no Vermonter particular advantage.[102]

Vermont's Special Constitutional Heritage—Common Benefits Clause

The court recognized the origins of both the American and the Vermont concepts of equality, even though this " 'egalitarian ideology' conspicuously excluded many oppressed people of the eighteenth century—including African-Americans, Native-Americans, and women—it did nevertheless represent a genuine social revolt pitting republican ideals of 'virtue,' or talent and merit, against a perceived aristocracy of privilege both abroad and at home."[103] That concept was particularly important for the development of Vermont's unique constitutional heritage.

> The historical origins of the Vermont Constitution thus reveal that the framers, although enlightened for their day, were not principally concerned with civil rights for African-Americans and other minorities, but with equal access to public benefits and protections for the community as a whole. The concept of equality at the core of the Common Benefits Clause was not the eradication of racial or class distinctions, but rather the elimination of artificial governmental preferments and advantages. The Vermont Constitution would ensure that the law uniformly afforded every Vermonter its benefit, protection, and security so that social and political preeminence would reflect differences of capacity, disposition, and virtue, rather than governmental facor and privilege.[104]

This standard was contrasted with the federal principle of equality enshrined by the Fourteenth Amendment of the United States Constitution. The core of this interpretation is grounded upon the particular definition of "community," as provided by this state tradition of republicanism.

> The language and history of the Common Benefits Clause thus reinforce the conclusion that a relatively uniform standard, reflective of the inclusionary principle at its core, must govern our analysis of laws challenged under the Clause. Accordingly, we conclude that this approach, rather than the rigid, multi-tiered analysis evolved by the federal courts under the Fourteenth Amendment, shall direct our inquiry under Article 7. As noted, Article 7 is intended to ensure that the benefits and protections conferred by the state are for the common benefit of the community and are not for the advantages of persons "who are a part only of that community."[105]

The response of the Vermont General Assembly to the Vermont Supreme Court's ruling, in this case, resulted in the legislative enactment of "civil union" status for gay and lesbian couples, including all benefits and privileges married couples receive from the state government. Although this constitutional mandate and result seems very progressive for an American state, its underlying basis is a unique interpretation of classical republicanism and, yet, another example of the Vermont judicial system's exploration of the ideological foundation of the state's constitutional tradition.

Legacy of Pragmatism

That heritage has been influenced by unique legacies of both republicanism and pragmatism and affected, also, by certain libertarian influences. The contribution of pragmatic political thought arguably has been, especially, influential. The legacy of pragmatism has been experienced throughout American law, politics, and society. However, it is possible to argue that the legacy originated within the unique historical and cultural confines of Vermont, especially in relation to the heritage of the democratic process that has been practiced there, throughout its history. The combination of a heightened preservation of individual civil rights and liberties, the promotion of the positive role of the state, a tendency to defer to local government, and a willingness to employ social science tools in support of legal realist analyses offer strong evidence in support of this assertion. This perspective offers an explanation for the seeming contradictions of libertarian and republican values that have permeated Vermont's constitutional history. It provides a legacy that could serve as a model for the broader American constitutional tradition, especially as federal jurists attempt to conciliate the seminal precedents of the courts of different eras, in which the conflict between individual rights and collective needs continue to be debated within the spacious context of American public law and political theory.

Chapter 9

Wyoming
Communitarian Ideal

Certain American states conjure certain images in terms of a perception of popular culture and values, as related to their respective societies. It is not surprising that these images can be associated with formal institutions, since these institutions (especially public ones related to the operation of government) reflect, by their very nature, the "culture" that they serve. Institutions that operate within the realm of the legal and judicial systems are particularly affected by this sort of popular association. These images, regarding popular culture, often prove to be useful for many people in terms of defining their fundamental relationships with government, other people, and society, in general.

This "culture," in turn, contributes to the development of a set of beliefs and values that become manifest within a specific variation of an ideological tradition. However, it is crucially important that a popular image of a state's "culture" is distinguished from the real beliefs and values that actually are embraced by its society (even if it is not readily acknowledged), especially when it is examined from an external perspective. Otherwise, reactions to that image may be based upon inaccurate, and even dangerous, stereotypes.[1]

It is arguable that the popular image of the Wild West is the strongest and most pervasive myth of American society. It is an image that has been associated with key policies and movements found throughout American history, including homesteading, the gold rushes, and the concept of "manifest destiny." This popular myth has helped to shape an equally strong perception of the individual American as being one who is able to function and thrive without the need of external assistance or, even, the benefit of a relationship to a society. The rugged cowboy, gunfighter, explorer, or trader offers an excellent example of this American Western mythology.[2]

Wyoming and the American West

Wyoming is, perhaps, the state that is most frequently associated with the popular culture of the American West. It is one of the Rocky Mountain states, and it is located in the midst of that semiarid, geologically complex part of the North American continent that influenced the economic development of westward expansion. The area that is now Wyoming has been inhabited by people for thousands of years, but it has been most frequently occupied, among both native and nonnative peoples, by temporary or transitory occupants. Ironically, this demographic trend would provide a basis for a popular self-perception of the solitary, restless, and dynamic character of the typical Wyoming resident. It would contribute to the popular myths and cultural images that have become an enduring legacy of the history of that territory and state that have made it a central focus of America's general frontier heritage.

People have lived within the geographical region that constitutes Wyoming for over ten thousand years. The first identifiable inhabitants appear to have been the Anasazi people of approximately two thousand years ago. However, more recent indigenous inhabitants, such as the Arapaho, Sioux, Bannock, Blackfoot, Ute, Flathead, Shoshoni, Modoc, Nez Percé, Kiowa, and, especially, the Cheyenne and Crow, are more typical, in this respect. These peoples moved frequently, following climactic changes and the migratory patterns of game animals, especially the bison—otherwise known as the American buffalo.[3]

These peoples needed to be strong and self-reliant, but they also were (consistent with the traditions of most of North America's aboriginal peoples) interdependent and strongly tied to a sense of community and mutual obligation. These values gave them a strong sense of identity. This sense of identity was reinforced by the often harsh conditions that this land imposed upon them, and it contributed to equally strong antagonisms among different native peoples, whose basic interests often conflicted as they competed for the use of hunting grounds and other resources. These antagonisms strengthened the attachment that individual members developed towards their exclusive community while, simultaneously, it placed an obligation upon them to contribute to the survival and, in good times, prosperity of that community through deeds of perseverance and courage.[4]

These diverse peoples dominated this region when Europeans arrived during the eighteenth century. These immigrants also were forced to adapt to the prevailing geographic and climactic conditions by pursuing livelihoods that demanded a great deal of individual initiative, persistence, and autonomous capacity. They included French voyageurs and, during the early eighteenth century, British and American trappers. An American military commander, General William Ashley, recognized the need to coordinate the economic activities of these trappers, since they operated alone and in virtual isolation from each other.

Therefore, he established a gathering, for the purpose of the sale and barter of furs, along the Green River in 1824. This gathering was repeated annually for more than two decades, and it established a pattern of balancing individual self-sufficiency within a cooperative framework that would continue to guide the economic, political, and social behavior and values of the people of this region.[5]

Relatively few people who came to this region remained long, despite the discovery of oil and minerals. The region became, instead, a popular crossroads for people whose ultimate destination was the Pacific coast. The Oregon trail proceeded through this area, as well as other notable trails and passes. The United States Government established a military presence there through the construction of Fort Laramie and Fort Bridger, in order to protect travelers. However, the lack of permanent settlers persisted, and it contributed to the incorporation of the region into the shifting boundaries of various United States territories, including Oregon, Washington, Idaho, and Dakota, while parts of this region also were controlled, at various times, by Spain, France, Mexico, and the Republic of Texas.[6]

Therefore, this region lacked a sense of cohesive identity; it was easy for a nonnative inhabitant to think in terms of a separate, isolated, and highly autonomous existence and identity. This identity would be reinforced during the 1850s and 1860s, when native peoples throughout this area began to defend their traditional lands against the incursions of explorers, miners, and migrants who were traveling westward through the region. Treaties that were intended to end these conflicts (particularly the Fort Laramie Treaty of 1868) were broken, particularly because of the activities of gold prospectors who followed Rocky Mountain gold veins into the region. The American military suppressed these conflicts and eventually drove the Sioux people from the region, while permanent settlers (especially ranchers and miners) began remaining there in increasing numbers and established permanent towns. The population and economic significance of the area increased sufficiently to enable the United States Congress to justify the organization of a territory (which was created from parts of the territories of Utah, Idaho, and Dakota) in 1868. This territory was named Wyoming, which was a name adapted from the language of the aboriginal Delaware people to indicate a great plain.[7]

President Ulysses S. Grant appointed his assistant secretary of war, Brigadier General John A. Campbell, to be the first territorial governor. The first territorial legislature was noted for recognizing, in 1869, the equal rights of women. This action allegedly was based upon an unsuccessful desire, by a strong opposition group within the legislature, to force the governor to veto an appropriations bill by attaching this gender equality provision as an amendment to it. However, the governor refused to be goaded in this manner and he allowed the bill to pass. The legislature attempted to reverse this decision, during the next session. But women had become sufficiently strong as a voting group, by then, to influence the

defeat of this measure.[8] Therefore, the equality of women became an accepted fact of Wyoming political life, even though Wyoming society was not necessarily more enlightened or progressive than any other territory or state of the United States.[9] It was a political fact which, ultimately, could not be rescinded and which was confirmed within the Wyoming Constitution when it was drafted and adopted in 1889.[10]

Johnson County Cattle War

A more accurate example of the general values and character of Wyoming residents can be offered in the form of the "Johnson County Cattle War" of 1892. The cattle industry expanded greatly during the territorial period. The Wyoming Stock Growers Association was organized by the larger, and more prosperous, cattle ranchers of the territory. This association facilitated the cooperation of its members in terms of enhancing and protecting the marketplace, sharing common resources, and, generally, promoting the industry. It also succeeded in dominating territorial politics and prompted the enactment of laws and policies that benefited the industry.

However, during the 1880s, increasing numbers of small, independent cattle ranchers were operating within the territory. These homesteaders (also known as "nesters") competed with the members of the association; some of them also were accused of cattle rustling. The members of the association generally resented the independence of these smaller operations; they were perceived as being uncooperative and their actions as being counterproductive to the economic prosperity of the territory. This attitude partially was prompted, admittedly, by a frustration over personal profits and the damage that the disastrous weather of the summer and winter seasons of 1886 and 1887 inflicted upon the cattle industry. Furthermore, the activities of cattle rustlers appeared to target the members of the association, which strengthened their suspicions regarding the "nesters."[11]

The resulting violent conflict was relatively minor, but it underscored a trend in the development of Wyoming society. Some of the members of the Stock Growers Association became frustrated at the inability of the judicial system to produce convictions of suspected cattle rustlers, whom, they felt, included many of the smaller ranchers. They formed a secret group, called the "Invaders," which, with the help of Texas mercenaries, conducted a surprise raid upon the Kaycee Ranch, near Casper, resulting in the death of two ranch hands. The ranchers of neighboring Johnson County were motivated by mutual fear and organized a large posse which surprised and surrounded the Invaders at the T A Ranch, near the county seat of Buffalo. Further violence was averted through the intervention of federal troops and the arrest of the members of the Invaders, who later were acquitted.[12]

Larger Community Values and Wyoming Stock Growers Association

The Johnson County Cattle War demonstrated the conflicting values that have influenced the dominant ideological development of Wyoming. The American

West, in general, and Wyoming, in particular, have conveyed an image of rugged individualism that eschews the idea of communal interdependence. That image has been particularly pertinent in relation to occupations that have dominated Wyoming, historically, including mining and ranching. However, that situation has not resulted in such a libertarian ethic. In fact, while independence and individual autonomy have been prized within this society, communal cooperation and the acquiescence in majoritarian decisions and forms of behavior have strongly influenced it, as well. In particular, the sharing of resources, the willingness to suppress individual desires for the needs of society, an identification with a larger community, are values that were expressed through the creation and growth of the Wyoming Stock Growers Association, the cooperative efforts of the Johnson County posse, the theme of sharing resources, and the ultimate willingness to trust the "system" (despite occasional diversions from that course of action) for the purpose of addressing claims, disputes, and matters of common concern.

The traditional image of Wyoming as a place that promotes a sense of strong individual values has been widely romanticized, especially within popular culture.[13] A classic literary example of both this genre and cultural image can be found within the popular western novel, *The Virginian.* This novel, which is set in Wyoming and which, later, provided the inspiration for a popular television series of the same name, conveys a stereotype image of Wyoming as being a land of tough, self-reliant adventurers who embrace strong libertarian values of rigid individual autonomy.

> There had been silence over in the corner; but now the man Trampas spoke again.
>
> "*And* ten," said he, sliding out some chips from before him. Very strange it was to hear him, how he contrived to make those words a personal taunt. The Virginian was looking at his cards. He might have been deaf.
>
> "*And* twenty," said the next player, easily.
>
> The next threw his cards down.
>
> It was now the Virginian's turn to bet, or leave the game, and he did not speak at once.
>
> Therefore Trampas spoke. "You bet, you son-of-a—."
>
> The Virginian's pistol came out, and his hand lay on the table, holding it unaimed. And with a voice as gentle as ever, the voice that sounded almost like a caress, but drawling a very little more than usual, so that there was almost a space between each word, he issued his orders to the man Trampas:—
>
> "When you call me that, *smile!*" And he looked at Trampas across the table. . . .
>
> "Sit quiet," said the dealer, scornfully to the man near me. "Can't you see he don't want to push trouble?" He has handed Trampas the choice to back down or draw his steel.
>
> Then, with equal suddenness and ease, the room came out of its strangeness. . . .

> For Trampas had made his choice. And that choice was not to "draw his steel." If it was knowledge that he sought, he had found it, and no mistake! We heard no further reference to what he had been pleased to style "amateurs." In no company would the black-headed man who had visited Arizona be rated a novice in the cool art of self-preservation.[14]

Cattle and Sheep Ranchers

However, despite this popular image, Wyoming has produced a society that has promoted cooperation and collective values, although these libertarian values also persist, especially as they are reinforced by the broader context of American society in which Wyoming exists. The infamous dispute between cattle and sheep ranchers, during the 1890s and the first decade of the twentieth century, underscored these themes and the specific ideological values that they tended to promote. Cattle ranchers claimed that sheep cropped grass so closely when they grazed that cattle were unable to graze upon it. The fact that common ranges were involved prompted open hostilities (such as the Ten Sleep raid of 1909), since cattle ranchers resented the alleged exhaustion of this resource by sheep ranchers. Eventually, this dispute was resolved through a general agreement to cooperate, share, and work towards the mutual economic welfare of the state, rather than the exclusive benefit of the organizations which represented the respective ranching interests.[15] This issue also underscored the importance of natural resources for the purpose of achieving this general prosperity, as well as the ideal that no group or person should be allowed to dominate those resources, even if they owned them, to the detriment of other relevant parties.[16]

Rasmussen vs. Baher—Electoral Validity

The first significant judicial pronouncement upon the underlying, fundamental values of the Wyoming Constitution occurred within the 1897 case of *Rasmussen vs. Baker.* The election of the treasurer of Carbon County was disputed, because the victorious candidate had received, in this close decision, a bloc of votes from naturalized citizens who had been born in Finland and who could not read the English language. The plaintiffs challenged the validity of these votes through an invocation of the language of ART. 6 of the Wyoming Constitution, and especially SEC. 9 of that article.[17]

Article VI

> SEC. 2: Every citizen of the United States of the age of twenty-one years and upwards who has resided in the State or Territory one year, and in the county wherein such residence is located sixty days next preceding any election, shall be entitled to vote at such election, except as herein otherwise provided.

> SEC. 9: No person shall have the right to vote who shall not be able to read the constitution of this State. The provisions of this section shall not apply to any person prevented by physical disability from complying with its requirements.[18]

The requirement that a citizen must be able to read the Wyoming Constitution in order to be eligible to vote was interpreted by the Wyoming Supreme Court as providing a prohibition against these Finnish speaking citizens of Carbon County, even though they had access to, and could read, a Finnish translation of that document. This requirement was motivated by a general desire to limit the franchise to persons whose characteristics made them acceptable to the other members of the body politic.[19] This attitude of exclusivity and community identity was reflected during the Wyoming constitutional convention debates, in 1890, especially by delegates such as the convention president, Melville C. Brown of Albany.

> I have said once on the floor of this convention, or committee, that the right of suffrage in my opinion is not a right but a privilege, and I propose to be consistent in that declaration through all. Now considering it a privilege, it is one that we, as a people, may bestow upon such classes of citizens as we see fit. . . . The educational test is proposed in our constitution as one that may guide and control this question of suffrage. . . . I may say, I think without fear of contradiction, that universal suffrage in the south has not worked to the highest good and welfare of that country, and if there is any objection to be urged against the measure that gave universal suffrage to the people of that country and those states, it is based, and must be based, upon the sole proposition of their ignorance. It is bringing into political affairs a man of ignorance that might endanger the welfare of that country.[20]

The court reached its interpretation of this constitutional clause through the application of a strict "constructionist" approach towards constitutional adjudication. The adoption of this approach is significant, especially since it has remained a popular one with Wyoming jurists, throughout the state's history.[21] A constructionist approach frequently is associated with the broader designation of judicial "interpretivism," which includes a variation of that approach that is known as the doctrine of "original intent."[22] A principal justification for the adoption of this approach is based upon a particular interpretation of democratic theory, as noted by one of its leading scholarly proponents, Raoul Berger.

> This study seeks to demonstrate that the Court was not designed to act, in James M. Beck's enthusiastic phrase, as a "continuing constitutional convention," that the role assigned to it was far more modest: to police the boundaries drawn in the Constitution. A corollary is that the "original intention" of the Framers, here very plainly evidenced, is binding on the Court for the reason early stated by Madison:

> if "the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable [government], more than for a faithful exercise of its powers."
>
> The present generation, floating on a cloud of post-Warren Court which read its libertarian convictions into the Fourteenth Amendment, forgetting that for generations the Court was harshly criticized because it had transformed *laissez faire* into constitutional dogma in order to halt the spread of "socialism." . . .
>
> Against the fulfillment of cherished ideals that turns on fortuitous appointments must be weighed the cost of warping the Constitution, of undermining "the rule of law." The Court has shown in the past that the Constitution can also be twisted to frustrate the needs of democracy.[23]

That sentiment was expressed by Chief Justice C. J. Potter within his opinion for a unanimous court.

> The primary principle underlying an interpretation of constitutions or statutes is that the intent is the vital part, and the essence of the law. "The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. In the case of all written laws, it is the intent of the lawgiver that is to be enforced." Such intent, however, is that which is embodied and expressed in the statute or instrument under consideration. . . . If the language employed is plain and unambiguous, there is no room left for construction. It must be presumed that in case of a constitution the people have intended whatever has been plainly expressed. Courts are not at liberty to depart from that meaning which is plainly declared.[24]

It is that search for the "plain meaning" of this section which led Justice Potter to ruminate upon the intention of the people of Wyoming and their delegates who framed that state's constitution. He declared, explicitly, that "[t]he debates of the [Wyoming constitutional] convention are not a very reliable source of information" for the purpose of understanding the fundamental beliefs and intent of the framers,[25] yet he was convinced that the actual construction of the Wyoming Constitution offers sufficient clues for achieving that purpose.

> When the word [constitution] was used, the convention was engaged in formulating, and the people afterward in ratifying and adopting, a written instrument containing organic rules for their government. They were proceeding to organize and establish a State, and to lay down in written form certain fixed and inflexible principles and mandates, which should, until legally changed, be adhered to by all departments and officials, and by the people themselves. It is self-evident that the common acceptation of the word "constitution" elsewhere in this country, was the sense in which they understood and employed it in providing that one qualification for an elector should consist in an ability to read the constitution of this State, which was in writing and existed in no other condition. Thus, in giving to the word as large a meaning as it is capable of imparting in its relation to the other words

> of the section, it signifies a written instrument only. In that sense we have the natural, ordinary, and obvious meaning of the term, and in that sense we are to determine the essential qualities of an ability to read it. Whether a person in reality is capable of reading it by reading a translation in some language other than English, depends upon a correct solution of the question whether such a translation is in fact the constitution, or is in truth and common acceptance a copy of it.[26]

However, in addition to the specific words, the underlying motives also were examined and revealed within this majority opinion. In fact, the ultimate purpose of this section of the Wyoming Constitution was determined to be one that promoted a particular, and somewhat exclusive, definition of Wyoming society. Voting rights for individual citizens were regarded as being extremely important, but when these rights collided with the community's desire to define itself and its overall interests as a community, the will of the "majority," according to Justice Potter (who was an influential member of the Wyoming constitutional convention and had direct knowledge of the activities and decisions of the "committee of the convention on suffrage"), was meant to prevail.

> In all probability there would occur no disagreement after a careful scrutiny of those debates, regarding the general purpose the [Wyoming constitutional] convention had in view by the adoption of the educational qualification. Throughout all the discussion, a particular class of voters was prominently mentioned. That was what was called the uneducated foreign element in the coal mining camps along the line of the Union Pacific Railroad. They were, by some, spoken of as ignorant of our institutions, and it was claimed that they were not intelligent voters. It would seem that it had been the positive intention not to deprive the foreign-born citizen of the right to vote, in case he was sufficiently educated in his own language to read a translation of the constitution, that intention would have been expressed, or some provision would have been made for translations. Had some such provision been made, there might have been room for modifying the ordinary import of the clause.[27]

The elected legislature might be permitted to expand the interpretation of constitutional clauses, but the judicial branch, according to the Wyoming Supreme Court, is not entitled to do it.[28] Furthermore, the legislative branch of government may be able to restrict, under certain circumstances, the scope of civil rights and liberties within the state.

> The sovereignty resides in the people, although by written constitutions, they have delegated the exercise of sovereign powers to several departments. . . . But this control and direction must be exercised in the legitimate mode previously agreed upon. "Participation in the elective franchise is a privilege rather than a right, and it is granted or denied on grounds of public policy; the prevailing view being that it should be as general as possible consistent with the public safety." The sovereign

> power residing primarily in all the people, but in fact and practically with those only who possess the right of suffrage, it would seem that none who are not clearly embraced in any restriction of such right should be excluded.[29]

The tone of this opinion is unmistakable, and it is strongly echoed in the concurring opinion of Chief Justice Samuel T. Corn.[30] This section eventually was declared to be invalid, but the theme of deference to the "popular will," even when it appears to conflict with individual rights, has remained active throughout Wyoming's jurisprudential and constitutional history. It is based upon the "command theory" of law, which stresses that a law is a positive command of the sovereign, and no other person or institution should challenge that command.[31] This theory disavows attempts to "second guess" the motivations of the framers of legislation; it is their *declared* intentions and will (which reflect the "command" of the community that delegated this responsibility to them), and *not* the effects or results of a law on individual people and circumstances, which should provide the *only* legitimate basis for all legal and constitutional interpretation.[32] This judicial approach is found frequently within Wyoming constitutional jurisprudence, and it may support further the contention that a communitarian tradition appears to have persisted as a dominant ideological theme of Wyoming culture, law, politics, and society.[33]

"Collective Rights"

This attitude provides a basis for the modern legal concept of "collective rights." This concept generally has remained ill-defined and misapplied, especially in relation to the more theoretically meaningful conceptualization of individual rights, both human and civil. The term "collective rights" denote a rights claim that belongs to a group, rather than a person or human being. These claims have been made with particular frequency in relation to the political and economic activities of labor unions (including a collective right to strike), the practice of cultural group activities (which claim has been advanced especially in terms of aboriginal peoples), and the appeal of nations, within an international law environment, to self-determination.[34] It is associated with a sense of collective identity, so the fundamental values that provide its conceptual basis often have been linked to a broader communitarian tradition of liberal democratic thought.[35]

Individual members of these groups are expected to subsume their separate and distinct interests, needs, and rights to the goal that the group is advancing through this collective rights claim. Another important feature of this concept is the belief that it is an exclusive right; the group can include people who seek admittance, but it is not obliged to receive them.[36] This concept of exclusivity has, at times, been accused of providing a means for the majority members of a group (including a politically defined society) to deny persons their individual rights of self-expression, including values of personal identity and self-actualization.[37] It is

possible that cases such as *Rasmussen v. Baker* reflect a similar ethic, since they seek to promote an exclusive definition of Wyoming society and to promote the interests of that collectivity against the individual claims of persons who want to exercise the right to vote and participate within the political system.

Collective and Populist Values

Collective and populist values already were well-entrenched within Wyoming society when the territory sought to achieve the status of statehood, during the late 1880s. They account for the adoption of a prominent section of the constitution that the territorial legislature adopted in 1889 and which became the basis for the state constitution that was approved by Congress, the following year. ART. 8 of the Wyoming Constitution is very specific regarding the disposition of, arguably, the most precious natural resource found within that state.

Article VIII

> sec. 1: The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.
>
> sec. 2: There shall be constituted a board of control, to be composed of the state engineer and superintendents of the water divisions; which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and of their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions [are] to be subject to review by the courts of the state.
>
> sec. 3: Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.
>
> sec. 4: There shall be a state engineer who shall be appointed by the governor of the state and confirmed by the senate; he shall hold his office for the term of six (6) years, or until his successor shall have been appointed and shall have qualified. He shall be president of the board of control, and shall have general supervision of the waters of the state and of the officers connected with its distribution. No person shall be appointed to this position who has not such theoretical knowledge and such practical experience and skill as shall fit him for the position.[38]

Water Rights

Wyoming is not the only state that includes this sort of provision within its constitution; many states in the American Southwest and Rocky Mountain region constitutionally protect water resources, also.[39] But Wyoming is conspicuous among these states because of its history, its perceived values, and the equal prominence that its constitution accords to private property rights, as well as to public water "rights."[40] This approach to liberal democratic values arguably is

based more upon a concern for the collective interests of society than the rights of the individual citizen. That tone can be found expressed by many of the delegates to Wyoming's constitutional convention in 1890, especially during the debate regarding ART. 8. Charles Buritt, who was a delegate for Johnson County, offered a typical response.

> A man gains a vested water right not by virtue of the United States law under which states rights are created, but those rights are different from what is generally understood. When a man builds a ditch and takes out water he has not the right against his country and all the world to the use of that water as long as he pleases. Behind it is another power to be considered. Notwithstanding all the legislation of congress, notwithstanding all the constitutional provisions of Colorado and Wyoming, water remains, so far as the right of the state to control it is concerned, with the state, just the moment that a state comes into the union. . . . No appropriation shall be denied except when demanded by the public interests, worded so as to preserve the idea that we have advanced that this constitutional provision shall contain nothing as to hint of a surrender of any of its rights of eminent domain.[41]

Modified Libertarian Principles

The defense of basic, libertarian principles appears prominently within the Declaration of Rights (ART. I) of the Wyoming Constitution. However, a general qualification regarding the ideological basis for these rights and liberties, resembling a communitarian critique of the liberal democratic tradition, also exists within that document.[42] In particular, SEC. 6 of this first article guarantees that "[n]o person shall be deprived of life, liberty or property without due process of law."[43] This section resembles, of course, similar guarantees found within the Fifth and Fourteenth amendments of the United States Constitution. However, the jurisprudential history of this section illustrates the willingness of Wyoming jurists to defer widely to governmental restrictions upon property, and other expressions of, rights and liberties, provided that the procedural guarantees of due process are met. This general trend within Wyoming constitutionalism, while not being unusual, tends to undermine a superficial interpretation of Wyoming's specific variant of the liberal democratic tradition as being based upon stringently libertarian principles.

Furthermore, it has been noted that this constitutional guarantee is directed against the attempts of private persons, as well as public authorities, to misappropriate property, since the Wyoming Constitution provides that "no person shall be deprived of life, liberty or property,"[44] as opposed to the federal guarantee that "nor shall *any State* [emphasis added] deprive any person."[45] Therefore, it could be interpreted as protecting the community from unscrupulous consumers, as well as from the coercive power of the state. Robert B. Keiter made this connection when he observed that ". . . the state [of Wyoming] due process clause does not have a state action requirement as the federal clause

does; it restrains private as well as governmental action that might deprive an individual person of life, liberty, or property. The state provision could, therefore, be constructed as creating a constitutional tort that might be enforced by an action against private parties as well as governmental entities."[46]

This general critique is particularly relevant to the relationship between ART. 1, SEC. 6 and ART. 8 of the Wyoming Constitution, since the distinction between public and private property, in this respect, has been subject to specific challenges which, in turn, have contributed to a judicial contemplation of the dominant value system upon which the history of Wyoming society, as well as its constitutional tradition, ultimately are based. In general terms, this ideological dichotomy has received judicial attention within Wyoming in relation to the regulation of individual commercial interests by the state government. The government has imposed a particular perspective upon Wyoming society that has been upheld by its judicial branch which differs from an assertion, by some people in Wyoming, regarding the sanctity of private property and unregulated commercial enterprise. This controversy certainly is not unique to Wyoming; it has been one of the most notable issues ever to affect American constitutional development.

Private Property, Government Intervention, and the Community

However, this controversy has reflected, within its Wyoming context, broad considerations of values and cultural traditions that are not necessarily reflected within the wider context of American society. The federal Congress, as well as various state legislatures, have been willing to experiment with the concept of governmental intervention in economic matters, throughout their respective histories, beginning, especially, during the latter part of the nineteenth century.[47] The defense of such initiatives generally focused upon a declared need to rectify the potential and actual abuses of a *laissez-faire* economic system through governmental regulation of, or assistance for, private business interests.

Judicial objections to these policies often invoked the principle of limited government and, in particular, a "states rights" approach toward American federalism.[48] However, the courts also could extend that principle beyond the federal context and apply it in support of a general restriction of the delegated powers of government. The United States Supreme Court, in the 1874 case of *Loan Association vs. City of Topeka, Kansas*, invalidated a municipal bond that had been issued by that city's government and which had been designed to assist the commercial efforts of local private industry.

> There are limitations on such power which grow out of the essential nature of all free governments. [They are] implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.[49]

Lochner vs. New York—Federal Libertarian Property Interest

But the most significant precedent in support of a libertarian property interest within the American constitutional tradition probably is the 1904 case of *Lochner vs. New York*. It addressed a challenge to a New York statute that restricted the number of working hours of laborers who were employed within bakeries. The United States Supreme Court invalidated this legislation upon the basis of a violation of an unenumerated yet, nonetheless, implied freedom which, they asserted, the Federal Constitution guaranteed. New York insisted that the regulations were necessary for the purpose of ensuring safe conditions within this industry. The court, however, accepted the argument that a fundamental "freedom of contract" was threatened by such expansive incursions by a government into economic affairs.

> It seems to us that the real object and purpose [of the New York statutes] were simply to regulate the hours of labor between the master and his employés *[sic]* (all being men, *sui juris*), in a private business. . . . Under such circumstances the freedom of master and employé to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.[50]

An unstated assumption was present, throughout this majority opinion, that the "freedom of contract" defends the entire principal of a liberal economic order. It is so fundamentally necessary for ensuring the general welfare of American society that it could be regarded as being a "natural" principal, which word was invoked often, within this opinion.[51] Even the dissenting opinion of three of the justices addressed this issue from the perspective of this assumption, although it refused to acknowledge that any civil right or liberty, including the freedom of contract, could be regarded as being absolute.

> Speaking generally, the State in the exercise of its powers may not unduly interfere with the right of the citizen to enter into contracts that may be necessary and essential in the enjoyment of the inherent rights belonging to every one, among which rights is the right "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation."[52]

Nonetheless, the minority insisted that, within this liberal economic tradition (even from a libertarian perspective), rights and liberties are, by definition, subject to limitations that maintain a consistency of values within that tradition.

> Granting then that there is a liberty of contract which cannot be violated even under sanction of direct legislative enactment, but assuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as

> the State may reasonably prescribe for the common good and the well-being of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? Upon this point there is no room for dispute; for, the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power.[53]

Indeed, three decades later, this interpretation finally would prevail among all three branches of American government, which reflected the general values that had been embraced particularly strongly in the wake of the Great Depression.

Contrasting the Federal and Wyoming Traditions

State of Wyoming vs. Lloyd G. Langley

However, Wyoming never experienced a "Lochner era" in terms of its own constitutional tradition; that fact demonstrates a substantive difference between the federal and Wyoming approaches to this issue, as well as an important, specific difference between the evolution of liberal thought and values (including both elite and mass perspectives) of Wyoming and the United States, as a whole. The most significant example within Wyoming constitutional law which reflects this difference is the 1938 case of *State of Wyoming vs. Lloyd G. Langley*. The defendant was a grocer who was charged with selling items below cost in an effort to undermine the competition and, consequently, force them out of business. He challenged his conviction upon the basis that the Wyoming statute that banned this sort of practice violated his freedom of property, as articulated in ART. 1, SEC. 6 of the Wyoming Constitution. He invoked principles that were similar to values that had governed the "Lochner era" at the federal level, thus, implying that Wyoming's social and constitutional history reflected and protected the libertarian and *laissez-faire* values of that particular state.[54]

The Supreme Court of Wyoming, however, categorically disagreed and, in so ruling firmly established the dominance of an interpretation of the Wyoming constitutional tradition that had not previously been challenged, successfully. A few early cases had addressed the extent to which the Wyoming government could intervene in economic matters. Generally, Wyoming courts affirmed governmental authority within this area, which is evident in the majority opinion found within the 1900 case of *Farm Investment Co. vs. Carpenter*.[55]

Due Process Rights

However, the most important case regarding both the Wyoming constitutional relationship of property rights to government police powers and the fundamental Wyoming values upon which the former relationship remains based in *State of Wyoming vs. Langley*. The defendant claimed that his due process rights, as

guaranteed in ART. 1, SEC. 6 of the Wyoming Constitution, were violated by the unfair competition statute. The Wyoming Supreme Court invoked ART. 10, SEC. 2 of that same document in support of its rejection of that argument.

> sec. 2: All powers and franchises of corporations are derived from the people and are granted by their agent, the government, for the public good and general welfare, and the right and duty of the state to control and regulate them for these purposes is hereby declared. The power, rights and privileges of any and all corporations may be forfeited by willful neglect or abuse thereof. The police power of the state is supreme over all corporations as well as individuals.[56]

Chief Justice Fred H. Blume insisted, within his opinion for a unanimous court, that the defendant's claims were based upon a misunderstanding of the underlying nature of the Wyoming constitutional tradition. First, the court acknowledged that a right to property and a liberty of contract is a central guarantee of the liberal tradition, as it has evolved within the west, in general, and which provides the ultimate context within which both the American and Wyoming constitutional traditions were created. However, the court noted that external regulation of commerce also has been an intrinsic part of that economic, social, political, and legal development.

> The Bill of Rights contained in the various constitutions, including our own, has its direct root in the ideas of the preceding centuries. Prior to the Renaissance prices of merchandise were freely regulated. It was not deemed improper to do so even in our colonies, including New York, New Jersey, Maryland and New Hampshire as late as the time of the [American] Revolution. With the Renaissance began a new period in human history. Thoughts of liberty and freedom took possession of the minds of men, first in the field of religion, then of politics, later in the field of economics. It came to be a part of the legal philosophy of the times that each man has, as such, and because he is a human being, certain natural, inherent and indefeasible rights of which no government should, or has the right to, deprive him.[57]

However, Chief Justice Blume made an even more specific and significant observation regarding the underlying ideological values and principles that govern Wyoming's economic culture, as addressed by the state's constitution.

> One of the chief exponents of that doctrine was Rousseaux, *[sic]* writing in his *Contrat Social* in the eighteenth century. . . . That doctrine was embodied in the Declaration of Rights of the French National Assembly of 1789 in which it is stated that the end of all union of men in society is the conservation of their natural and indefeasible rights of man, and in the French Constitution of 1791, which states that the legislative power cannot make any laws which infringe and interfere with these rights. The *Contrat Social* of Rousseaux had its repercussions and its influence upon all modern doctrine of legal and political philosophy and [Leon]

Deguit states that "the principle of sovereignty limited by the rights of the individual is still dominant in French classical doctrine."[58]

Rousseau and Communitarianism

The emphasis upon Rousseau is very significant, because it indicates a variation of the liberal democratic tradition that differs from the Lockean interpretation that has been most dominant, throughout American history. The liberalism of Rousseau has been associated with a formal philosophical movement that has been particularly active during the latter part of the twentieth century, even though its roots are more than two centuries old. Communitarianism has been offered as a particularly strong, internal challenge to a traditional, libertarian interpretation of liberalism. It emphasizes, in particular, the central importance of the democratic process as a proper basis for a successful society. It seeks to de-emphasize (without, necessarily, rejecting) an emphasis upon individual rights and liberties that serves, it is argued, as a source of fragmentation which, ultimately, undermines the stability and prosperity of a society. This perspective has been expressed succinctly by one of its most prominent scholarly proponents, Charles Taylor, especially in relation to the essential philosophical approach of Georg Wilhelm Friedrich Hegel.

> The happiest, unalienated life for man, which the Greeks enjoyed, is where the norms and ends expressed in the public life of a society are the most important ones by which its members define their identity as human beings. For then the institutional matrix in which they cannot help living is not felt to be foreign. Rather it is the essence, the "substance" of the self. . . .
>
> And because this substance is sustained by the activity of the citizens, they see it as their work. . . .
>
> To live in a state of this kind is to be free. The opposition between social necessity and individual freedom disappears.[59]

Critics of this ideological approach contend that communitarian values often are promoted merely as an apology for majoritarian dominance within a society, especially in terms of the potential "tyranny" of that sovereign majority. But Rousseau did not abandon the concept of rights and liberties; he merely argued that their existence is derived from a consensus of the fundamental values of the members of a community, and not from any "innate" or "natural" source. He made a general association between this latter source of rights and broad claims that promoted the concept of the "right of the strong" to dominate society, despite the legitimate claims and needs of the community, as a whole.

> Le plus fort n'est jamais assez fort pour être toujours le maitre, s'il ne transforme sa force en droit et l'obéissance en devoir. De là droit du plus fort: droit pris

> ironiquement en apparence, et réellement établi en principe. Mais ne nous expliquera-t-on jamais ce mot? La force est une puissance physique: je ne vois point quelle moralité peut résulter de ses effets. Céder à la force est un acte de nécessité, non de volonté; c'est tout au plus un acte de prudence. En quel sens pourra-ce être un devoir?[60]

A remarkably similar tone is found to have been expressed by many delegates to Wyoming's constitutional convention in terms of the water rights claims of corporate, and other large, interests, in opposition to the distributive approach that the state's population appeared to support.[61] This perspective served to contradict the "possessive individualism" of early liberal thought which, allegedly, allowed wealthy, and other powerful, persons to undermine the democratic will in favor of their own, parochial interests.[62]

However, the Wyoming Supreme Court partly acknowledged the validity of the arguments of the defendant regarding the effective presence of a Lockean "natural rights" argument as a component of Wyoming's social and constitutional traditions, especially in relation to Wyoming's history as a conspicuous part of the American frontier experience.

> "The end of all political associations," writes [Thomas] Paine in his "Rights of Man" (Conclusion Part 1) "is the preservation of the natural and imprescriptible rights of man, and these rights are liberty, property, security and resistance of oppression." Liberty of production and exchange was proclaimed no less than political liberty. The "Wealth of Nations" of Adam Smith, e.g., wielded an enormous influence. . . . That theory was naturally accentuated by reason of the existence and development of our frontier, and the spirit engendered by that development has not lost all of its influence at the present time. The doctrine of natural and inherent rights to life, liberty and property was announced in the Declaration of Independence, in the constitutions of New Hampshire, Virginia, and Pennsylvania in 1776, in the constitution of Vermont in 1777, in that of Massachusetts in 1780, in that of New Jersey in 1784. Other constitutions followed the same vein. Section 3 of Article 1 of our own constitution refers to natural rights of man and section 2 of the same article provides that "in their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal."[63]

Simultaneously, however, the court addressed itself to the competing communitarian perspective in terms of Wyoming's social and constitutional existence.

> There are those who maintain that man has no natural rights; that none can exist except in society, and that whatever rights he has, he, accordingly, receives from society. However that may be theoretically, natural rights are recognized by our constitution. The doctrine is part of the positive law of the land, and section 6 of Article 1 of our constitution provides that no person shall be deprived of life,

> liberty or property without due process of law. The article evidently refers to the natural and inherent rights otherwise mentioned, and so it becomes apparent, particularly in view of the history above outlined, that the framers of the constitution meant that the protection thereof is important and that they, though loosely defined, should not be unduly invaded.[64]

Therefore, although the court appeared to sympathize with the libertarian interpretation of the Wyoming Constitution, which formed the basis for the defendant's claims against the governmental regulation of his business, it tempered its concurrence, considerably.

> Now let us look at the other side of the problem. It may be observed that section 6 of Article 1, *supra,* does not state that "no person shall be deprived of life, liberty or property," but states that no person shall be deprived thereof "without due process of law." That is a recognition of the fact that the natural and inherent rights are not absolute or unlimited, but are relative. It is a recognition, in other words, of the police power. That power, giving the legislature the right to enact laws for the health, safety, comfort, moral and general welfare of the people, is an attribute of sovereignty, is essential for every civilized government, is inherent in the legislature except as expressly limited, and no express grant thereof is necessary. It is expressly recognized in our constitution, which in Sec. 2 of Article 10, states that "the police power of the state is supreme over all corporations as well as individuals."[65]

Thus, the court sought to identify a conciliation between these different interpretations of liberal jurisprudence that could be truly applicable to this case, in particular, and to Wyoming constitutionalism (although the court drew upon broader American examples for the purpose of illustrating this conciliation), in general.

> That power, on the other hand, is not unlimited. The phrase "due process of law" has, on its face, but a procedural aspect, relating to proceedings before judicial or quasi-judicial tribunals, and in the early cases, appeal to that phrase was made from that standpoint only. It was not until the second half of the 19th century that a contrary view came definitely to be taken. The doctrine of natural and inherent rights asserted itself. . . . That is the view which has been maintained by the courts ever since that time, and so we find it stated as a general rule that it has reference also to the enactments of the legislature.
>
> Nearly every law abridges individual freedom of action to a more or less extent. In nearly all instances when one is enacted, it gives rise, or may give rise, to a conflict between such freedom on the one hand, and the power of the legislature to abridge it on the other. The solution to the conflict is judicial in its nature.[66]

The court concluded, in conjunction with the standard of "reasonableness," that the judicial branch of the Wyoming government is tasked with the responsibility

of reconciling this conflict of values. The police power represents the legitimate will of a democratic sovereign, but that sovereign still must act within certain parameters. This approach is far from being incompatible with the constitutional jurisprudence of the rest of the United States, at either the federal or state levels. However, the emphasis upon the ultimate authority of the sovereign over the individual member of the community is a point that is particularly prominent, here. The court noted that ART. 1, SEC. 7 of the Wyoming Constitution limited the power of the government when it stated that "absolute, arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."[67] But this very emphasis is, itself, an acknowledgment of the preeminent place of the community, in relation to individual members, that appears to have become an important component of traditional Wyoming society.

> It is hardly a debatable question whether majorities may not act as arbitrarily as King John or Louis the Fourteenth. We are not able to state whether, in the long run, courts will be able to withstand preponderant majorities. That is for the psychologist to say. It may be that, in the long run, might will make right. But it would seem that courts should not adopt such a fatalistic attitude, so long as the constitution commits to them the power and duty to say what is "right." It would seem further that in view of the position which courts occupy under our constitutional form of government, and to uphold true democracy under the constitution, it is incumbent upon them, in deciding constitutional questions such as the one before us, to avoid Scylla on the one hand and Charybdis on the other, and to travel at all times, so far as is humanly possible, along the path of the golden mean. Let us then examine the immediate question before us in that light.[68]

That controversy was decided in favor of the state. The United States Supreme Court determined, likewise, that property rights are not absolute. However, the tone of this, and similar, Wyoming decisions differed from its federal counterparts in a significant way.[69] That difference becomes more evident when cases concerning the conflict between individual property rights (ART. 1) and state control of water resources (ART. 8) are examined.

Riparian Rights

The earliest precedent in this area is the 1896 case of *Moyer vs. Preston*.[70] However, the preeminent precedent in this area of Wyoming jurisprudence is the 1900 case of *Farm Investment Co. vs. Carpenter, et al*. The plaintiff in this case had been denied the ability to divert water from a creek that ran through his land by the state, which claimed the authority to maintain water levels on behalf of the public interest. More than one constitutional claim was advanced against the water control legislation and administration of the state, including one that was based upon a separation of powers claim. However, the most significant challenge, in terms of providing a revelation of the competing ideological values

present within both this judicial system and this society, was made in relation to the perceived conflict between the individual person and the state regarding property rights, due process, and the government's role as a guardian of a "public trust." It was articulated from a constitutional and common law perspective by the plaintiff's attorneys.

> Irrigation was practiced from the beginning of the civilized settlements of the arid regions of this country; and the first taker was conceded to have the first right. That principle became the fundamental formula of law concerning the acquisition of property and water rights for beneficial use. The right thus became an original property right resting on the law of necessity. Priority of use among different claimants from the same stream determines the seniority of a continual and perpetual right. When such rights have attached, the principle of vested rights intervenes to protect them through all the mutations and theories of subsequent legislation. . . . No federal or State statute can be said to confer the right to take the water; the most they can do is to regulate the use under the police powers of the State for the health and peace of the community.[71]

The attorneys representing the defendants countered this line of reasoning by referring to the communal nature of water and the collective claim to this proprietary interest.

> Of all the arid States, irrigation was latest of development in Wyoming. . . . While we have embodied in our laws what has been found good and efficient in the laws of other States, we have not adopted some which have been found to lamely protect *[sic]* the public interest. The history of irrigation shows that the public interest has been too frequently ignored. The subsequent appropriator has rights as well as the prior appropriator, though they are inferior to those of the one prior in time. They need protection, nevertheless. In this State it is understood that two things are essential to this end: first, the limitation of appropriation to actual need for beneficial use; and, second, public control.[72]

In fact, the defendants appear to have repudiated the more libertarian interpretations of this issue that seemed to have been adopted by other American states.[73] The Wyoming Attorney General, J. A. VanOrsdel, supported this approach with broadly political and philosophical, as well as legal, pronouncements within the *amicus curiæ* brief that he submitted on behalf of the state government.

> The waters of the streams are owned and held by the State for the benefit of its citizens. The rights of the first appropriator are no greater than those of the last except in the point of time. It is the duty of the State to protect all. The argument of the counsel for plaintiff proceeds upon a false basis. He assumes that the plaintiff had an absolute and completed right, when, in fact, he had only a claim to a right. One can not acquire a vested right to the use of water by making a mere

> claim to it, regardless of local requirements, laws, and usages. The contention that he can is not justified by the statutes or decisions of courts.[74]

The court accepted this interpretation. Chief Justice Potter ruled, on behalf of a unanimous court, that a collective interest (as entrusted to the delegated authority of the state government) can take precedence over individual claims to property rights, provided that due process guidelines are observed for the purpose of determining this priority. He noted that this collective interest was articulated within the confines of the Wyoming Constitution's Declaration of Rights (ART. 1), which article also defines the individual property and due process rights of Wyoming residents.

> Water being essential to industrial prosperity, of limited amount and easy of diversion from its natural channels, its control must be in the State, which, in providing for its use, shall equally guard all the various interests involved.[75]

It is implied, therefore, that SEC. 31 of ART. 1 deliberately restricts the scope of such property rights in favor of this important collective interest. Chief Justice Potter confirmed this implication with a stated judicial assertion upon the matter that incorporated common law doctrines in support of this constitutional assertion.

> Under the doctrine of prior appropriation, it would seem essential that the property in waters affected by that doctrine should reside in the public, rather than constitute an incident to the ownership of the adjacent lands. Such waters are, we think, generally regarded as public in character.
>
> By the civil law the waters of all natural streams were *publici juris*, and according to Bracton that was the rule anciently in England. At the modern common law public waters are generally confined to those which are navigable, and public rights therein to navigation and fishery, and privileges incident thereto. In the arid region of this country another public use has been recognized by custom and laws and sanctioned by the courts; a public use sufficient to support the exercise of the power of eminent domain. This use, and the doctrine supporting it, is founded upon the necessities growing out of natural conditions, and is absolutely essential to the development of the material resources of the country. Any other rule would offer an effectual obstacle to the settlement and growth of this region, and render the lands incapable of continued successful cultivation. The waters for the reclamation of the desert lands must be obtained, in a very large measure, from the natural streams and other natural bodies of water.
>
> The common law doctrine of riparian rights relating to the use of the water of natural streams and other natural bodies of water not prevailing, but the opposite thereof, and one inconsistent therewith, having been affirmed and asserted by custom, laws, and decisions of courts, and the rule adopted permitting the acquisition of rights by appropriation, the waters affected thereby become perforce

> *publici juris*. It is therefore doubtful whether an express constitutional or statutory declaration is required in the first place to render them public. . . . But, however this may be, we entertain no doubt of the power of the people in their organic law, when existing vested rights are not unconstitutionally interfered with, to declare the waters of all natural streams, and other natural bodies of water, to be the property of the public, or of the State.[76]

Police Powers

The tone of this decision reflected a belief in the paramount importance of the public interest, under such circumstances. This attitude has been reflected at the federal level, also, but not as categorically as the Wyoming Constitution appears to provide.[77] This greater emphasis upon the scope of police powers in relation to individual rights was addressed, significantly, within the 1927 case of *Salt Creek Transportation Co. vs. Public Service Commission of Wyoming*. This case challenged the validity of the state's authority to regulate common carrier companies as a "public service," rather than treating them as private businesses that are subject only to general commercial regulations. Both the State of Wyoming, as defendant, and the Wyoming Supreme Court appeared to concede the plaintiff's argument that the United States Constitution provides greater protection for the contract and property rights of individual persons, and is less deferential to the claimed regulatory authority of government, than does the Wyoming Constitution. However, they also rejected arguments that supported the applicability of the Fifth Amendment of the United States Constitution, through the Fourteenth Amendment, to areas of regulatory controversy that fell within the jurisdiction of Wyoming.[78]

Subsequent constitutional cases within Wyoming have not substantively challenged the underlying justifications provided by these early precedents. Cases such as the 1979 ruling in *Edith M. Thayer vs. City of Rawlins*[79] and the 1981 decision in *Wendell Jackson vs. State of Wyoming*[80] have reaffirmed these principles, as well as this general cultural and ideological perception of the state, for nearly a century.[81] However, the validity of this perception has been challenged specifically after many decades, even if only in dissent. The Wyoming Supreme Court revisited these values in a series of cases that addressed the protection against unreasonable searches and seizures and the right to privacy within that state. Chief Justice Walter Urbigkit was critical of the more communitarian interpretations of the Wyoming Declaration of Rights that have dominated that state's constitutional and jurisprudential history, especially ART. 1, SEC. 4.

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized.[82]

Search and Seizure

This philosophical theme dominates the 1992 case of *Edward Everette Goettl vs. State of Wyoming*, in which the appellee contended that the police lacked sufficient probable cause when they searched and arrested him for possession of a controlled substance. A majority of the state Supreme Court noted that the acceptable conditions that are required in order to validate a warrantless search under the Fourth Amendment to the United States Constitution had been met within this case. The majority opinion of Justice Richard V. Thomas asserted further that, despite the appellant's claims, ART. 1, SEC. 4 of the Wyoming Constitution does not offer greater protection than its federal counterpart within this area of law.

> Goettl, in his brief and in his oral arguments before this court, encouraged us to offer greater protection under the Constitution of the State of Wyoming than the protection that has been provided pursuant to the Constitution of the United States. The provisions of the constitutional proclamations [at both levels of government] are substantially identical. . . .
>
> The only difference in these two provisions is that, under the Constitution of the State of Wyoming, an affidavit is required to support the issuance of a search warrant. . . . This court previously adopted the standard of reasonableness, which is the federal constitutional standard for searches and seizures. In addition, this court has adopted the federal test justifying an investigatory stop, which is something less than the information necessary to establish probable cause.
>
> We are not persuaded in this instance by Goettl's argument that we should expand the rights protected by the Constitution of the State of Wyoming beyond the protection furnished according to the Constitution of the United States. In light of precedent which heretofore has adopted the federal standards, we are satisfied that adopting the argument of Goettl in this regard would simply create an area of the law in which law enforcement officers, prosecutors, and trial courts would be left without a standard.[83]

However, Chief Justice Urbigkit did not accept this constructionist approach towards this area of Wyoming constitutional jurisprudence, nor its results. He insisted, instead, within his dissenting opinion, that the Wyoming Constitution should provide a separate and stronger standard than the United States Constitution for this area of criminal law. He argued that the Wyoming Constitution, as well as state constitutions, generally, were designed to fulfill that very purpose.

> Providing more protection for individual rights under the language of the Wyoming Constitution is not a unique proposition. Besides those cases we have already examined, other jurisdictions have accorded more expansive protection of individual liberty under their state constitutions. . . .
>
> Despite the majority's hasty dismissal of the linguistic differences between the Fourth Amendment and Wyoming's search and seizure provision, this court has previously held those differences to be significant. . . .

> The majority fails to recognize that prior to the selective incorporation of Fourth Amendment principles announced by *Wolf* in 1949, the only protection against unreasonable searches and seizures by state officials between 1890 and 1949 was provided by the Wyoming Constitution. Therefore, decisions of that era offer special guidance into the protection accorded the citizens of Wyoming by our state constitution.[84]

However, Chief Justice Urbigkit failed to identify the underlying principles or values that might make Wyoming distinctive, in this way. Instead, he emphasized various precedents within the jurisprudential history of Wyoming and other states in which search and seizure protections were extended, but he did not elaborate upon the fundamental cultural or ideological basis that might support this expansion, except in terms of the general assertion that state units of government are smaller and "closer to the people," so traditionally they have been regarded as being better suited to perform the function of protecting the rights and liberties of the individual citizen than the larger, and more distant, federal government.[85]

The Wyoming Supreme Court returned to this theme within the 1993 case of *Maro Saldana vs. State of Wyoming*. The appellee in this case charged that police had violated both his freedom from unwarranted searches and seizures and his right to privacy, as guaranteed by both the United States and Wyoming Constitutions, when his telephone conversations were recorded without his knowledge or consent. In particular, he contended that ART. 1, SEC. 4 of the Wyoming Constitution offers protections in this area that are more stringent than its federal counterpart.

A majority of the Wyoming Supreme Court rejected this argument, largely through reference to a constructionist approach to this article. Justice Thomas expressed this belief within his opinion on behalf of the court.

> Whether a search is reasonable is to be determined from the facts and circumstances of the case in light of the "fundamental criteria" that are found in the Fourth Amendment, as those criteria have been interpreted and defined in the opinions of the [United States] Supreme Court. The question of reasonableness does not arise, unless there has been an intrusion upon a legitimate expectation of privacy. The primary, and often ultimate, test for determining whether evidence must be suppressed, at least in the federal arena, has evolved into the determination of whether "the individual's expectation, viewed objectively, is 'justifiable' under the circumstances."
>
> The protection against unreasonable searches and seizures found in the Constitution of the State of Wyoming is virtually identical to that found in the federal constitution. Even though the federal law establishes minimum requirements for individual protection and does not mandate any maximum criteria as to the degree of protection afforded an individual under state law, federal interpretations of the Fourth Amendment are regarded as persuasive and this court adheres

> to them closely, absent some contrary direction from the legislature of the State of Wyoming. . . .
>
> Under the Tenth Amendment to the United States Constitution, the freedom of the state to provide greater expectations of privacy for its citizens than those provided under the federal constitution is guaranteed if, in either its legislative or judicial discretion, it deems it necessary or appropriate to do so. Increased protection could be afforded to Wyoming citizens *[sic].* It is our conclusion, however, that the substantial identity of the constitutional provisions involved does not suggest, nor do we perceive it appropriate in this instance to recognize, any increased protection as being afforded by our state constitution.[86]

Chief Justice Urbigkit rejected this reasoning within his dissenting opinion and criticized his perception "that this decision to adopt federal constitutional 'lockstep' mandates an answer of essentially nothing."[87] However, he acknowledged that a determination of the difference between the American and Wyoming constitutional traditions is a difficult process, since supporting historical evidence is scarce.[88] Nonetheless, he agreed with the pronouncements of scholars and jurists, such as United States Supreme Court Justice William J. Brennan, that state bills of rights and state constitutional jurisprudence should provide, in comparison to the federal level of government, increased protections for individual citizens. He emphasized the concept of a general state level jurisprudence, because of the lack of specific guidance regarding the philosophical basis for Wyoming constitutionalism. Therefore, he tended to cite examples from a variety of state constitutional precedents regarding an expanded protection against warrantless searches and a rigorous defense of the right to privacy.[89]

Separation of Powers

Perhaps, a more interesting insight can be attained from an examination of the issues arising from a separation of powers challenge. This issue had arisen, previously, in terms of the "quasi-judicial" powers that had been delegated to administrative agencies for the purpose of regulating water claims within Wyoming. But the 1990 case of *Jerome D. Billis vs. State of Wyoming* (which was consolidated with five other cases that addressed similar constitutional issues) offers a more explicit consideration of the meaning and interpretation of the separation of governmental powers within Wyoming than did these earlier cases. A probation statute (commonly known as "new 301") allowed criminal courts to defer prosecution proceedings and place a defendant on probation, without the entry of a final verdict, if both the state and the defendant consented. The appeals were based upon a claim that "new 301" violated the separation of powers, as enumerated in separate articles of the Wyoming Constitution,[90] because it required a representative of the executive branch of government (in this case, a state's attorney) to grant consent before the judicial branch could render

a decision regarding the acceptance of a plea and the assignment of a penalty in connection with a case before a state district court.[91]

The Wyoming Supreme Court's ruling in favor of the state was consistent with earlier precedents and, therefore, not surprising. But the court was more elaborate in offering an underlying justification for its position. Justice Michael Golden, within his majority opinion, confirmed the belief that the practice of permitting an apparent overlap of functions of the three branches of government for reasons of practicality and efficiency did not violate any strict principles within this area, either at the federal or state levels of government.[92] However, it appears that the Wyoming Supreme Court further accepted an interpretation of this relationship that may be even more deferential towards the general discretionary authority of government within Wyoming, in particular.

> From the forgoing discussion, we see that Wyoming's constitutional scheme of state government is, like the federal scheme of national government, replete with checks and balances, we are convinced that the state's framers had in mind a pragmatic, flexible view of differentiated governmental power. They intended that "practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Separation of powers, then, merges into balanced government. We adopt this view and reject the "air-tight compartment" view of these criminal defendants.[93]

Chief Justice Urbigkit again dissented from the opinion of his colleagues in the majority. In particular, he challenged their interpretation of Wyoming's constitutional tradition within this area, especially in terms of their willingness to concede the contention, when the rights of the person and the will of the electorate (as expressed through the state government) collide in areas that have not been expressly defined by the state's constitution, that the citizen must yield to the collective interests that the state represents.

> Today, the majority turns its back on its duty to guarantee the protection of individual rights and yields to enterprising ambition of a force within or without legislative action to take from the judiciary and give to the executive a power not theirs to give. Not only is the judiciary demeaned, but his holding overall makes no sense unless one examines the unprincipled impact of political theory upon appellate adjudication. Rather than binding precedent, this outcome appears driven by a political theory which tightens the grip of the prosecutor on the throat of the accused at every opportunity.
>
> As the jurisprudence of Ronald Dworkin has reminded us, several of the constitutional clauses guaranteeing rights to individuals are formulated in such general terms that in many cases judges cannot base their decisions upon the text or the intent of the framers. Rather, they must base them, consciously or unconsciously, on a political theory of some kind, a theory that defines in the abstract the proper scope of governmental authority and individual liberty.

> Whatever name is given to the political theory in operation here, it is one which finds primacy in securing legislative supremacy over the rights of citizens unless those rights are enumerated. Such a philosophy does no more than articulate by rote a political theory which selects legislative primacy when the values of majority adaptation in representative government and rights of citizen collide.[94]

This unnamed "political theory" is apparently a communitarian one. The relatively libertarian perspective of Chief Justice Urbigkit, within this case and other ones, did not prevail. His analysis of the underlying value system, upon which the majority based its claims, appears to have been, essentially, correct. His activist approach towards constitutional jurisprudence complemented that value system, as well as the preponderance towards constructionist and, more generally, interpretivist approaches among many Wyoming jurists. That approach also complemented the value system that the other justices appear to have associated with Wyoming society and the constitution that it produced.

Conclusion

Wyoming's constitutional tradition may appear to present an enigma to the observer who has been seduced by its superficial popular image as part of the Old West. However, those observers who take into account the strong and intricate interrelationship of physical environment, economics, and culture that has existed throughout this region and state since the time when the Cheyenne and other native peoples dominated it, will appreciate the effect that these forces have had upon the development of Wyoming's philosophical and ideological tradition. This development, in turn, has provided a foundation for the creation and evolution of the legal and constitutional system for that territory and state. The Wyoming Constitution is part of the broad liberal democratic ideological tradition that has influenced the larger context of American constitutionalism, and it shares many of the libertarian features of its federal counterpart. But Wyoming has proven to be more than an administratively defined state; it is a community, in both the political and philosophical meanings of the term.[95] That fact has provided the theoretical basis for a legal and constitutional tradition that is unique, and it also provides a meaningful reflection of Wyoming society, in general.

Chapter 10

Conclusion

State constitutions have gained particular relevance, especially during the late twentieth century. This book has focused upon distinctions among certain state constitutions. It has not emphasized the broader controversy of federalism in terms of theoretical or policy evaluation, nor has it claimed to find any new trends in that area. It is, therefore, fundamentally about state constitutions, rather than the federal system of which they are part. Nonetheless, it is impossible to assess the importance of state constitutions, generally, without acknowledging (even if only in passing) that source of greater interest and relevance that is derived from a widely acknowledged shift in the emphasis of the ongoing struggle of federalism, even if that acknowledgment offers no new insights.

A New Federalism

The move towards a "states' rights" agenda in the United States Supreme Court, as part of a larger policy development called the, "new federalism" has made it necessary for civil libertarian and other political activists to seek a different venue from the customary focus upon that federal high court. The Republican administrations of Ronald Reagan and George Bush, in particular, devoted themselves to the task of promoting a decentralized federalism. Part of that policy process included the appointment of judges to the federal courts (including Supreme Court justices such as Antonin Scalia and Clarence Thomas) who have pursued this agenda through a reinterpretation of the fundamental constitutional relationship between federal and state governments.[1] This quest has created an opportunity and a need for state judicial bodies to reevaluate their own constitutional traditions, especially addressing matters of government authority and civil rights and liberties.

Particular emphasis has been placed upon the underlying cultural and ideological values that define these constitutions and direct their interpretive

development. Despite the occasional disdain of some legal practitioners who regard constitutional law as primarily a technocratic process, these documents are, in fact, *political* documents that provide the foundational expression of the political ideals and values of a society that are derived, in turn, from philosophical experience and discourse.[2] Judicial originalists and activists, alike, are extremely solicitous of this interpretive approach, whether it emphasizes the "original understanding" of the constitutional framers and their society or a maturing of beliefs and principles through an evolution of that cultural dialogue. Constitutions are supreme declarations of the political culture of any society, including both the state and national level of the United States.[3]

This book has compared the American constitutional tradition, and the political culture it expresses, to a variety of state constitutions and their unique variations upon the broad theme of American political culture. The selected states have represented a cross section of various regions of the United States. They also range from large, diverse states, like California, to small and relatively homogeneous states, like Wyoming. Most importantly, the choice of these states was determined by the fact that each one offers a distinctive example of the variety of cultural and constitutional influences that have shaped the wide mosaic of American constitutionalism. This analysis ranges from the "frontier autonomy" found in Alaska to the microcosm of the broader American experience found in California; the republicanism of the Deep South found in Georgia; the Polynesian and Pacific rim influences found in Hawaii; the Spanish and French patriarchal legacies found in Louisiana; the religious and humanist collaboration found in Utah; the progressive republicanism found in Vermont to the communitarian prairie experience found in Wyoming.

The reemergence of state courts as articulators of constitutional values and political principles has been aided by continuing efforts to delegate responsibility for protecting the civil rights and liberties of American citizens from the federal to the state level. This struggle might continue and intensify during the twenty-first century. It will be aided especially by the shifting composition of the United States Supreme Court and other benches of the federal judiciary, the increased activism of courts at the state level, the ongoing reevaluation of the diversity of American political culture, and the perpetual struggle to define the parameters of American federalism as demonstrated through the resurgence of a "states' rights" movement.[4]

Constitutions as Political Expressions

Constitutions provide the ultimate expression of a political system and its prevailing political culture. The decentralizing trend of the federal judiciary in the United States has raised the stature and increased the relevance of state courts and their respective constitutions. Subsequently, it also increases the need to understand both the nature of the ideological ideals and values that provide the

ultimate foundation for the American constitutional tradition and the variations upon that American political culture found among the several states. The best examples are representative of a regional tradition, a relatively homogeneous society, or a unique history and heritage, including such states as Alaska, Georgia, and Vermont. The significance of this trend is not restricted narrowly to the jurisprudence of these specific states. An exploration of the the underlying ideological conflicts that define American constitutionalism, through this comparative survey, have revealed that broader importance of this trend of American politics, especially for the future.[5]

Expansive interpretations of federal constitutional sanctions such as the "necessary and proper" clause, the commerce clause, the "republican form of government" clause, and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution tended to preempt state constitutional jurisprudence for large stretches of American political history. This centralizing trend gradually culminated in the New Deal programs, the national agenda of the Cold War, and the Great Society programs.[6] However, beginning in the 1970s, a political reaction against these tendencies (especially in opposition to many progressive reforms that appeared to threaten local autonomy and "traditional" American values) resulted in policies designed to devolve policy prerogatives to the state level, especially during the administrations of Ronald Reagan, George Bush, and George W. Bush. This "new federalism" achieved limited success, in some respects, although it did diminish the enthusiasm for continuing federal control over many policy areas, even during the period of the Clinton administration.[7]

Advancement of State Courts

Simultaneously, state courts have been encouraged to develop a stronger judicial presence in response to decentralizing trends of public policy and judicial delegation of authority.[8] Cases such as *Michigan vs. Long* provided a particularly strong prompting for states to consider, increasingly, the relevance of their state constitutional traditions, especially within the realm of civil rights and liberties.[9] That political phenomenon requires a more critical analysis of these state constitutions and the specific ideals and values they provide and promote. Otherwise, any political (including policy) analysis will prove to be incomplete.

Constitutional Expression of American Political Values

The United States Constitution provides the ultimate expression of American political values. Those values have been, and continue to be, instrumental to the judicial interpretation of American public law, regardless of the judicial approach employed. It is, obviously, extremely important to identify the prevailing ideology of this nation. However, that identification is far from clear, nor does

definitive agreement concerning this issue exist among constitutional scholars and political theorists. Certainly, the United States Constitution reflects the institutions of a liberal democracy. But this ideological tradition is a very broad and malleable one, and it includes many variations that can differ greatly from each other, while all accept the central principles of "property," liberty, individualism, and limited government. This sort of broad tradition exists within the American polity, and it is distinguished, in particular, by a competition between "libertarian" and "republican" interpretations of American liberal democracy.[10] The libertarian interpretation is based upon a "classic" liberalism that had been regarded widely as the most proper ideological interpretation of the American constitutional tradition, particularly under the influence of such seminal scholars as Edward S. Corwin. It stresses the strength of a universal application of the liberty influence as protected by government, stressing the centrality of individual autonomy throughout the polity and the standard of "harm" to define the limits of governmental authority.[11]

Republican Challenge to Dominant Classic Liberal Assumptions

However, another school of thought of the latter twentieth century produced a strong republican challenge to that assumption. It stresses the influence of "civic virtue" and the importance of competing governmental institutions to include all important groups of society, while also emphasizing the political and moral will of the community that can be most effectively represented at the most local levels of government.[12] The true identity of the overall American ideological foundation probably embraces both interpretations. It certainly remains subject to a great deal of flexibility, adaptability, and subjectivity.

It also provides an impetus for exploring the underlying values and meaning of the various state constitutional traditions, especially in terms of their respective political cultures and ideological identity. The regional variations of these themes, reflecting differing historical, economic, environmental, and social factors, reinforces the potential for diversity, in this respect, so the continued decentralization of federal judicial responsibility, including within the area of civil rights and liberties, demands an appreciation of this diversity, even if, in some cases, it ultimately must submit to a more expansive definition of American political culture and its liberal democratic norms.[13]

Constitutional Diversity

This sort of constitutional diversity also has become one of the most important themes of international politics. Self-determination has found its most effective recognition, under international law, through competition, comparison, and contrast. The evolution of the European Union has occurred within the framework of a debate regarding the effect of such a union upon the sovereignty of its

member states and the continued supremacy of their respective constitutional traditions. The merits and nature of federalism and an actual development of a confederal system inevitably have been a central feature of that debate, but it also has compelled these countries to reevaluate those political, legal, and constitutional values that distinguish each of them from the other states of this continent.[14] The subject of sovereignty has assumed greater sophistication as a result of these combined considerations. The fact that these themes, though present at a subnational level, remain central to the political history of the United States should not be surprising to students of twenty-first century politics, from both American and global perspectives. This book has sought to provide further insights and clarity into that larger phenomenon and the relevance of constitutions at all levels of sovereign authority.[15]

The need to understand and appreciate state constitutions, including the unique variations of the American liberal democratic tradition that define them, is increasingly important. This judicial development will continue to be central to American political discourse for the present and the future. But rather than just focus upon the practical and theoretical issues arising out of federalism, a comparative study of the actual "competitors" within this "contest" need to be assessed and appreciated, also.

These case studies of state constitutional traditions from a perspective of political culture have sought that very goal. Hopefully, further studies will expand upon this effort. The relevance of political culture to any political system, especially in terms of its legal heritage, often is underappreciated, overlooked, or, even, derided. This book advances an argument that this approach is not only a useful, but an essential, one. Otherwise, the larger relevance of sovereign states within the greater American union becomes, itself, suspect.

The motto *E Pluribus Unum* expresses the ideal of "from many, one." However, if the opposite statement of "from one, many" (*Ex Uno Plura*) fails to be equally valid, the very need for a federal system (as opposed to a unitary state) can be subject to challenge. This study suggests, emphatically, that such a challenge is unnecessary, for American constitutionalism is a far more diverse field than many commentators might realize. The United States is host to fifty-one sovereign constitutional traditions, and each one has its own, unique perspective. More analysis is needed to strengthen that argument, but this book has offered eight examples of the veracity of that contention and its real significance to American legal and political life.

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Notes

Chapter 1: Introduction

1. This trend is addressed in Richard Brisbin Jr., "The Reconstitution of American Federalism? The Rehnquist Court and Federal-State Relations," *Publius* 28, no. 1 (Winter 1998): 189–216; Sue Davis, "Rehnquist and State Courts: Federalism Revisited," *Western Political Quarterly* 45, no. 3 (September 1992): 773–782; John J. Dinan, "The Rehnquist Court's Federalism Decisions in Perspective, *Journal of Law and Politics* 15, no. 2 (Spring 1999): 127–194; Michael C. Dorf, "No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court, *Rutgers Law Journal* 31, no. 3 (Spring 2000): 741–752; John A. Ferejohn and Barry R. Weingast, "The Politics of the New Federalism," in *The New Federalism: Can the States Be Trusted?* (Stanford, CA: Hoover Institution Press, 1997), pp. 157–163; Bernard Schwartz, "Federalism, Administrative Law, and the Rehnquist Court in Action, *Tulsa Law Journal* 32, no. 3 (Spring 1997): 477–492; and Lori G. Wentworth, "Justice Harlan, Justice Rehnquist, and the Values of Federalism," *New York Law School Law Review* 36, no. ½ (1991): 255–276.

Additional texts that treat this trend from a more general, theoretical perspective include Thomas J. Anton, *American Federalism and Public Policy* (Philadelphia, PA: Temple University Press, 1989), pp. 217–233; Thomas R. Dye, *American Federalism: Competition Among Governments* (Lexington, MA: D. C. Heath, 1990), pp. 5–13; Daniel J. Elazar, *American Federalism: A View from the States* (New York: Crowell, 1966), pp. 186–193; and David C. Nice, *Federalism: The Politics of Intergovernmental Relations* (New York: St. Martin's Press, 1987), pp. 8–9.

2. This development is approached in William A. Fletcher, "The Eleventh Amendment: Unfinished Business," *Notre Dame Law Review* 75, no. 3 (2000): 843–858; Vicki C. Jackson, "Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity, *Notre Dame Law Review* 75, no. 3 (2000): 953–1,010; Timothy S. McFadden, "The New Age of the Eleventh Amendment," *Journal of College and University Law* 27, no. 2 (Fall 2000): 519–560; and John V. Orth, "History and the Eleventh Amendment," *Notre Dame Law Review* 75, no. 3 (2000): 1,147–1,160.

3. This sort of identification of the significance of this movement is provided, for example, in Shirley S. Abrahamson and Diane S. Gutmann, "New Federalism: State Constitutions and State Courts," in *A Workable Government? The Constitution After 200 Years,* Burke Marshall, ed. (New York: W. W. Norton, 1987), pp. 105–116.

4. This observation is made in Arthur J. Kropp, "Reagan, Bush, and the Supreme Court," *University of Richmond Law Review* 26, no. 3 (Spring 1992): 495–497; and John W. Moore, "Righting the Courts," *National Journal* 24, no. 4 (January 1992): 200–205.

5. This concern is raised in Jules L. Coleman, "Truth and Objectivity in Law, *Legal Theory* 1, no. 1 (March 1995): 33–68; and Heidi Li Feldman, "Objectivity in Legal Judgements," *Michigan Law Review* 92, no. 5 (March 1994): 1,187–1,329.

6. An excellent general affirmation of this principle is expressed in Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, Anne M. Cohler, Basia Carolyn Miller, Harold Samuel Stone, trans. and eds. (Cambridge: Cambridge University Press, 1989), pp. 154–186, 494–520.

7. That recognition was expressed in conjunction with the rise of the modern state and, with it, the modern concept of a constitution, as presented in Thomas Hobbes, *Leviathan*, John Plamenatz, ed. (Cleveland: Meridian Books, 1963), pp. 166–168, 243–252, and explored further in Andrzej Rapaczynski, *Nature and Politics* (Ithaca: Cornell University Press, 1987), pp. 29–36.

Implications of this essential nature of law, including constitutions (whether entrenched or unentrenched) are addressed in Terrence Ball and J. G. A. Pocock, eds., *Conceptual Change and the Constitution* (Lawrence: University Press of Kansas, 1988), pp. 1–12; Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law," *Harvard Law Review* 42, no. 2 (1928): 149–185; no. 3 (1928): 365–409; A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1967), pp. 39–86; Ronald Dworkin, ed., *The Philosophy of Law* (Oxford: Oxford University Press, 1986), pp. 3–9; Philip S. James, *Introduction to English Law* (London: Butterworths, 1985), pp. 113–121; Charles F. Mullett, *Fundamental Law and the American Revolution*, 1760–1776 (New York: Octagon Books, 1966), pp. 35–37; and Owen Hood Phillips and Paul Jackson, *O. Hood Phillips' Constitutional and Administrative Law* (London: Sweet and Maxwell, 1987), pp. 41–82.

8. The desire to remove all "subjective" applications of personal or collective ideals to the application and interpretation of law became a component of the modern cultivation and promotion of legal positivism. This influence was advanced with particular force during the late eighteenth and early nineteenth centuries, especially in reaction to the perceived abuses are arbitrary judges, making legal decisions upon the basis of personal predilection and prejudice. This objection, in terms of the judicial "discovery" and application of rights and liberties, was raised with great effect by utilitarian thinkers reformers, as revealed in Jeremy Bentham, *The Works of Jeremy Bentham*, John Bowring, ed. (Edinburgh: William Tait, 1843), 3: 221–225.

This approach influenced the professional development of many American jurists of the early period of the history of the United States. One of the most noted sources of that time for the advancement of this "scientific" and value neutral approach to law included specific arguments in favor of this perspective, John Austin, *Lectures on Jurisprudence*, Robert Campbell, ed. (London: John Murray, 1885), 1: 124–125, 171–174, 407–425. The general implications of this approach are evaluated in Phil Harris, *An Introduction to Law* (London: Weidenfeld and Nicolson, 1988), pp. 372–397.

Yet that "objective" and "morally neutral" approach to judicial interpretation is, ultimately, untenable. It is practically impossible to divorce the influence of moral influences, as derived from philosophical beliefs and values received from the political

community, upon any political or social process, including legal interpretation. Many critics have demonstrated the premise of that argument, very persuasively, including Arnold Brecht, *Political Theory* (Princeton, NJ: Princeton University Press, 1967), pp. 182–185; Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), pp. 45–86; Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1969), pp. 38–94; Harold J. Laski, *Authority in the Modern State* (Hamden, CT: Archon Books, 1968), pp. 63–69; Dennis Lloyd [Lord Lloyd of Hampstead], *The Idea of Law* (London: Penguin, 1987), pp. 113–115; and Abraham Moslow, *Toward a Psychology of Being* (Princeton, NJ: Van Nostrand and Company, 1968), pp. 1–44.

9. Perhaps, the best example of this sort of analysis is the classification of state political cultures according to "moralistic," "individualistic," and "traditionalistic" categories that are shifting according to the needs, experiences, and political activities occurring within various state constitutional traditions. An exposition of this approach is offered in Daniel J. Elazar, "Steps in the Study of American Political Culture," in *Political Culture, Public Policy, and the American States*, John Kincaid, ed. (Philadelphia: Institute for the Study of Human Issues, 1982), pp. 223–235. Another, excellent example of this sort of general approach is provided by the addition of considerations such as degrees of restrictions of local and individual autonomy, interaction of policy choices, residual powers, the interaction of "ordinary politics," and the strength of the federal influence, as found within G. Alan Tarr, *Understanding State Constitutions* (Princeton, NJ: Princeton University Press, 1998), pp. 6–59.

10. This development is well-documented and evaluated. A sample of this literature includes Charles Fairman, *Reconstruction and Reunion, 1864–1888*; part VI of *History of the Supreme Court of the United States* (New York: Macmillan, 1971), pp. 1,320–1,374; David M. O'Brien, *Storm Center: The Supreme Court in American Politics* (New York: W. W. Norton, 1993), pp. 23–64; Geoffrey Sawer, *Modern Federalism* (London: C. A. Watts, 1969), pp. 117–124; J. Clay Smith, Jr., "Shifts of Federalism and Its Implications for Civil Rights," *Howard Law Review* 39, no. 3 (1996): 737–756; Keith E. Whittington, "The Political Constitution of Federalism in Antebellum America: The Nullification Debate as an Illustration of Informal Mechanisms of Constitutional Change," *Publius* 26, no. 2 (Spring 1996): 1–24.

11. This development is well noted in Melanie St. Clair, "A Return to States Rights? The Rehnquist Court Revives Federalism," *Northern Illinois University Law Review* 18, no. 2 (Spring 1998): 411–439.

Nonetheless, the centralizing trend within all federal systems is powerful. Ironically, for example, Nixon's approach to the "new federalism" had the effect of increasing federal policy dominance in many areas, despite his judicial appointments (including Chief Justice Warren Burger and Justice William Rehnquist) and the increased delegation to the state governments of responsibility for implementing these policies. Still, contradictory forces continue to emerge that encourage decentralization within federal systems, generally, regardless of the overall strength of centralizing tendencies, as discussed in Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987), pp. 198–222.

12. 463 U.S. 1032 (1982).

13. 392 U.S. 1 (1968).

14. 428 U.S. 364 (1976).

15. The repercussions of this case are discussed in Donna M. Nakagiri, "Developing State Constitutional Jurisprudence After *Michigan v. Long*," *Detroit College of Law at Michigan State University Law Review* 1998, no. 3 (Fall 1998): 807–856.

16. Nakagiri, "Developing State Constitutional Jurisprudence," pp. 807–856.

17. 463 U.S. 1032 (1982), at 1039–1041.

18. 463 U.S. 1032 (1982), at 1067–1068.

19. 447 U.S. 74 (1980).

20. 447 U.S. 74 (1980), at 91.

21. An overview of this constitutional principle, as applied to the proposed Defense of Marriage Act, a federal bill intended to prevent the sanctioning of homosexual marriages by state courts or legislatures, is provided in Ralph U. Whitten, "The Original Understanding of the Full Faith and Credit Clause and DOMA," *Creighton Law Review* 32, no. 1 (October 1998): 255–394.

22. U.S. Const. Art. IV, § 4. This restriction also is addressed in Tarr, *Understanding State Constitutions,* pp. 12–15.

23. This development receives an excellent analysis in C. B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1990), pp. 23–43.

The term "mercantile," within the context of this book, refers to a "free market" economy, dominated by a merchant sector of society. It should not be confused with "mercantilism," which was a state directed economic system. That distinction is addressed in Georges Duby and Robert Mandrou, *A History of French Civilization,* James Blakely Atkinson, trans. (New York: Random House, 1964), pp. 237–244, and John Lough, *An Introduction to Seventeenth Century France* (New York: David McKay, 1961), pp. 112–113, 153.

24. This institutional, political, and social transformation from a feudal to a mercantile economic system is described in Mortimer J. Adler, *The Capitalist Manifesto* (New York: Random House, 1958), pp. 87–90; Tryphon Kostopoulos, *Beyond Capitalism Toward Nemocracy* (New York: Praeger, 1986), pp. 29–47; and Karl Marx, *Pre-Capitalist Economic Formations*, Jack Cohen, trans., E. J. Hobsbawm, ed. (New York: International Publishers, 1965), pp. 99–120.

25. A description of this seventeenth-century development is provided in John Dunn, *The Political Thought of John Locke* (Cambridge: Cambridge University Press, 1969), pp. 87–95; and Martin Seleger, *The Liberal Politics of John Locke* (New York: Praeger, 1969), pp. 180–208.

26. Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988), p. 14.

27. This perspective is offered in C. B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford: Oxford University Press, 1962), pp. 1–8; and Mostafa Rejai, *Political Ideologies* (New York: M. E. Sharpe, 1995), pp. 150–170.

28. Application of the term "political" to Native American communities implies a Eurocentric interpretation. This tendency to evaluate these cultures in such a manner is noted in Dee Brown, *Bury My Heart at Wounded Knee* (New York: Henry Holt and Co., 1991), pp. 1–12.

29. These general values tend to be shared, despite the vast diversity of native peoples who have lived, and continue to live, throughout the continent of North America. This diversity and these shared values and "political" practices are explored in Sharon O'Brien, *American Indian Tribal Governments* (Norman, OK: University of Oklahoma Press, 1988), pp. 14–33.

30. This aboriginal perspective and the practices that have resulted from it are elaborated in Janake Highwater, *The Primal Mind* (New York: Harper and Row, 1981), pp. 3–51; Howard S. Russell, *Indian New England Before the Mayflower* (Hanover, NH: University Press of New England, 1980), pp. 19–29; and Marshall Sahlins, *How Natives Think* (Chicago: University of Chicago Press, 1995), pp. 148–189.

31. This possible influence is offered in William W. Newcombe Jr., *North American Indians: An Anthropological Perspective* (Pacific Palisades, CA: Goodyear, 1974), pp. 55–75; and Neal Salisbury, *Manitou and Providence* (New York: Oxford University Press, 1982), pp. 13–39.

32. This contrasting perspective of British society (which was still dominated by certain post-feudal values) during the American colonial period is discussed in E. P. Thompson, *Whigs and Hunters* (New York: Random House, 1975), pp. 245–269. A further evaluation of these ideological principles can be found in Harry K. Girvetz, *The Evolution of Liberalism* (New York: Collier, 1963), pp. 91–101.

33. An attempt to provide empirical support for this widely held normative claim can be found in Seymour Martin Lipset, "Canada and the United States: The Cultural Dimension," in *Canada and the United States: Enduring Friendship, Persistent Stress* (Englewood Cliffs, NJ: Prentice-Hall, 1985), pp. 109–160.

34. John Locke, *Second Treatise of Government*, C. B. Macpherson, ed. (Indianapolis, IN: Hackett, 1980), pp. 52–68.

35. An excellent evaluation of this Lockean influence upon the origins of American law, politics, and society (and a literature review of other sources that defend this position) can be found in Steven M. Dworetz, *The Unvarnished Doctrine: Locke, Liberalism, and the American Revolution* (Durham, NC: Duke University Press, 1994), pp. 3–38.

36. Mullett, *Fundamental Law,* p. 58.

37. The essential premises of this theory are outlined in Louis Hartz, *The Founding of New Societies* (New York: Harcourt, Brace, and World, 1964), pp. 1–20.

38. This criticism of the Hartzian model is provided by F. D. Forbes, "Hartz-Horowitz at Twenty," *Canadian Journal of Political Science* 20, no. 2 (June 1987): 292–296.

39. This problem of Hartz's parochialism is noted in Kenneth Dolbeare, *American Political Thought* (Chatham, NJ: Chatham House, 1989), pp. 4–6.

40. This influence is generally acknowledged, in passing, in Seymour Martin Lipset, *Continental Divide* (Toronto: Canadian-American Committee, 1990), pp. 19–41.

41. An overview of the arguments in favor of this shift in theoretical perspective from Lockean liberalism to republicanism as the dominant source of American ideological development can be found in Robert Shalhope, "Toward a Republican Synthesis: The Emergence of an Understanding in American Historiography," *William and Mary Quarterly* 29, no. 1 (1972): 49–80.

42. Examples of the writings of these prominent republicans include James Harrington, *The Commonwealth of Oceana*, J. G. A. Pocock, ed. (Cambridge: Cambridge University Press, 1992), pp. 8–42; and John Milton, *Aeropagitica and Other Prose Writings* (New York: Book League of America, 1929), pp. 53–66. The writings of republican philosophers have been cited particularly as having been read and admired by the American Founding Fathers, although the extent of his influence upon their own political ideas and actions remains uncertain. This contention is mentioned in Samuel H. Beer, *To Make a Nation: The Rediscovery of American Federalism* (Cambridge, MA: Belknap Press, 1993), pp. 215–307.

43. This approach to understanding the dominant ideology of American society has been advanced by scholars who have challenged the hegemony of Lockean liberalism within this area, including Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1967), pp. 33–54; John Patrick Diggins, *The Lost Soul of American Politics: Virtue, Self-Interest, and the Foundations of Liberalism* (New York: Basic Books, 1984), pp. 3–19; J. G. A. Pocock, "The Myth of John Locke and the Obsession with Liberalism," in *John Locke*, Richard Ashcraft and J. G. A. Pocock, eds. (Berkeley: University of California Press, 1980), pp. 3–24; and Gordon S. Wood, *The Creation of the American Republic* (Durham: University of North Carolina Press, 1969), pp. 22–43. However, these authors also have accepted the prominence of the core values of libertarian values within the American tradition, a point that is noted, with specific reference to these authors in Dworetz, *Unvarnished Doctrine,* pp. 99–108. This synthesis also can be noted within subsequent citations that refer to these "republican" authorities.

44. This argument is offered in J. G. A. Pocock, "Virtue and Commerce in the Eighteenth Century," *Journal of Interdisciplinary History* 3, no. 2 (Summer 1972): 119–134.

45. John Trenchard and Thomas Gordon, *Cato's Letters*, Ronald Hamowy, ed. (Indianapolis: Liberty Fund, 1995), 1: 251.

46. This position is expressed convincingly in Thomas L. Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (Chicago: University of Chicago Press, 1988), pp. 1–38.

47. An excellent source that identifies this body of literature and defends the libertarian influence upon American social, political, economic, and legal development is Dworetz, *Unvarnished Doctrine,* pp. 3–38. Among the sources that Dworetz identifies which elaborate upon this Lockean liberal influence, one of the older, yet still convincing, texts is Carl Becker, *The Declaration of Independence* (New York: Vintage Books, 1958), pp. 72–80.

48. The difficulty of arriving at a consensus of basic social, economic, legal, and political values amid the diversity of American society is discussed in Richard C. Sinopoli, ed., *From Many, One: Readings in American Political and Social Thought* (Washington, DC: Georgetown University Press, 1997), pp. 3–13.

49. Regional differences between the American northern and southern colonies, including philosophical differences, are evaluated in G. W. Dyer, *Democracy in the South Before the Civil War* (New York: Arno Press, 1973), pp. 7–35.

50. These competing economic developments that would lend themselves to these associated theoretical distinction between the northern and southern United States is considered in Frank L. Owsley and Harriet C. Owsley, "The Economic Basis of Society in the Late Antebellum South," *Journal of Southern History* 6, no. 1 (January 1940): 1–26.

51. Jefferson's interest in a "ward system," with its emphasis upon a political system in which power is distributed among a large number of local "wards" that allow for direct democratic participation and political control among citizens, reflects his decentralist preferences. Hannah Arendt expressed a similar interest in this sort of democratic expression from a twentieth-century perspective in Hannah Arendt, *On Revolution* (New York: Penguin, 1963), pp. 175–196.

52. These differences between the Hamiltonian and Jeffersonian perspectives are elaborated in Alf J. Mapp Jr., *Thomas Jefferson: A Strange Case of Mistaken Identity* (Lanham, MD: Madison, 1987), pp. 283–298.

53. Madison made his distinction between "republican" and "democratic" government upon systemic, rather than ideological, grounds; the former term referred to a system of direct participation in government, while the latter term referred to a system of representative government. Madison alluded to this distinction in Federalist no. 14, in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, Benjamin Fletcher Wright, ed. (Cambridge, MA: Belknap Press, 1961), pp. 150–155. However, it has been noted that most political orators during the early period of American political and constitutional development referred to "democratic" and "republican" governments as synonymous expressions of a system that is based upon liberal values, William Paul Adams, *The First American Constitutions: Republican Ideology and the Making of State Constitutions in the Revolutionary Era*, Rita Kimber and Robert Kimber, trans. (Chapel Hill, NC: University of North Carolina Press, 1980), pp. 99–117.

54. This Madisonian reconciliation of these two competing visions of the political and economic future of the United States is argued in Irving Brant, *The Fourth President* (Indianapolis, IN: Bobbs-Merrill, 1970), pp. 197–206.

55. These ideological and practical motivations that prompted the creation and adoption of the Bill of Rights are related in Richard K. Matthews, *If Men were Angels: James Madison and the Heartless Empire of Reason* (Laurence, KS: University of Kansas Press, 1995), pp. 117–172.

56. The separation of governmental authority into three (legislation, enforcement, and adjudication) rather than merely two (legislation and enforcement) made Montesquieu's approach to this systemic issue more inclusive than the structure that Locke indicated. The former structure is recommended in Montesquieu, *Spirit of the Laws,* pp. 21–30, while the latter structure is suggested in Locke, *Second Treatise*, pp. 75–77.

57. Madison's early appreciation of, and support for Hamilton's "national" perspective, and his later adoption of Jeffersonian democratic principles, is discussed in Adrienne Koch, *Jefferson and Madison: The Great Collaboration* (New York: Oxford University Press, 1964), pp. 7–32.

58. A good assessment of the ideas and political purposes of Jacksonian Democracy is provided by Edward Pressen, *Jacksonian America* (Homewood, IL: Dorsey Press, 1969), pp. 5–38; and Charles M. Wiltse, *John C. Calhoun: Sectionalist* (Indianapolis, IN: Bobbs-Merrill, 1951), pp. 411–427.

59. These Jacksonian values, and the inconsistencies inherent within them, are evaluated in Glyndon G. Van Densen, *The Jacksonian Era* (New York: Harper and Bros., 1960), pp. 192–207.

60. The practical and ideological implications of the Union victory in the American Civil War and the subsequent imposition of the Reconstruction agenda upon the defeated Confederacy is examined in Vicki Vaughan Johnson, *The Men and the Vision of the Southern Commercial Conventions, 1845–1871* (Columbia, MO: University of Missouri Press, 1992), pp. 171–192. The ideological implications of the "special culture" of the American South are addressed in John Shelton Reed, *The Enduring South* (Lexington, MA: Lexington Books, 1972), pp. 21–32.

61. The seminal source for this economic belief and its relationship to libertarian thought is Adam Smith, *The Wealth of Nations*, Edwin Cannan, ed. (New York: Random House, 1987), pp. 3–98.

62. In this manner, jurists claimed to uphold those libertarian principles that constituted, in their opinion, The "higher law" of The American constitutional tradition. This relationship between *laissez-faire* economic principles, American liberalism, and the American jurisprudence are analyzed in Loren P. Beth, *The Development of The American Constitution* (New York: Harper and Row, 1971), pp. 216–248; Thomas C. Grey, "Original Understanding and The Unwritten Constitution," in *Toward a More Perfect Union*, Neil L. York, ed. (Provo, UT: Brigham Young University Press, 1988), pp. 162–168; Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, MA: Harvard University Press, 1977), pp. 109–139; and Bernard Schwartz, *A Commentary on The Constitution of The United States, Part II, Rights of Property* (New York: Macmillan, 1965), 3: 27–31.

63. 198 U.S. (1904), at 64.

64. 198 U.S. (1904), at 52–65.

65. 198 U.S. (1904), at 65.

66. 198 U.S. (1904), at 68.

67. 198 U.S. (1904), at 75.

68. The hardships and exploitation that workers experienced during this period of American history and the progressive reforms that they inspired are surveyed (particularly, but not exclusively, from the perspective of the agrarian sector) in Lawrence Goodwyn, *The Populist Moment* (New York: Oxford University Press, 1978), pp. 174–212.

69. A general analysis of the "harm principle," as well as its practical effect upon liberal societies, governments, and laws, is provided in Macpherson, pp. 50–64.

70. John Stuart Mill, *On Liberty*, David Spitz, ed. (New York: W. W. Norton, 1975), p. 88.

71. This reaction against the "harm" that was found within The American economy and its moral and ideological defense are articulated in Kenneth M. Dolbeare and Patricia Dolbeare, *American Ideologies* (Chicago: Markham, 1971), pp. 80–106.

72. A general assessment of pragmatist thought is offered in Judith Baker, "Democratic Deliberations, Equality of Influence, and Pragmatism," in *Pragmatism*, C. J. Misak, ed. (Calgary, Canada: University of Calgary Press, 1999), pp. 253–272.

73. The writings of these influential pragmatists that express these basic beliefs and approach include William James, *Essays in Philosophy* (Cambridge, MA: Harvard University Press, 1978), pp. 123–139; and Charles Sanders Peirce, *Pragmatism as a Principle and Method of Right Thinking*, Patricia Ann Turrisi, ed. (Albany, NY: State University of New York Press, 1997), pp. 205–220.

74. The legacy of pragmatism upon American ideological and institutional development is provided by Andrew Feffer, *The Chicago Pragmatists and American Progressivism* (Ithaca, NY: Cornell University Press, 1993), pp. 264–270.

75. William James, *What Pragmatism Means*, Alburey Castell, ed. (New York: Hafner, 1948), p. 152.

76. A history of the rise of the interventionist state in the United States, the conditions that contributed to its development, and the evolution of "reform" liberal values that extended the definition of "harm" that a government could be permitted to address to protect the basic health of the economy and the welfare of the people who participate within it is offered in Stuart M. Blumin, "The Social Implications of U. S.

Economic Development," in *The Cambridge Economic History of the United States*, Stanley L. Engerman and Robert E. Gallman, eds. (Cambridge: Cambridge University Press, 2000), 2: 813–863; and Richard Sylla, "Experimental Federalism: The Economics of American Government, 1789–1914, in *The Cambridge Economic History,* Engerman and Gallman, eds., pp. 483–541.

77. U. S. Const., ART. I, § 8 (1787). The authority to regulate economic relations "among the several States" experienced attempts to limit its scope to a narrow range of activities. Although the United States Supreme Court rejected such a narrow interpretation, beginning with the 1824 case of *Gibbons vs. Ogden*, 22 U.S. 1, American jurists tended to reject calls to extend federal power in this area prior to the early twentieth century, as demonstrated by its invalidation of an attempt by the federal government to invoke the Sherman Antitrust Act in order to disband a sugar monopoly in the 1895 case of *United States vs. E. C. Knight Company*, 156 U.S. 1. Critical historical assessment of aspects of this clause and its relationship to both federal and economic liberty issues can be found in Daniel J. Gifford, "Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy," *Emory Law Journal* 44, no. 4 (Fall 1995): 1,227–1,276; and Harry Litman and Mark D. Greenberg, "Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes, *Case Western Reserve Law Review* 47, no. 3 (1997): 921–1,030.

78. Roosevelt's convincing victory in the 1936 presidential election vindicated his assertion that interventionist policies were both widely popular and consistent with American ideological values. His attempt to induce Congress to increase the number of members of the United States Supreme Court (so that he could "pack" the high court with jurists who were sympathetic to his ideological approach to constitutional interpretation) failed, but the effort may have contributed additional pressure upon the members of this court, for a majority of them did adjust their positions on such matters by 1938. This "stitch in time that saved nine" is mentioned in David M. O'Brien, *Constitutional Law and Politics: Volume II, Civil Rights and Civil Liberties* (New York: W. W. Norton, 2000), pp. 262–264.

79. The overall significance of these policies and laws, which were enacted and implemented in response to the economic crisis of the Great Depression, are addressed in general in Ronald Edsforth, *The New Deal: America's Response to the Great Depression* (Malden, MA: Blackwell, 2000), pp. 1–10.

80. 295 U.S. 495, at 549.

81. 297 U.S. 1 (1936), at 70–71.

82. 300 U.S. 379 (1937), at 391–392.

83. 301 U.S. 1 (1937), at 33.

84. 347 U.S. 483 (1954), at 495.

85. 347 U.S. 483 (1954), at 493.

86. 163 U.S. 537 (1896).

87. Examples of these precedents include *Mapp vs. Ohio*, 367 U.S. 643 (1961); *Terry vs. Ohio*, 392 U.S. 1 (1968); *Chimel vs. California*, 395 U.S. 752 (1969); and *Arizona vs. Hicks*, 480 U.S. 321 (1987).

88. Examples of these precedents include *Hurtado vs. California*, 110 U.S. 516 (1884); *Palko vs. Connecticut*, 302 U.S. 319 (1937); *Duncan vs. Louisiana*, 391 U.S. 145

(1968); *Goldberg vs. Kelly*, 397 U.S. 254 (1970); and *Goss vs. Lopez*, 419 U.S. 565 (1975).

89. Examples of these precedents include *Everson vs. Board of Education of Ewing Township*, 330 U.S. 1 (1947); *Engel vs. Vitale*, 370 U.S. 421 (1962); *Lemon vs. Kurtzman*, 403 U.S. 602 (1971); *Wallace vs. Jaffre*, 472 U.S. 38 (1985); and *Lee vs. Weisman*, 112 S.Ct. 2,649 (1992).

90. Examples of these precedents include *Backus vs. Fort Street Union Depot Co.*, 169 U.S. 557 (1898); *Berman vs. Parker*, 348 U.S. 26 (1954); *Andrus vs. Allard*, 444 U.S. 51 (1979); and *Nollan vs. California Coastal Commission*, 483 U.S. 825 (1987).

91. Examples of these precedents include *Schenck vs. United States*, 249 U.S. 47 (1919); *Gitlow vs. New York*, 268 U.S. 652 (1925); *Brandenburg vs. Ohio*, 395 U.S. 444 (1969); *Miller vs. California*, 413 U.S. 15 (1973); *Texas vs. Johnson*, 491 U.S. 397; and *R.A.V. vs. City of St. Paul, MN*, 112 S.Ct. 2,538 (1992).

92. Examples of these precedents include *Robinson vs. California*, 370 U.S. 660 (1962); *Powell vs. Texas*, 392 U.S. 514 (1968); *Furman vs. Georgia*, 408 U.S. 238 (1972); and *McCleskey vs. Kemp*, 481 U.S. 279 (1987).

93. Examples of these precedents include *Powell vs. Alabama*, 287 U.S. 45 (1932); *Gideon vs. Wainwright*, 372 U.S. 335 (1963); and *Argersinger vs. Hamlin*, 407 U.S. 25 (1972).

94. Examples of these precedents include *Miranda vs. Arizona*, 384 U.S. 436 (1966); *In re Gault*, 387 U.S. 1 (1967); *Rhode Island vs. Innis*, 446 U.S. 291 (1980); *Duckworth vs. Eagan*, 492 U.S. 195 (1989); and *Arizona vs. Fulminante*, 111 S.Ct. 1,246 (1991).

95. Just one example of an approach to this sort of extensive analysis is Laurence H. Tribe, *American Constitutional Law* (Mineola, NY: Foundation Press, 2000), pp. 1,293–1,331.

96. This case and its implications are summarized and assessed in Gerald Gunther, *Constitutional Law* (Mineola, NY: Foundation Press, 1985), pp. 515–516.

97. 381 U.S. (1965), at 381.

98. 381 U.S. (1965), at 493–494.

99. 381 U.S. (1965), at 518–519.

100. Summaries of this misuse of the term "natural law" and a more meaningful explanation of that broad, yet distinctive, theoretical legal tradition can be found in James T. McHugh, "I, the Person: Natural Law, Judicial Decision Making, and Individual Rights," diss., Queen's University, 1991 (Kingston, ON: Queen's University), especially pp. 277–344; and the excellent treatise found in Lloyd L. Weinreb, *Natural Law and Justice* (Cambridge, MA: Harvard University Press, 1987), pp. 9–12, 224–265.

101. Russell Hittinger, "Liberalism and The American Natural Law Tradition," *Wake Forest Law Review* 25 (1990): 465.

102. Richard A. Posner, *The Economics of Justice* (Cambridge, MA: Harvard University Press, 1981), pp. 274–275.

103. 410 U.S. 113 (1973), at 152.

104. This contrast of the theoretical and practical approaches of African-American thinkers and activists such as Washington and Garvey can be found in John White, *Black Leadership in America* (London: Longman, 1990), pp. 1–16, 191–194.

105. An overall assessment of these loosely defined and competing schools of

African-American thought is offered in Dolbeare and Dolbeare, *American Ideologies,* pp. 107–144.

106. Certain essential differences among various schools of feminist thought within an American context are addressed in Hester Eisenstein, *Contemporary Feminist Thought* (Boston: G. K. Hall, 1983), pp. 125–135. Separate examples of this literature include Susan Brownmiller, *In Our Time* (New York: Dial Press, 1999), pp. 194–224; Andrea Dworkin, *Woman Hating* (New York: E. P. Dutton, 1974), pp. 17–24; Carol Gilligan, *In a Different Voice* (Cambridge, MA: Harvard University Press, 1982), pp. 128–150; Catharine A. MacKinnon, *Feminism Unmodified* (Cambridge, MA: Harvard University Press, 1987), pp. 32–45; and Carole Pateman, *The Sexual Contract* (Stanford, CA: Stanford University Press, 1988), pp. 1–18.

107. That idea is explained in Paul E. Sigmund, *Natural Law in Political Thought* (Cambridge, MA: Winthrop, 1971), pp. 1–2.

108. The significance of these cases and judicial trends is considered in Yvonne Kauger, "Individual Rights: Reflections on Federalism: State Constitutions' Roles as Nurturers of Individual Rights," *Emerging Issues in State Constitutional Law* 1991, no. 4 (1991): 105–132.

109. This development is assessed in John C. Yoo, "Judicial Review and Federalism," *Harvard Journal of Law and Public Policy* 22, no. 1 (Fall 1998): 197–206.

110. This ideological competition is given an excellent critique in Dworetz, *Unvarnished Doctrines,* pp. 3–38. Prime examples of this tradition of conflicting ideological interpretations of American constitutionalism are provided in Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace, and World, 1955), pp. 3–26; and J. G. A. Pocock, *The Machiavellian Moment* (Princeton, NJ: Princeton University Press, 1975), pp. 507–545.

111. An observation of this proclivity is offered in Ann Woolhandler, "Judicial Federalism and the Administrative State," *California Law Review* 87, no. 3 (May 1999): 613–702.

Chapter 2: Alaska: Frontier Autonomy

1. John Locke, *Two Treatises of Government*, Peter Laslett, ed. (Cambridge: Cambridge University Press, 1960), pp. 287–296; John Locke, *Essays on the Law of Nature*, William von Leyden, ed. (Oxford: Clarendon Press, 1954), pp. 205–215. The relationship between the natural world and reason within this "state" is discussed in Lloyd Weinreb, *Natural Law and Justice* (Cambridge, MA: Harvard University Press, 1987), pp. 76–83.

2. Nora Marks Dauenhauer and Richard Dauenhauer, eds., *Haa Ḵusteeyí, Our Culture*: *Tlingit Life Stories* (Seattle: University of Washington Press, 1994), pp. 3–15; George Thronton Emmons, *The Tlingit Indians*, Frederica de Laguna, ed. (Seattle: University of Washington Press, 1991), pp. 21–57.

3. Robert Warrand Carlyle and Alexander James Carlyle, *History of Mediæval Political Theory in the West* (Edinburgh: William Blackwood and Sons, 1936), 1: 111–129.

4. John D. G. Evans, *Aristotle* (Brighton: Harvester Press, 1987), pp. 156–160; Terrence Irwin, *Aristotle's First Principle* (Oxford: Clarendon Press, 1988), pp. 94–116.

5. St. Thomas Aquinas, *Summa Theologiæ*, Thomas Gilby and T. C. O'Brien, trans. (Cambridge: Blackfriars, 1966), 28: 19–21, 51–73; John Finnis, "Nature, Reason,

and God in Aquinas," in *St. Thomas Aquinas on Politics and Ethics*, Paul E. Sigmund, ed. (New York: W. W. Norton, 1988), pp. 190–191.

6. Genesis, chs. 1–3.

7. This contrast between fundamental Western and non-Western comprehensions of cosmology, soteriology, fate, and destiny is addressed Joseph Campbell, *Transformations of Myth Through Time* (New York: Harper and Row, 1990), pp. 93–109; and Richard J. Parmentier, "Comparison, Pragmatics, and Interpretation in the Comparative Philosophy of Religion," in *Religion and Practical Reason*, Frank E. Reynolds and David Tracy, eds. (Albany: State University of New York Press, 1994), pp. 407–428.

8. These American aboriginal values, which continue to offer an example of cooperation and community to highly individualistic societies, like Alaska, are addressed in Sharon O'Brien, *American Indian Tribal Governments* (Norman: University of Oklahoma Press, 1987), pp. 14–33.

9. This imagery was offered in support of the underlying premise and justification of property rights in Locke, *Essays on the Law of Nature,* pp. 289–296. Perhaps, the most profound expression of this interpretation of the liberal tradition can be found in C. B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford: Oxford University Press, 1962), pp. 1–11.

10. This myth of the "frontier" within American society (including its policy manifestations in relation to western expansion, racism against indigenous peoples, and general support for the image of "rugged individualism") is explored in Anders Stephanson, *Manifest Destiny*: *American Expansionism and the Empire of Right* (New York: Hill and Wang, 1995), pp. 66–111.

11. This interpretation remained almost completely unchallenged until the 1960s, and it still dictates the parameters of present scholarly and judicial discourse within this area. It is expressed within such classic texts as Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace, and World, 1955), pp. 1–32; and John C. Miller, *Origins of the American Revolution* (Stanford, CA: Stanford University Press, 1966), pp. 169–180.

12. This contrast is evident when considered in relation to Mill's theories regarding social policy, such as provided in John Stuart Mill, "Utilitarianism," in *English Philosopher from Bacon to Mill*, Edwin A. Burtt, ed. (New York: Random House, 1967), pp. 916–922. A classic evaluation of this contrast is offered in C. B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977), pp. 50–64.

13. This libertarian approach to American society and the laws that govern it, including the basic application of the "harm principle," are discussed in Judith J. Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), pp. 227–293.

14. John Stuart Mill, *On Liberty* (Boston: Ticknor and Fields, 1863), pp. 22–23.

15. A critique of this common [mis]identification of objectivism with the libertarian tradition of liberal democracy is provided in Peter Schwartz, "Libertarianism: The Perversion of Liberty," in Ayn Rand, *The Voice of Reason*: *Essays in Objectivist Thought*, Leonard Peikoff, ed. (New York: New American Library, 1988), pp. 311–333.

16. An explanation and evaluation of Rand's objectivism is offered in James T. Baker, *Ayn Rand* (Boston: Twayne, 1987), pp. 94–123.

17. Ayn Rand, *Atlas Shrugged* (New York: Random House, 1957), p. 757.

18. An example of this perceived similarity between objectivist political philosophy and libertarian political thought can be found in Ayn Rand, "Antitrust: The Rule of Unreason," in "Perversion of Liberty," Peikoff, ed. (1988), pp. 254–259.

19. Ayn Rand, "The Rights of Man," in *The Voice of Reason*: *Essays in Objectivist Thought*, Leonard Peikoff, ed. (New York: Meridian, 1990), p. 92, with emphasis provided within the original text.

20. Dauenhauer and Dauenhauer, *Haa Kusteeyí, Our Culture,* pp. 18–22.

21. Polly Miller, *The Lost Heritage of Alaska* (Cleveland: World, 1968), pp. 4–6.

22. Miller, *Lost Heritage of Alaska,* pp. 6–27.

23. Ibid., pp. 30–93; P. A. Tikhmenev, *A History of the Russian-American Company*, Richard A. Pierce and Alton S. Donnelly, trans. and eds. (Seattle: University of Washington, 1978), pp. 41–60.

24. John A. Harrison, *The Founding of the Russian Empire* (Coral Gables, FL: University of Miami Press, 1971), pp. 114–123.

25. Antoinette Shalkop, "The Russian Orthodox Church in Alaska," in *Russia's American Colony*, S. Frederick Starr, ed. (Durham, NC: Duke University Press, 1987), pp. 196–217; Tikhmenev, *History of Russian-American Company,* pp. 61–75.

26. N. N. Bolkhovitinov, "Russian-America and International Relations," in *Russia's American Colony,* Starr, ed., pp. 251–270; Archie W. Shiels, *The Purchase of Alaska* (College: University of Alaska Press, 1967), pp. 1–5.

27. Claus-M. Naske and Herman E. Slotnick, *Alaska*: *A History of the 49th State* (Norman: University of Oklahoma Press, 1987), pp. 57–62.

28. Shiels, *Purchase of Alaska,* pp. 139–173.

29. Jeannette Paddock Nichols, *Alaska* (New York: Russell and Russell, 1963), pp. 35–58.

30. Naske and Slotnick, *Alaska: A History,* pp. 72–75.

31. Clarence C. Hulley, *Alaska*: *Past and Present* (Portland, OR: Binfords and Mort, 1958), pp. 213–221, 284–295; Nichols, *Alaska,* 71–88.

32. Hubert Howe Bancroft, *History of Alaska*, *1730–1885* (New York: Antiquarian Press, 1985), pp. 590–629; William R. Hunt, *Alaska*: *A Bicentennial History* (New York: (W. W. Norton, 1976), pp. 56–58, 79–89.

33. Henry W. Clark, *History of Alaska* (Freeport, NY: Books for Libraries Press, 1972), pp. 98–115; Naske and Slotnick, *Alaska: A History,* pp. 77–99; David Wharton, *The Alaska Gold Rush* (Bloomington, IN: Indiana University Press, 1972), pp. 25–42.

34. These themes are given critical scrutiny and expression in Michael Kumin, "The Call of the Wild: London's Seven Stages of Allegory," *Jack London Newsletter* 21, no. 1 (1988): 86–98.

35. Jack London, *The Call of the Wild*, Daniel Dyer, ed. (Norman: University of Oklahoma Press, 1997), pp. 60–61.

36. Naske and Slotnick, *Alaska*: *A History*, p. 71.

37. George Washington Spicer, *The Constitutional Status and Government of Alaska* (Baltimore: Johns Hopkins University Press, 1927), pp. 70–81.

38. Hunt, *Alaska*: *A Bicentennial History*, p. 181.

39. Hunt, *Alaska*: *A Bicentennial History*, pp. 104–134.

40. Clark, *History of Alaska,* pp. 156–180; Ernest Gruening, *The State of Alaska* (New York: Random House, 1968), pp. 527–539.

41. Ernest Gruening, *The Battle for Alaska Statehood* (College: University of Alaska Press, 1967), pp. 71–91; Naske and Slotnick, *Alaska: A History,* pp. 241–274.

42. Gordon S. Harrison, *Alaska's Constitution*: *A Citizen's Guide*, 2d ed. (Anchorage: Institute of Social and Economic Research, 1986), pp. 6–7.

43. M. V. Bezeau, "The Realities of Strategic Planning: The Decision to Build the Alaska Highway," in *Interpreting Alaska's History*: *An Anthology*, Mary Childers Mangusso and Stephen W. Haycox, eds. (Anchorage: Alaska Pacific University Press, 1989), pp. 402–414.

44. Ak. Const., ART. I, SEC. 1.

45. 501 P.2d 159, at 167.

46. 501 P.2d 159, at 169.

47. 391 U.S. 145 (1965).

48. Ak. Const., ART. I, SEC. 22 (1972).

49. 537 P.2d 494 (Alaska 1975), at 502–503.

50. 537 P.2d 494 (Alaska 1975), at 503.

51. 537 P.2d 494 (Alaska 1975), at 514.

52. This principle is expressed, at the federal level in terms of the "clear and present danger" test, relating to limits upon the freedom of expression, that was articulated by Oliver Wendel Holmes in the landmark 1921 case of *Schenck vs. United States*, 249 U.S. 47 (1919).

53. 537 P.2d 494 (Alaska 1975), at 511. This approach was supported within the 2001 case of *State of Alaska vs. Planned Parenthood,* 35 P.3d 30 (*Alas.* 2001).

54. This expression was used first within the 1989 Alaska Supreme Court case of *State of Alaska vs. Enserch Alaska Construction, Inc.*, in which state regulations that restricted business practices were subjected to a heightened scrutiny when balanced against the commercial interests and property rights of persons in the marketplace, 787 P.2d 624 (Alaska 1989).

55. 792 P.2d 686 (1990 Alas. App.), at 687–688.

56. 685 P.2d 1255 (Alaska 1984).

57. 792 P.2d 686 (1990 Alas. App.), at 688.

58. 391 U.S. 145 (1968).

59. 471 P.2d 386, at 396.

60. 358 P.2d 375 (Alaska 1960).

61. 358 P.2d 375 (Alaska 1960), at 377.

62. 358 P.2d 375 (Alaska 1960), at 378–380.

63. 486 P.2d 925 (Alaska 1971).

64. 486 P.2d 925 (Alaska 1971), at 934.

65. Ak.Const., art. I, secs. 1, 7, 11.

66. 486 P.2d 925 (Alaska 1971), at 936–937.

67. 486 P.2d 925 (Alaska 1971), at 939–940.

68. 458 P.2d 340 (Alaska 1969).

69. 458 P.2d 340 (Alaska 1969), at 341.

70. 458 P.2d 340 (Alaska 1969), at 342–344.

71. 458 P.2d 340 (Alaska 1969), at 344–345.

72. 458 P.2d 340 (Alaska 1969), at 349–355.

73. 626 P.2d 104 (Alaska 1981).

74. 626 P.2d 104 (Alaska 1981), at 107–110. This theme was revisited within the 2002 case of *Fraiman vs. State of Alaska,* 38 P.3d 1149 (*Alas.* 2002).

75. This constitutional approach has continued to be invoked (although generally in passing) by Alaskan courts (particularly the state's Supreme Court) in various cases. Some of the more notable of these decisions include *Alaska Gay Coalition vs. Anchorage*, 578 P.2d 951 (Alaska 1978); *State of Alaska vs. Daniel,* 589 P.2d 408 (Alaska 1979); *Messerli vs. State of Alaska*, 626 P.2d 81 (Alaska 1981); and *Pratt vs. Kirkpatrick*, 718 P.2d 962 (Alaska 1986).

Chapter 3: California: Diverse Microcosm

1. An exception to this rule would be a state like New Jersey, which is densely populated but not geographically extensive. However, these large states generally share characteristics which, in turn, parallel the broader American society, as noted (with particular emphasis upon California, in this respect) in Mark Baldassare, *California in the New Millennium*: *The Changing Social and Political Landscape* (Berkeley: University of California Press, 2000), pp. 136–180.

2. These British inspired legal and political institutions and their traditional interpretation and use persist, despite the cultural influences of various immigrant groups. This trend even is true in California, despite its very strong Latino legacy that has, otherwise, inspired an image of the state as an "American Mediterranean," as described in Kevin Starr, *Americans and the California Dream*, *1850–1915* (New York: Oxford University Press, 1973), pp. 365–414.

3. Examples of this persistent influence in terms of Texas are found in Harold H. Bruff, "Separation of Powers Under the Texas Constitution," *Texas Law Review* 68, no. 7 (1990): 1,337–1,368; and John Cornyn, "The Roots of the Texas Constitution: Settlement to Statehood," *Texas Tech Law Review* 26, no. 4 (1995): 1,089–1,218.

4. Philip L. Fradkin, *The Seven States of California* (New York: Henry Holt, 1995), pp. xv–xix; Carey McWilliams, *California*: *The Great Exception* (Westport, CT: Greenwood Press, 1971), pp. 8–24.

5. John W. Caughey and Norris Hundley Jr., *California*: *History of a Remarkable State* (Englewood Cliffs, NJ: Prentice-Hall, 1982), pp. 2–13.

6. Charles Edward Chapman, *The Founding of Spanish California* (New York: Octagon, 1973), pp. 1–13.

7. Herbert Eugene Bolton, *An Outpost of Empire* (New York: Russell and Russell, 1965), pp. 33–42.

8. Chapman, *Founding of Spanish California,* pp. 145–172.

9. Felix Reisenberg, *The Golden Road: The Story of California's Spanish Mission Trail* (New York: McGraw-Hill, 1962), pp. 38–52.

10. James A. Sandos, "Between Crucifix and Lance: Indian-White Relations in California, 1769–1848," in *Contested Eden*: *California Before the Gold Rush*, Ramón A. Guitiérrez and Richard J. Orsi, eds. (Berkeley: University of California Press, 1998), pp. 210–213.

11. David Lavender, *California*: *Land of New Beginnings* (New York: Harper and Row, 1972), pp. 48–79.

12. W. H. Hutchinson, *California*: *Two Centuries of Man*, *Land*, *and Growth in the Golden State* (Palo Alto, CA: American West, 1971), pp. 67–72.

13. Robert Glass Cleland, *From Wilderness to Empire* (New York: Alfred A. Knopf, 1944), pp. 176–191.

14. Horace Greeley, *An Overland Journey from New York to San Francisco in the Summer of 1859* (Lincoln: University of Nebraska Press, 1999), p. 386.

15. Robert Glass Cleland, *A History of California* (Westport, CT: Greenwood Press, 1975), pp. 1–10

16. Ralph J. Roske, *Everyman's Eden*: *A History of California* (New York: Macmillan, 1968), p. xi.

17. John Stuart Mill, *On Liberty*, Elizabeth Rapaport, ed. (Indianapolis, IN: Hackett, 1978), p. 9.

18. Kevin Starr, *Americans and the California Dream* (New York: Oxford University Press, 1973), pp. 21–34.

19. Mill, *On Liberty,* p. 94.

20. Cleland, *A History of California*, pp. 46–60.

21. Hutchinson, *California,* pp. 97–107.

22. Cleland, *From Wilderness to Empire*, pp. 113–124.

23. Cleland, *A History of California*, pp. 153–164.

24. Lisbeth Hass, "War in California, 1846–1848," in *Contested Eden,* Guitiérrez and Orsi, eds., pp. 331–350.

25. David Lavender, *California: A Bicentennial History* (New York: W. W. Norton, 1976), pp. 126–128.

26. Rockwell Dennis Hunt, *The Genesis of California's First Constitution* (Baltimore, MD: Johns Hopkins University Press, 1895), pp. 17–18.

27. Royce D. Delmatier, Clarence F. McIntosh, and Earl G. Waters, *The Rumble of California Politics*, *1848–1970* (New York: John Wiley and Sons, 1970), pp. 9–11.

28. Joseph R. Grodin, Calvin R. Massey, Richard B. Cunningham, *The California State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1993), pp. 4–5.

29. Grodin, et al., *The California State Constitution,* pp. 6–7.

30. William Gwin, in *Report of the Debates of the Convention of California on the Formation of the State Constitution*, J. Ross Browne, ed. (Washington, DC: n.p., 1850), p. 117, as quoted in Grodin, et al., *The California State Constitution,* p. 5.

31. Carey McWilliams, *California*: *The Great Exception* (Westport, CT: Greenwood Press, 1971), pp. 41–49.

32. Andrew Gyory, *Closing the Gate*: *Race*, *Politics*, *and the Chinese Exclusion Act* (Chapel Hill, NC: University of North Carolina Press, 1998), pp. 3–16.

33. John H. Culver and John C. Syer, *Power and Politics in California* (New York: John Wiley and Sons, 1980), pp. 27–29.

34. This philosophical movement also influenced the specific development of the common law system, which had profound implications for the growth of American constitutionalism. This theme is explored in greater detail in Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge: Harvard University Press, 1977), pp. 109–139.

35. Jeremy Bentham, "An Introduction to the Principles of Morals and Legislation," in John Stuart Mill and Jeremy Bentham, *Utilitarianism and Other Essays*, Edwin

A. Butt, ed. (Harmondsworth, England: Penguin, 1987), p. 65, with emphasis found within the original text.

36. John Austin, *Lectures on Jurisprudence*, Robert Campbell, ed. (London: John Murray, 1885), 1: 124–125.

37. 11 Pet. (36 U.S.) 420 (1837), at 424.

38. 175 P. 466 (Cal. 1918), at 474.

39. 70 Am.Dec. 638 (Cal. 1858), at 639–640.

40. That determination was made by the federal judiciary within the cases of *In re Parrott*, 1 F. 481 (C.C.D. Cal. 1880), and *Baker vs. City of Portland*, 2 F. Cas. 472 (C.C.D. Or. 1879) (No. 777).

41. Grodin, et al., *The California State Constitution,* pp. 11–15.

42. Spencer C. Olin Jr., *California's Prodigal Sons*: *Hiram Johnson and the Progressives* (Berkeley: University of California Press, 1968), pp. 169–182.

43. Walter J. Stein, *California and the Dust Bowl Migration* (Westport, CT: Greenwood Press, 1973), pp. 32–70.

44. John Steinbeck, *The Grapes of Wrath* (New York: Viking, 1986), pp. 297–298.

45. This trend is explored in Garin Burbank, "Governor Reagan and California Welfare Reform: The Grand Compromise of 1971," *California History* 70, no. 3 (Fall 1991): 278–289.

46. Baldassare, *California in the New Millennium,* pp. 46–59.

47. Gerald F. Uelman, "Victims' Rights in California," *St. John's Journal of Legal Commentary* 8, no. 1 (1992): 197–204; Gerald F. Uelman, "California's Crime Victims Reform Act: Limiting State Constitutional Rights of Criminal Defendants," *State Constitutional Notes and Commentaries* 1, no. 4 (Summer 1990): 5–9.

48. *California Constitution* (1879), ART. I, SEC. 28 (1982).

49. *California Constitution*, (1879) ART. I, SEC. 24, as amended.

50. 13 Cal.3d 528 (1975), at 547–548. One precedent that the California Supreme Court found to be particularly relevant in this respect was *Cooper vs. State of California*, in which the United States Supreme Court acknowledged this prerogative of state courts, in general, and the California judicial system, in particular, 386 U.S. 58 (1967).

51. *California Constitution* (1879), ART. I, SEC. 13.

52. 13 Cal.3d 528 (1975), at 549–552.

53. 13 Cal.3d 528 (1975), at 549–550.

54. 13 Cal.3d 528 (1975), at 548–550; Justice Mosk cited, in particular, scholarly authorities such as Falk, "The State Constitution: A More than 'Adequate' Nonfederal Ground," *California Law Review* 61, 273; and Schwartz, *The Bill of Rights: A Documentary History*, vol. I in support of this universal interpretation of state constitutions within the American system.

55. 13 Cal.3d 528 (1975), at 552–556. The historical evidence regarding the original intentions of the framers of the California Constitution of 1850, based upon Browne's report of the debates of that convention, is cited at 555, n. 3.

56. 414 U.S. 218 (1973).

57. 414 U.S. 260 (1973).

58. 14 Cal.3d 943 (1975), at 951–952, with the word "former" bracketed within the original text.

59. 68 Cal.2d 436 (1968), at 440–444.

60. 68 Cal.2d 436 (1968), at 444.

61. 395 U.S. 752 (1969), at 757.

62. This consideration is part of John Austin's broader concern with the establishment of neutral rules for interpreting and applying law, as expressed in Austin, *Lectures on Jurisprudence,* vol. I, pp. 407–425.

John Stuart Mill provides a more definitive defense of the legal limits established by a concept of "public safety, particularly in John Stuart Mill, *On Liberty*, Elizabeth Rapaport, ed. (Indianapolis, IN: Hackett, 1984), pp. 73–93. The quandary regarding the conflict of the expression of additional "moral" purposes within the law is addressed in John Stuart Mill, "Utlitarianism," in *English Philosophers from Bacon to Mill*, Edwin A. Burtt, ed. (New York: Random House, 1967), pp. 916–922.

This theme is not confined to the American legal and constitutional traditions but is typical of all liberal democratic societies. Further critical analysis of this subject also is provided in Dennis Lloyd [Lord Lloyd of Hampstead], *The Idea of Law* (London: Penguin, 1987), pp. 98–102; and C. B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977), pp. 25–37.

63. The difficulty of determining the proper boundaries of this relationship between law and the social purposes, ideals, and history that ultimately are responsible for it is a central theme of the influential analysis provided by Charles Secondat, Baron de Montesquieu, *The Spirit of the Laws*, Anne M. Cohler, Basia Carolyn Miller, Harold Samuel Stone, trans. and eds. (Cambridge: Cambridge University Press, 1989), pp. 154–186, 494–520.

64. A seminal analysis of this prominent theme, and the requirements of interpretive neutrality it imposes upon jurists, is provided in Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), pp. 45–86.

65. H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994), p. 7.

66. 23 Cal.3d 899 (1979), at 908. This issue was revisited within the 2002 case of *People of California vs. Mar,* 124 Cal. Rptr. 2d 161 (Cal. 2002).

67. *California Civil Code*, SEC. 47 (3).

68. 48 Cal.3d 711 (1989), at 745–746.

69. *California Constitution* (1879), ART. I, SEC. 4.

70. 61 Cal.2d 716 (1964), at 717–718, including n. 1.

71. One exception to this prevalent reliance upon federal precedents was a passing reference to the case of *Sandelin vs. Collins*, 1 Cal.2d 147 (1934), which defined the reasonable extent of police powers for the purpose of restricting religious practices and which was decided primarily upon the basis of a First Amendment interpretation.

The federal precedents that the California Supreme Court cited within this opinion include decisions within the cases of *Reetz vs. State of Michigan*, 188 U.S. 505 (1903); *Cantwell vs. Connecticut*, 310 U.S. 296 (1940); *West Virginia State Board of Education vs. Barnette*, 319 U.S. 624 (1942); *Braunfeld vs. Brown*, 366 U.S. 599 (1960); *In re Jenison*, 375 U.S. 14 (1963); and a particular emphasis upon the federal decision within the case of *Sherbert vs. Verner*, 374 U.S. 398 (1963).

72. 61 Cal.2d 716 (1964), at 727.

73. John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1971), p. 212.

Rawls's thesis is, of course, a complex one that attempts to redefine basic conceptualizations of justice, the social contract, and the idea that rights should not be sacrificed for the benefit of achieving a larger social "good." His basic arguments can be found in Rawls, *A Theory of Justice,* pp. 54–117.

This particular passage demonstrates Rawls' commitment to certain liberal democratic values (such as pluralism and tolerance) that are fundamental to his overall conception, as well as to the practical expectations of a modern liberal democratic society, such as the United States. A critique of this aspect of his theory, including a consideration of the extent to which it is relevant to the ideological tradition of American society, can be found in William A. Galston, "Pluralism and Social Unity," in *Political Theory: Classic Writings, Contemporary Views*, Joseph Losco and Leonard Williams, eds. (New York: St. Martin's Press, 1992), pp. 684–696.

74. 494 U.S. 872 (1990), at 889.

75. This more narrow construction of California's definition of the freedom of religion has been given scholarly treatment in a commentary entitled "Religious Beliefs and the Criminal Justice System," *Loyola Law Review* 8, (1975): 401–402.

76. These principles were derived, in part, from the "Lemon test" that was established within the federal case of *Lemon vs. Kurtzman*, 403 U.S. 602 (1971). Other precedents that contributed to this decision include the federal case of *Walz vs. Tax Commission*, 397 U.S. 664 (1970); and the state cases of *Hewitt vs. California Board of Medical Examiners*, 148 Cal. 590 (1906); and *Blinder vs. California Division of Narcotic Enforcement*, 25 Cal.App.3d 174 (1972).

77. 211 Cal.App.3d 1,346 (1989), at 1,351. The popular association of modern California with unconventional behavior, especially in terms of unusual religious organizations and cults, might lend itself to a conclusion that this state is more tolerant of, and more ready to defend, a religious group such as this one within the context of such a controversy. However, that popular image does not necessarily reflect a genuine cultural sentiment. For example, the court, within this case, cited certain scholarly works that supported its general position, including John H. Mansfield, "The Religion Clauses of the First Amendment and the Philosophy of the Constitution," *California Law Review* 72, (1984): 848–849, 856–858; and Martin S. Sheffer, "The U.S. Supreme Court and the Free Exercise Clause," *Journal of Church & State* 23, 535.

The California Court of Appeals did acknowledge that "faith healers" are constitutionally protected within California, but it also noted that this practice did not entail actual medical practice and, therefore, did not pose a direct "harm" to society. The protection of the practice of faith healers within California and its relationship to general restrictions regarding religion and medical practices is addressed in Note, "Restrictions on Unorthodox Health Treatment in California," *UCLA Law Review* 24, (1977): 647, 664, 695.

A related controversy can be found within the 2001 case of *Morris Cerullo World Evangelism vs. Superior Court of San Diego County,* 2001 Cal. App. LEXIS 812.

Chapter 4: Southern Republicanism

1. This image of Georgia as a strong representative of this image of the Deep South is explored in Neal R. Peirce, *The Deep South States of America* (New York: W. W. Norton, 1974), pp. 375–379.

2. The origins of this popular perception of southern culture and politics are noted in Alan Gallay, *The Formation of a Planter Elite* (Athens: University of Georgia Press, 1989), pp. 1–29. The term "mercantile" should not be confused with "mercantilism," as explained within notes 24 and 27 of the Introduction, supra.

3. An example of this affect of the English Civil War upon the Cavaliers, including the subsequent migrations of some of them, is addressed in Peter Laslett, "The Gentry of Kent in 1640," *Cambridge Historical Journal* 9, (1948): 149–174.

4. This representation of colonization patterns within the American colonies is found in Herbert Eugene Bolton and Thomas Maitland Marshall, *The Colonization of North America* (New York: Macmillan, 1920), pp. 329–342.

5. Will Durant and Ariel Durant, *The Age of Louis XIV* (New York: Simon and Schuster, 1963), p. 183, including note.

6. Alistair Cooke, *Alistaire Cooke's America* (New York: Alfred A. Knopf, 1976), p. 78.

7. David Hawke, *The Colonial Experience* (Indianapolis, IN: Bobbs-Merrill, 1966), p. 69.

8. Thomas L. Pangle, *The Spirit of Modern Republicanism* (Chicago: University of Chicago Press, 1988), pp. 30–32.

9. Milton Sydney Heath, *Constructive Liberalism*: *The Role of the State in Economic Development in Georgia to 1860* (Cambridge, MA: Harvard University Press, 1954), pp. 1–9.

10. James Harrington, "The Prerogative of Popular Government," in *The Political Works of James Harrington*, J. G. A. Pocock, ed. (Cambridge: Cambridge University Press, 1977), p. 401.

11. Scott A. Nelson, *The Discourses of Algernon Sydney* (London: Associated University Presses, 1993), pp. 38–43.

12. This legacy is explored further in Alan Craig Houston, *Algernon Sydney and the Republican Heritage in England and America* (Princeton, NJ: Princeton University Press, 1991), pp. 223–267.

13. Gallay, *Formation of a Planter Elite,* p. xvii.

14. Houston, *Algernon Sydney,* pp. 103–108.

15. George R. Lamplugh, *Politics on the Periphery*: *Factions and Parties in Georgia*, *1783–1806* (Newark: University of Delaware Press, 1990), pp. 27–28.

16. The composition of the House of Burgesses, and the way it reflected southern culture, economics, and politics throughout the region, is discussed in Jack P. Greene, "Foundations of Political Power in the Virginia House of Burgesses," in *Shaping Southern Society*, T. H. Breen, ed. (Oxford: Oxford University Press, 1976), pp. 215–231.

17. Phinizy Spalding, "Oglethorpe and the Founding of Georgia," in *A History of Georgia*, Kenneth Coleman, ed. (Athens: University of Georgia Press, 1991), pp. 16–24.

18. Kenneth Coleman, *Colonial Georgia* (New York: Charles Scribner's Sons, 1975), pp. 13–35.

19. James Edward Oglethorpe, "Letter to the Author of the *London Journal*, in *The Publications of James Edward Oglethorpe*, Rodney M. Baine, ed. (Athens: University of Georgia Press, 1994), p. 160.

20. Coleman, *Colonial Georgia,* pp. 55–76; Elizabeth J. Deariso, "The Spanish War in Georgia," in *Studies in Georgia History and Government*, James C. Bonner and Lucien E. Roberts, eds. (Athens: University of Georgia Press, 1990), pp. 18–36.

21. Robert Preston Brooks, *History of Georgia* (Boston: Atkinson, Mentzer, and Co., 1972), pp. 81–100.

22. Harold H. Martin, *Georgia*: *A Bicentennial History* (New York: W. W. Norton, 1977), pp. 33–48.

23. Kenneth Coleman, "Georgia in the American Revolution," in Coleman, *Colonial Georgia,* pp. 71–88; Charles C. Jones Jr., *The History of Georgia* (Boston: Houghton Mifflin, 1883), pp. 421–429.

24. Albert Berry Saye, *A Constitutional History of Georgia* (Athens: University of Georgia Press, 1948), pp. 117–134.

25. Lamplugh, *Politics on the Periphery,* pp. 19–28.

26. U.S. Const., ART. IV, SEC. 4.

27. Cullen B. Gosnell and C. David Anderson, *The Government and Administration of Georgia* (New York: Thomas Y. Crowell, 1956), pp. 14–16.

28. Prior to the adoption of the Fourteenth Amendment to the United States Constitution, the status of citizenship was determined separately by each state. The famous 1857 case of *Dred Scott vs. Sandford* confirmed the presumption that there was no constitutional status of United States citizenship. However, the Fourteenth Amendment altered that relationship, so that, now, a person who lives within a particular state can be a citizen of the United States, but they can be only a "resident" of that state. Nonetheless, legal residents of one state are still prevented by the Eleventh Amendment from suing the government of another state, even though the construction of that amendment continues to refer to "citizens" of states. This issue is addressed in Walter V. Shaefer, "Sanctity of the Person," in *The Fourteenth Amendment*, Bernard Schwartz, ed. (New York: New York University Press, 1970), pp. 39–54.

The principle of "sovereign immunity" is grounded upon the modern understanding of sovereignty, originality in classic conservative thought and continued within liberal democratic traditions. Recent judicial trends in sovereign immunity doctrine within the American constitutional tradition are addressed in E. H. Caminker, "Judicial Solicitude for State Dignity," 547 *Annals of the American Academy of Political and Social Science,* no. 1 (March 2001), pp. 81–92.

29. That amendment specifically states that "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State," U.S. Const., amend. XI (1795). An appraisal of it and its relationship to the legal and political development of Georgia is provided in Paul W. Kahn, *The Reign of Law*: *Marbury v. Madison and the Construction of America* (New Haven, CT: Yale University Press, 1997), pp. 28–29; and, especially, John V. Orth, *The Judicial Power of the United States*: *The Eleventh Amendment in American History* (New York: Oxford University Press, 1987), pp. 3–29.

30. U. B. Phillips, *Georgia and State's Rights* (Washington, DC: Government Printing Office, 1902), pp. 65–93. This sentiment was reflected within the majority opinion of the seminal *antebellum* case of *Dred Scott vs. Sandford*, 19 How. 392 (1859), which declared, among other things, the belief in state control over fundamental economic and cultural matters, such as slavery, as discussed in Paul Finkelman, *Dred Scott vs*. *Sandford*: *A Brief History with Documents* (Boston: Bedford Books, 1997), pp. 24–36.

31. Nunan V. Bartley, *The Creation of Modern Georgia* (Athens: University of Georgia Press, 1990), pp. 16–44.

32. A consideration of these developments, especially as they related to the people of the coastal region of Georgia, can be found in George A. Rogers and R. Frank Saunders Jr., *Swamp Water and Wiregrass* (Macon, GA: Mercer University Press, 1984), pp. 151–170.

33. An account of the Yazoo scandal from a Georgian perspective is found in Kenneth Coleman, "Political Development in a Frontier State," in Coleman, *Colonial Georgia,* pp. 96–101.

34. The way in which this Federalist interpretation prevailed under Chief Justice John Marshall is explained in Kahn, *The Reign of Law,* pp. 9–17.

35. 10 U.S. 87 (1810), at 135.

36. This conflict between the Creek and Cherokee peoples and Georgia is described, by a contemporary who was involved in the conflict, in Wilson Lumpkin, *The Removal of the Cherokee Indians from Georgia*, Robert M. Fogelson and Richard E. Rubenstein, eds. (New York: Arno Press, 1969), 2: 181–266. A modern appraisal of this episode is offered in Phillips, *Georgia and States' Rights,* pp. 66–86.

37. 30 U.S. 1 (1831), at 17.

38. 31 U.S. 515 (1832), at 545.

39. A good assessment of the general ideas and political purposes of this ideological approach, especially within the context of the era of "Jacksonian Democracy," is provided by Edward Pressen, *Jacksonian America* (Homewood, IL: Dorsey Press, 1969), pp. 5–38.

40. These ideas are evaluated in Charles M. Wiltse, *John C. Calhoun: Sectionalist* (Indianapolis, IN: Bobbs-Merrill, 1951), pp. 411–427.

41. John C. Calhoun, "A Disquisition on Government," in *Union and Liberty*: *The Political Philosophy of John Calhoun*, Ross M. Lence, ed. (Indianapolis, IN: Liberty Fund, 1992), pp. 5–24.

42. Lence, *Political Philosophy of John Calhoun*, pp. 22–23.

43. These beliefs that have been expressed within such seminal works as Edmund Burke, *Reflections on the Revolution in France*, J. G. A. Pocock, ed. (Indianapolis, IN: Hackett, 1987), pp. 8–46. They have been critiqued in George Fasel, *Edmund Burke* (Boston: Twayne, 1983), pp. 125–132.

44. This seminal expression is found in Thomas Hobbes, *Leviathan*, C. B. Macpherson, ed. (London: Penguin, 1985), pp. 261–274. An overview of this conservative tradition is provided in Jean Hampton, *Hobbes and the Social Contract* Tradition (Cambridge: Cambridge University Press, 1986), pp. 97–113; and Michael Oakeshott, *Hobbes on Civil Association* (Berkeley: University of California Press, 1975), pp. 29–54.

45. This development of a Georgian "nationalism" is discussed in E. Merton Coulter, *Georgia*: *A Short History* (Chapel Hill, NC: University of North Carolina Press, 1960), pp. 207–217; and Michael P. Johnson, *Toward a Patriarchal Republic* (Baton Rouge: Louisiana State University Press, 1977), pp. 143–178.

Georgia society lost the exclusive authority to define its own community when the issue of citizenship became subject to a federal standard under the Fourteenth Amendment to the United States Constitution, U.S. Const., amend. XIV. This change in status is explained in William D. Guthrie, *Lectures on the Fourteenth Article of Amendment to the Constitution of the United States* (New York: De Capo, 1970), pp. 18–19, 52–58.

46. The Georgia constitutional conventions of 1833 and 1839 are assessed in Fletcher M. Green, *Constitutional Development in the South Atlantic States*, *1776–1860* (Durham, NC: University of North Carolina Press, 1930), pp. 233–240.

47. Critical evaluations of this literary perspective of Georgia society are offered in Irene C. Goldman, "A Community of Capitalists: Rebuilding the Ruins in *Atlas Shrugged* and *Gone with the Wind*," *Journal of Popular Literature* 4, no. 2 (Fall 1990): 1–12; and J. M. Welsh, "*Gone with the Wind*: Scholarship and the 'Windies,' " *Literature Film Quarterly* 18, no. 1 (1990): 67–83.

48. Margaret Mitchell, *Gone with the Wind* (New York: Macmillan, 1936), pp. 17–18.

49. The political machinations of Troup, Clark, and other Georgian politicians and parties during this period are addressed in Kenneth Coleman, Numan V. Bartley, William F. Holmes, F. N. Boney, Phinzy Spaulding, Charles E. Wynes, *A History of Georgia*, Kenneth Coleman, gen. ed. (Athens: University of Georgia Press, 1991), pp. 129–152.

50. This significance of this movement (especially during the critical years of 1844 to 1848) is analyzed in Richard Harrison Shryock, *Georgia and the Union in 1850* (New York: AMS Press, 1968), pp. 126–177.

51. Coleman, "Political Development," in Coleman, *Colonial Georgia,* pp. 141–146.

52. This Georgia Constitution under the Confederate States of America, and Cobb's part in shaping it, are addressed in William B. McCash, *Thomas R. R. Cobb*: *The Making of a Southern Nationalist* (Macon, GA: Mercer University Press, 1983), pp. 217–227, 229–236.

53. The destruction of Georgia's political and economic infrastructure, as a result of the American Civil War, and its enduring consequences (including cultural ones), are examined in Coleman, et al., *History of Georgia*, pp. 225–237. The affect of these events upon African-American Georgians (as well as the entire *post-bellum* economic system of that state) during, and after, this conflict is evaluated in Edmund L. Drago, *Black Politicians and Reconstruction in Georgia*: *A Splendid Failure* (Baton Rouge: Louisiana State University Press, 1982), pp. 101–140.

54. The Georgia Constitutions of 1865 and 1868 are considered in Bartley, *Creation of Modern Georgia,* pp. 46–57.

55. This Georgia Constitution of 1877, and its significance, is evaluated in Saye, *Constitutional History of Georgia,* pp. 280–309.

56. The efforts of this commission, and the Georgia Constitution of 1945 that it produced, are considered in Tip H. Allen Jr. and Coleman B. Ransone Jr., *Constitutional Revision in Theory and Practice* (Birmingham, AL: University of Alabama Press, 1962), pp. 109–139.

57. This remaining constitutional development is appraised in Robert S. Stubbs, *Powers and Limits of State Government Under Georgia Laws* (Athens: University of Georgia Institute of Government, 1980), pp. 597–621. The administrative reform of the Georgia Constitution by Governor Busbee, in 1976, is addressed briefly in James F. Cook, *The Governors of Georgia* (Macon, GA: Mercer University Press, 1995), pp. 299–300.

58. The history of Georgia during, and soon after, the Reconstruction era is assessed in Martin, *Georgia: A Bicentennial History,* pp. 112–132.

59. These late-nineteenth-century populist movements and parties are surveyed in Alex Matthews Arnett, *The Populist Movement in Georgia* (New York: Columbia University Press, 1922), pp. 3–29.

60. The legacy of racism within Georgia, including the violation of voting rights, is considered in Ronald H. Bayor, *Race and the Shaping of Twentieth-Century Atlanta* (Durham, NC: University of North Carolina Press, 1996), pp. 3–52. Another aspect of

this heritage is explored in Roger Kent Hux, "The Ku Klux Klan in Macon, 1919–1925," *Georgia Historical Quarterly* 62, no. 2 (Spring 1978): 155–168.

61. This affect of both Governors Talmadge upon Georgia history and culture is explored in James F. Cook, *The Governors of Georgia*, *1754–1995* (Macon, GA: Mercer University Press, 1995), pp. 228–234, 248–252.

62. The ideas that shaped the heritage of Dr. King and other civil rights activists throughout the South, including Georgia, is addressed in Richard King, "The Role of Intellectual History in the Histories of the Civil Rights Movement," in *Race and Class in the American South Since 1890*, Melvyn Stokes and Rick Halpern, eds. (Oxford: Berg, 1994), pp. 171–179.

63. Georgia's political and social history, from the 1950s through the 1980s, is evaluated in Bartley, *Creation of Modern Georgia,* pp. 208–237; and Coleman, et al., *History of Georgia*, pp. 375–407.

64. The judicial interpretation of these parts of the Georgia Constitution have been critiqued as archaic and peculiar to that state's constitutional and cultural heritage in R. Perry Sentell Jr., "The Canons of Construction: 'Anachronisms in Action,' " *Georgia Law Review* 25, no. 2 (Winter 1991): 365–436.

65. Ga. Const., preamble (1777).

66. 176 Ga. App. 212 (1985), at 213–214.

67. 176 Ga. App. 212 (1985), at 215.

68. 127 Ga. App. 719 (1972), at 724.

69. 150 Ga. App. 408 (1979), at 410.

70. 150 Ga. App. 408 (1979), at 413.

71. 150 Ga. App. 408 (1979), at 413–416.

72. This general controversy is addressed, especially in terms of another case within this category, in Amy S. Haney, "The Constitutional Rights of Unwed Fathers in Georgia: *In re Baby Girl Eason*, *Georgia State University Law Review* 5, no. 2 (Spring 1989): 591–618.

73. 150 Ga. App. 408 (1979), at 416–418.

74. 150 Ga. App. 408 (1979), at 418, n. 2.

75. A critique of these types of cases, and the community-based morality that is invoked by certain jurists in reference to it, is provided in Judith A. Baer, *Equality Under the Constitution*: *Reclaiming the Fourteenth Amendment* (Ithaca, NY: Cornell University Press, 1983), pp. 225–242. The ongoing effect of this decision can be noted within the 2002 case of *Luke vs. Battle,* 565 S.E. 2d 816 (Ga. 2002).

76. The right to privacy was found to be implied by the language of the due process clause that is found in ART. 1, SEC. 1 of the Georgia Constitution. This determination was made within the seminal 1905 precedent of *Pavesich vs. New England Life Insurance Co.*, 122 Ga. 190 (1905).

77. Ga. Const., ART. III, sec. 6.

78. 231 Ga. 886 (1974), at 886–887.

79. 231 Ga. 886 (1974), at 888–889.

80. 70 Ga. 390. The Supreme Court of Georgia bolstered this opinion in *Cooper vs. Rollins*, 152 Ga. 588, and *Lamons vs. Yarbrough*, 206 Ga. 50.

81. 266 Ga. 474 (1996), at 476.

82. 266 Ga. 474 (1996), at 478.

83. 127 Ga. App. 282 (1977).

84. 261 Ga. 248 (1991). A more recent assessment of these constitutional issues can be found within the 2002 case *In re Stewart,* 275 Ga. 199 (2002).

Another interesting case, in this respect, is the 1996 Georgia Supreme Court case *In re: R.E.W.*, involving the visitation rights of a father who had been convicted of "solicitation of sodomy" and was determined to be a "demonstrable" homosexual, 267 Ga. 472 (1996).

85. John Trenchard and Thomas Gordon, "Considerations on the Weakness and Inconsistencies of Human Nature," in *Cato's Letters*: *or Essays on Liberty*, *Civil and Religious*, *and Other Important Subjects*, Ronald Hamowy, ed. (Indianapolis, IN: Liberty Fund, 1995), 1: 222.

Chapter 5: Hawaii: A Multi-Ethnic Heritage

1. Valued advice and assistance regarding this state and the research relating to its constitutional tradition was provided by Dean Robert G. Johnston of The John Marshall Law School, Chicago.

2. Hawaii's diverse ethnic heritage, especially its native population and its current proportion of the population of the state, is addressed (with the use of detailed demographic tables) in Eleanor C. Nordyke, *The Peopling of Hawaii* (Honolulu: University Press of Hawaii, 1977), pp. 127–186.

3. Polynesian cultural values, especially in terms of the environment and the holistic clan system, are reviewed in Felix M. Keesing, *Social Anthropology in Polynesia* (London: Oxford University Press, 1953), pp. 8–35.

4. This sort of liberal assessment is addressed in Max J. Skidmore, *Ideologies*: *Politics in Action* (Fort Worth, TX: Harcourt Brace Jovanovich, 1993), pp. 22–36, 59–74.

The allegory of the "state of nature" was offered as a way of explaining the origin of fundamental European values in Thomas Hobbes, *Leviathan*, C. B. Macpherson, ed. (London: Penguin, 1985), pp. 183–188 and John Locke, *Second Treatise of Government*, C. B. Macpherson, ed. (Indianapolis, IN: Hackett, 1980), pp. 8–14, though with very different conclusions regarding the relative character of the individual human.

5. Both the diversity and common identity of aboriginal peoples around the world is addressed in Janake Highwater, *The Primal Mind* (New York: Harper and Row, 1981), pp. 3–51. It also is treated, with particular emphasis regarding Hawaii, in Marshall Sahlins, *How Natives Think* (Chicago: University of Chicago Press, 1995), pp. 148–189.

6. This issue of membership and status within Polynesian clans is treated in E. S. Craighill Handy and Mary Kawena Pukui, *The Polynesian Family System in Ka-'U*, *Hawai'i* (Rutland, VT: Charles E. Tuttle, 1972), pp. 40–74.

7. Polynesian economic values and the "system" that results from it (including the basic division of labor) is explained in Irving Goldman, *Ancient Polynesian Society* (Chicago: University of Chicago Press, 1970), pp. 476–514.

8. This holistic life of the Polynesian community, especially in terms of collective (as opposed to individualistic) and mutual (i.e., reciprocal) economic activity, is alluded in Margaret Mead, "Homogeneity and Hypertrophy: A Polynesian Based Hypothesis," in *Polynesian Cultural History*, Genevieve A. Highland, et al., eds. (Honolulu: Bishop Museum Press, 1967), pp. 121–132.

9. These clan councils and the general Polynesian "political structure" and their general values are described and explained in Marshall D. Sahlins, *Social Stratification in Polynesia* (Seattle: University of Washington Press, 1967), pp. 30–36, 64–68, 86–91, 101–104.

10. A general description of the cooperative and communal approach of Polynesian peoples is provided in Keesing, *Social Anthropology in Polynesia,* pp. 50–51.

11. Polynesian attitudes that suggest a general and strong opposition to economic and environmental exploitation can be found in L. M. Thompson, "The Relations of Men, Animals, and Plants in an Island Community," *American Anthropologist* 51 (1949): 253–267.

12. The essential concept of "*mana*" is elaborated in Raymond Firth, "The Analysis of Mana," *Journal of Polynesian Society* 49, (1940): 483–512.

13. This essential concept of "*tapu*" is explained in Goldman, *Ancient Polynesian Society,* pp. 519–522.

14. The non-hierarchical perspective of Polynesian peoples towards modern societies, such as Hawaii, especially in terms of the concept of a "dispersed community," is addressed in Handy and Pukui, *Polynesian Family System,* pp. 1–17.

15. Nonetheless, Polynesians have adapted some of their value system to the developed world, such as the "westernization" of Hawaiian music and its transformation into a modern industry, as noted in George S. Kanahele, *Hawaiian Music and Musicians* (Honolulu: University of Hawaii Press, 1979), pp. 335–344.

16. The underlying meaning of "ideology" and "society" as exclusive Western concepts is addressed in Nancy S. Love, *Dogmas and Dreams*: *Political Ideologies in the Modern World* (Chatham, NJ: Chatham House, 1991), pp. xiii–xxi.

17. The fundamental difference between the cosmological and symbolic perspectives of Eastern and Western religious concepts has been a special focus of study for many years. It has been expressed especially in terms of linear (Western) and cyclical (Eastern) concepts of time and power, which has been analyzed within a comparative perspective by leading scholars of religion. This approach was made popular through the early considerations of the existence of a "shared human memory" regarding mutually held symbols of religious conceptualization in Carl Jung, *The Archetype and the Collective Unconscious*, R. F. C. Hull, trans. (New York: Pantheon, 1959), pp. 3–41. Other, and more recent, sources that promote this basic approach and understanding include Joseph Campbell, *Transformations of Myth Through Time* (New York: Harper and Row, 1990), pp. 93–109; and Richard J. Parmentier, "Comparison, Pragmatics, and Interpretation in the Comparative Philosophy of Religion," in *Religion and Practical Reason*, Frank E. Reynolds and David Tracy, eds. (Albany: State University of New York Press, 1994), pp. 407–428.

18. Medieval European theory offered a vision of dual, but complementary, sources of authority. The Roman Catholic Church and its hierarchical structure provided a spiritual source of authority, while the Holy Roman Emperor symbolized the apex of an equally hierarchical system of secular authority, even though, in reality, true political power remained relatively decentralized (consistent with the economic hegemony of the control of land and agricultural production) throughout the medieval period. This "doctrine of the two swords" generally remained a viable theory throughout Europe until the Reformation. An explanation and defense of this doctrine can be found in Marsilius of

Padua, "The Defender of Peace," in *Philosophy in the Middle Ages*, Arthur Hyman and James J. Walsh, eds. (Indianapolis, IN: Hackett, 1983), pp. 721–747.

19. A classic account of this theory of the state can be found in John Stuart Mill, *Considerations on Representative Government* (New York: Liberal Arts Press, 1958), pp. 15–35. A more recent, but equally celebrated, account and defense of the "minimalist" liberal state is provided by Robert Nozick, *Anarchy*, *State*, *and Utopia* (New York: Basic Books, 1974), pp. 88–119. An assessment of various approaches to the liberal theory of the state is offered in Steven M. DeLue, *Political Obligation in a Liberal State* (New York: State University of New York, 1989), pp. 1–24.

20. A classic critique of the liberal state that established this tradition can be found in Karl Marx, *Capital*, Ernest Mandel, ed. (London: Penguin, 1990), pp. 914–940. More recent adaptations of this Marxist tradition, including the rejection of the liberal idea of autonomous individualism, can be found in John F. Sitton, *Marx's Theory of the Transcendence of the State* (New York: Peter Lang, 1989), pp. 139–156; and Paul Thomas, *Alien Politics*: *Marxist State Theory Retrieved* (New York: Routledge and Kegan Paul, 1994), pp. 1–25.

21. This tendency towards the compartmentalization of different fields of endeavor within the Western tradition is indicated in John R. Everett, *Religion in Human Experience* (New York: Henry Holt, 1950), pp. 3–18.

22. The Western distinction between religion and philosophy, law and politics is offered in Everett, *Religion in Human Experience,* pp. 4–9, 275–283, 346–350.

23. The general Eastern view of time and power as part of a cyclical cosmology is treated in Arthur F. Wright, "Introduction," in *The Confucian Tradition*, Arthur F. Wright, ed. (Stanford, CA: Stanford University Press, 1960), pp. 3–20.

24. This concept is addressed in Charles O. Hucker, "Confucianism and the Chinese Censorial System," in *Confucianism and Chinese Civilization*, Arthur F. Wright, ed. (New York: Athenaeum, 1964), pp. 50–76.

25. This perspective is offered in Benjamin Schwartz, "Some Polarities in Confucian Thought," in *Confucianism in Action*, David S. Nivison and Arthur F. Wright, eds. (Stanford, CA: Stanford University Press, 1966), pp. 50–62.

26. Kung Futse [Confucius], *The Wisdom of Confucius*, Lin Yutang, trans. and ed. (New York: The Modern Library, 1966), pp. 111–112.

27. A contextual definition of *li* can be found in Chung-ying Cheng, *New Dimensions of Confucian and Neo-Confucian Philosophy* (Albany: State University of New York, 1991), pp. 9–22.

28. Kung Futse, pp. 214–215.

29. A general explanation of Taoist thought is offered in Angus C. Graham, *Disputes of the Tao* (LaSalle, IL: Open Court, 1989), pp. 213–235.

30. These political implications of Taoism are addressed in Graham, *Disputes of the Tao,* pp. 267–292.

31. I-ming Liu, *I Ching*, Thomas Cleary, trans. (Boston: Shambhala, 1986), p. 40.

32. A summary of Shinto beliefs, especially in relation to environmental politics, is found in Wing-tsit Chan, et al., *The Great Asian Religions* (New York: Macmillan, 1969), pp. 238–248.

33. Genchi Katò and Hikoshirò Hoshino, trans., *Kogoshùi*: *Gleanings from Ancient Stories* (London: Curzon Press, 1972), pp. 16–17.

34. This holistic nature of Eastern thought is revealed in T'ang ChÜn-I, "The Individual and the World in Chinese Methodology," *The Chinese Mind* (Honolulu: University of Hawaii Press, 1967), pp. 264–285.

35. The holistic nature of aboriginal thought is addressed in David Suzuki and Peter Knudston, *Wisdom of the Elders* (New York: Bantam, 1992), pp. 175–181; and Arthur Verslius, *Sacred Earth* (Rochester, VT: Inner Traditions International, 1992), pp. 9–47.

36. The adaptation of the common law from its medieval roots to the conditions and values of the modern era is addressed in Arthur R. Hogue, *Origins of the Common Law* (Indianapolis, IN: Liberty Press, 1985), pp. 241–251.

37. The influence of these Puritan ideals regarding the transformation of the Hawaiian economy is evaluated in Aidan Foster-Carter, "The Modes of Production Controversy," *New Left Review* 107, (January 1978): 1–31.

The term "mercantile" should not be confused with "mercantilism," as explained within notes 24 and 27 of the Introduction, supra.

38. A summation of these Puritan theological beliefs is provided in Mordecai Rotenberg, *Damnation and Deviance* (New York: Macmillan, 1978), pp. 22–40.

39. The mutual influence of Puritanism and liberalism upon each other, including the relationship of Puritan beliefs to Hobbesian theoretical concepts, can be found in Michael Walzer, *The Revolution of the Saints* (Cambridge, MA: Harvard University Press, 1965), pp. 1–65.

40. The Calvinist theory of predestination is reviewed in Rotenberg, *Damnation and Deviance,* pp. 93–99.

41. This development is addressed in Walzer, *Revolution of the Saints,* pp. 35–65.

42. The theocratic nature of the Massachusetts Bay Colony is explained in Richard D. Brown, *Massachusetts*: *A Bicentennial History* (New York: W. W. Norton, 1978), pp. 102–128; and Francis Jennings, *The Invasion of America* (Chapel Hill, NC: University of North Carolina Press, 1975), pp. 177–185.

43. The history of the arrival of missionaries to Hawaii is recounted briefly in Sandra E. Wagner, "Mission and Motivation: The Theology of the Early American Mission in Hawai'i," *Hawaiian Journal of History* 19 (1985): 62–70.

44. John Winthrop, *Winthrop's Journal*, J. K. Hosmer, ed. (New York: Scribner's, 1908), 2: 239.

45. A history of Hawaiian Polynesians prior to the eighteenth century is provided by Elizabeth Buck, *Paradise Remade* (Philadelphia: Temple University Press, 1993), pp. 31–56.

46. The early trade between Hawaiians and Europeans, including the sandalwood trade, is addressed in Ralph S. Kuykendall, *The Hawaiian Kingdom* (Honolulu: University of Hawaii Press, 1938), 1: 85–92.

47. Hawaiians began to challenge their Polynesian beliefs in response to European contacts, as noted in Harold W. Bradley, *The American Frontier in Hawaii* (Gloucester, MA: Peter Smith, 1968), pp. 13–54.

48. Kamehameha I's campaign, victory, and political consolidation is treated in Abraham Fornander, *An Account of the Polynesian Race* (Rutland, VT: Charles E. Tuttle, 1969), 2: 299–349; and Noel Kent, *Hawaii*: *Islands Under the Influence* (New York: Monthly Review Press, 1983), pp. 11–14.

49. In fact, Kamehameha's establishment of a united kingdom was based, in part, upon certain Western notions of the concept of a nation-state which complemented tradi-

tional Polynesian visions of community. A classic theoretical approach to this broad ideal of nationalism is offered in Karl W. Deutsch, *Nationalism and Social Communication* (New York: John Wiley and Sons, 1953), pp. 1–45.

50. The abolition of the *kapu* system under Kamehameha II is treated in Ralph S. Kuykendall and A. Grove Day, *Hawaii*: *A History from Polynesian Kingdom to Statehood* (Englewood Cliffs, NJ: Prentice Hall, 1976), pp. 39–46.

51. The political and cultural influence of missionaries within Hawaii is recounted from a primary perspective in Hiram Bingham, *A Residency of Twenty-One Years in the Sandwich Islands* (Rutland, VT: Charles E. Tuttle, 1981), pp. 579–616. A secondary source account of this influence is provided in Wagner, "Mission and Motivation," pp. 65–70.

52. Reasons and motivations for the Great Mahele are provided in Buck, *Paradise Remade,* pp. 57–67.

53. A brief economic history of the Great Mahele is provided in Buck, Ibid., pp. 67–73.

54. The evolution of the Great Mahele is addressed in Jon J. Chinen, *The Great Mahele* (Honolulu: University of Hawaii Press, 1958), pp. 5–12.

55. Chinese and Japanese economic migrations to Hawaii during this period are noted in Gavan Dawes, *Shoal of Time* (Honolulu: University of Hawaii Press, 1974), pp. 241–243.

56. Chinen, *Great Mahele,* pp. 8–9.

57. Ibid., pp. 8–9.

58. The duties and powers of this board are articulated in *Statute Laws of His Majesty Kamehameha III*, *1845* (Honolulu: Government of Hawaii Press, 1847), p. 107.

59. The gradual American takeover of Hawaii in the late nineteenth century, including in terms of displacing other foreign interests with the approval of Hawaiian economic and political elites, is addressed in Helena G. Allen, *Sanford Ballard Dole*: *Hawaii's Only President* (Glendale, CA: Arthur H. Clark, 1988), pp. 105–149.

60. The revolt against the government of Queen Liliuokalani is addressed in Kuykendall and Day, *History from Polynesian Kingdom,* pp. 179–185.

61. Sanford B. Dole, "Hawaiian Land Policy," in *The Hawaiian Annual* (Honolulu: n.p., 1898), pp. 125–126.

62. The Hawaiians Home Commission Act of 1920 and its implications, is evaluated in Roger Bell, *Last Among Equals*: *Hawaiian Statehood and American Politics* (Honolulu: University of Hawaii Press, 1984), pp. 46–47, 111–112, 184–185; and Kuykendall and Day, *History from Polynesian Kingdom,* pp. 208–209.

63. The statehood process, including the original constitutional draft of 1950 and the final draft that was approved in 1959, is reviewed in Ruth Tabrah, *Hawaii*: *A Bicentennial History* (New York: W. W. Norton, 1980), pp. 191–202.

64. Hi. Const., ART. XI (1959), as amended.

65. The common law concepts of riparian and appurtenant rights often are addressed together. They are defined in terms of their common law, civil law, American, and Hawaiian developments in Robert Emmett Clark, *Water and Water Rights* (Indianapolis, IN: Allen Smith, 1967), 1: 60–66, 160–161. However, appurtenant rights only are strictly applicable when the easement requirements are prescriptive, although Hawaiian courts often have mistakenly addressed them in that way, such as within the 1930 Hawaii

Territorial Supreme Court case of *Gay vs. Territorial Government of Hawaii*, 31 Haw. 376 (1930). This Hawaiian approach to riparian and appurtenant rights is addressed in Wells A. Hutchins, *The Hawaiian System of Water Rights* (Honolulu: State of Hawaii, 1965), pp. 83–86.

The broad legal concepts that are addressed by these cases are treated theoretically in Kenneth R. Minogue, "The Future of the Concept of Property Predicted from Its Past," in *Property*, J. Roland Pennock and John W. Chapman, eds. (New York: New York University Press, 1980), pp. 36–47.

66. 656 P.2d 57 (1982), at 64, with in-text citations omitted.

67. HRS § 1–1 (1985).

68. 656 P.2d 57 (1982), at 68.

69. 656 P.2d 57 (1982), at 68.

70. 656 P.2d 57 (1982), at 76 n. 20.

71. 656 P.2d 57 (1982), at 76.

72. 504 P.2d 1,330 (Haw. 1973), at 1,335–1,337, 1,341–1,342.

73. The issue of *res judicata*, in which the final judgment of a court that has proper jurisdiction is conclusively applicable to the parties in any subsequent litigation that involves the same course of action, also was an important common law focus of the court within this case, 504 P.2d 1,330 (Haw. 1973), at 1,334–1,335, 1,335–1,336.

74. 504 P.2d 1,330 (Haw. 1973), at 1,342.

75. 42 Haw. 560 (1958).

76. 31 Haw. 376 (1930).

77. Additional cases that address this approach to ART. 11 of the Hawaii Constitution include *Ahuna vs. Department of Hawaiian Home Lands*, 640 P.2d 1,161 (Haw. 1982); *Safeway Stores, Inc. vs. Board of Agriculture of the State of Hawaii*, 590 F.Supp. 778 (D.Haw. 1984); *Robinson vs. Ariyoshi*, 658 P.2d 287 (Haw. 1982); and *Fiedler vs. Clark*, 714 F.2d 77 (9th Cir. 1983).

78. Hi. Const., ART. XII (1959), as amended.

79. 656 P.2d 745 (Haw. 1982), at 747.

80. This issue is addressed statutorily within HRS § 7–1. The origins of this statute are found within the edicts of the Great *Mahele*, as noted in 656 P.2d 745 (Haw. 1982), at 749.

81. 656 P.2d 745 (Haw. 1982), at 747–748.

82. 656 P.2d 745 (Haw. 1982), at 749.

83. 837 P.2d 1,247 (Haw. 1992), at 1,289, with in-text citations omitted.

84. 837 P.2d 1,247 (Haw. 1992), at 1,325–1,326, with in-text citations omitted.

85. Other cases that reveal this approach include *Ahia vs. Hawaiian Department of Transportation*, 751 P.2d 81 (Haw. 1988); *Hoohull vs. Ariyoshi*, 631 F.Supp. 1,153 (D.Haw. 1986); *Trustees of Hawaiian Affairs vs. Yamasaki*, 737 P.2d 446 (Haw. 1987); *Price vs. Akaka*, 928 F.2d 824 (9th Cir. 1990), and *State of Hawaii vs. Brown,* 98 Haw. 142 (2002).

86. 652 P.2d 1,130 (Haw. 1982), at 1,136–1,137.

87. A "takings clause" provides, in general, for compensation to persons whose lands are commandeered by the government for the purpose of pursuing a legitimate public interest. This form of compensation reflects the property law concept of "conversion," but, more fundamentally, it reflects essential liberal beliefs regarding property rights, as discussed in Dennis J. Coyle, "Takings Jurisprudence and the Political Cultures

of American Politics," 42 *Catholic University Law Review* (Summer 1993), p. 817–862. The "takings clause" that is found within the Fifth Amendment to the United States Constitution has been the subject of a volatile judicial history, especially in terms of the attempt to define the types of property that can reasonably be "seized" by a government in pursuit of a "public interest." The power of the federal government appears to have been limited, in this respect, more than the Hawaiian government, given the diminished interpretation of libertarian economic interests within a traditional Hawaiian context. The American constitutional history of this clause is addressed in David M. O'Brien, *Constitutional Law and Politics* (New York: W. W. Norton, 1995), 2: 287–296.

88. 704 P.2d 888 (Haw. 1985), at 896, with in-text citations omitted.

89. Examples of Hawaiian cases that declare the presence of a greater expansive nature of the Hawaiian constitutional tradition without necessarily articulating the underlying source of those superior protections include *State of Hawaii vs. Saburo Miyasaki*, 614 P.2d 915 (Haw. 1980); *Ron Pray vs. Judicial Selection Commission of the State of Hawaii*, 861 P.2d 723 (Haw. 1993); *State of Hawaii vs. Patrick Constantino Russo*, 734 P.2d 156 (Haw. 1987); *State of Hawaii vs. James Kalaukoa Pokini, et al*., 367 P.2d 499 (Haw. 1961); *State of Hawaii vs. Abel Texeira*, 433 P.2d 593 (Haw. 1967), and *State of Hawaii vs. Tana,* 98 Haw. 142 (2002).

90. Hi. Const., ART. I, sec. 6 (1959).

91. 748 P.2d 372 (Haw. 1988), at 378.

Chapter 6: Louisiana: Constitutional Patriarchy

1. An account of the native inhabitants of this region (especially the Natchez people), as well as the initial exploration and settlement of this territory by Spanish and French entrepreneurs like Crozat, is revealed in the contemporary writing of Antoine Simon LePage du Pratz, *The History of Louisiana*, Joseph G. Tregle Jr., ed. (Baton Rouge: Louisiana State University Press, 1975), pp. xl–lvi, 35–118.

2. The initial development of the colony by figures such as Bienville and Law is discussed in Michel Giraud, *A History of French Louisiana* (Baton Rouge: Louisiana State University Press, 1974), pp. 31–61.

3. The transference of the colony from France to Spain, including the events and pressures leading to it, is explained in E. Wilson Lyon, *Louisiana in French Diplomacy* (Norman, OK: University of Oklahoma Press, 1934), pp. 39–54.

4. This Spanish colonial administration, and the accommodation that existed among Spanish political and French economic elites, is provided a specific treatment in Jack D. L. Holmes, "Some French Engineers in Spanish Louisiana," in *The French in the Mississippi Valley*, John Francis McDermott, ed. (Urbana: University of Illinois Press, 1965), pp. 123–142.

5. This rebellion of the French inhabitants against Spanish authority, the restoration of that authority, and its legacy, is addressed in Pierre H. Boulle, "French Reactions to the Louisiana Revolution of 1768," in McDermott, ed., *French in the Mississippi Valley,* pp. 143–157; and John Preston Moore, *Revolt in Louisiana* (Baton Rouge: Louisiana State University Press, 1976), pp. 165–215.

6. This early arrival and development of Creole culture in Louisiana is explored in Gwendolyn Midlo Hall, *Africans in Colonial Louisiana* (Baton Rouge: Louisiana State University Press, 1992) pp. 156–236. All Louisianans of French ancestry can, and often

do, claim the designation of "Creole," but it also has been applied, more specifically, to that population of mixed African and European ancestry within the state, especially in relation to the Cajun community. The political and social tensions and conflict that have existed between the Creole and Cajun communities within that state are addressed in Carl A. Brasseaux, *The Founding of New Acadia* (Baton Rouge: Louisiana State University Press), pp. 167–176. A general account of the rise of the cultural and political influence of those Acadian exiles within Louisiana is provided in William Faulkner Rushton, *The Cajuns*: *From Acadia to Louisiana* (New York: Farrar Straus Giroux, 1979), pp. 93–118.

7. These fundamental values that guided the political thought of medieval Europe are treated in Robert Warrand Carlyle and Alexander James Carlyle, *History of Mediæval Political Theory in the West* (Edinburgh: William Blackwood and Sons, 1936, 1: 34–49; 2: 111–129.

8. The overall influence of Roman Catholicism, in general, and the Jesuit order, in particular, upon Louisiana's cultural, social, political, and legal development is evaluated in Roger Baudier, *The Catholic Church in Louisiana* (New Orleans: Louisiana Library Association, 1972), pp. 3–18; Charles Edwards O'Neill, *Church and State in French Colonial Louisiana* (New Haven, CT: Yale University Press, 1966), pp. 283–288; and James Pitot, *Observations on the Colony of Louisiana*, 1769 to 1807, Henry C. Pitot, trans. (Baton Rouge: Louisiana State University Press, 1979), pp. 26–33.

9. These essential parameters of the natural law tradition as they have evolved are given an excellent summary in Lloyd L. Weinreb, *Natural Law and Justice* (Cambridge, MA: Harvard University Press, 1987), pp. 1–12.

10. Shadia B. Drury, "The Resilient Core of Natural Law," in *Law and Politics*, Shadia B. Drury, ed., Rainer Knopff, assoc. ed. (Calgary: Detselig Enterprises, Ltd., 1980), pp. 6–7.

11. These beliefs are articulated in Gaius, *The Institutes of Gaius*, W. M. Gordon and O. F. Robinson, trans. (Ithaca: Cornell University Press, 1988), pp. 19–23.

12. Marcus Tullius Cicero, *On the Commonwealth*, George Holland Sabine and Stanley Barney Smith, eds. (Columbus: Ohio State University Press, 1929), pp. 215–216.

13. The development and significance of the civil law system as it emerged from France is addressed in Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, Tony Weir, trans. (Oxford: Clarendon Press, 1987), 1: 76–137.

14. These historical circumstances and legal principles are addressed in Arthur R. Hogue, *Origins of the Common Law* (Indianapolis, IN: Liberty Press, 1985), pp. 33–45, 183–215.

15. Some of the most basic principles of the common law system that finally emerged from its development are given a classic treatment in A.V. Dicey, *The Law of the Constitution*, (Indianapolis, IN: Liberty Press, 1982), pp. cxliii–cxlv, 107–145.

16. This influence of the civil law tradition within Louisiana and other "mixed" legal traditions is noted in Mary Ann Glendon, Michael W. Gordon, and Christopher Osakwe, *Comparative Legal Traditions in a Nutshell* (St. Paul: West, 1982), pp. 43–44.

17. An example of this fundamental Aristotelian influence upon Thomistic thought can be found in Aristotle, "The Politics," in *The Basic Works of Aristotle*, Richard McKeon, ed. (New York: Random House, 1942), pp. 1,176–1,205. It should be noted that much of the knowledge of Aristotelian ideas and methods among medieval scholars like Saint Thomas Aquinas was based upon the interpretations of classic Arab scholarship, since

much ancient Greek learning was preserved by Middle Eastern cultures after it had been lost initially by Western Europeans. An excellent example of this interpretation can be found in Abū Nasr al-Fārābī, *Al-Fārābī, on the Perfect State*, Richard Walzer, trans. (Oxford: Clarendon Press, 1985), pp. 228–259.

18. Saint Thomas Aquinas, *Summa Theologiæ*, Thomas Gilby and T. C. O'Brien, trans. (Cambridge: Blackfriars, 1966), 28: 19–24, 37–39, 51–97.

19. St. Thomas Aquinas, *Summa Theologiæ*, Fathers of the English Dominican Province, trans. (Westminster, MD: Christian Classics, 1981), 2: 1,021–1,022.

20. This particular assessment of Thomistic thought and influence is pursued in greater detail in F. C. Copelston, *Aquinas* (London: Penguin Books, 1965), pp. 235–250; and John Finnis, "Nature, Reason, and God in Aquinas," in *St. Thomas Aquinas on Politics and Ethics*, Paul E. Sigmund, ed. (New York: W. W. Norton and Co., 1988), pp. 180–191.

21. Blaise Pascal, *Pensées*, Philippe Sellier, ed. (Paris: Bordas, 1991), p. 170.

22. Abbé d'Ailly, "Pensées diverses," Jean Lafond, ed., in *Moralistes du XVIIème siècle*, Jean LaFond, ed. (Paris: Robert Laffont, 1992), p. 270.

23. Thomas Hobbes, *Leviathan*, Michael Oakeshott, ed. (New York: Collier Books, 1962), p. 247, with the emphasis found within the original text.

24. Hobbes, *Leviathan,* pp. 250–251.

25. In particular, he responded in opposition to Filmer's perspective in John Locke, "The First Treatise of Civil Government," in *Two Treatises of Government*, Peter Laslett, ed., (Cambridge: Cambridge University Press, 1963), pp. 220–234.

26. He articulated this idea of political sovereignty in Algernon Sydney, *Court Maxims*, Hans W. Blom, Eco Haitsma Mulier, and Ronald Janse, eds. (Cambridge: Cambridge University Press, 1996), pp. 183–204.

27. The French reacquisition of Louisiana and its subsequent purchase by the United States is examined in Arthur Preston Whitaker, *The Mississippi Question*, *1795–1803* (New York: D. Appleton-Century, 1934), pp. 189–253.

28. Louisiana's history as an American territory, the drafting of its first constitution, and its admission into the American union as a state are addressed in Edwin Adams Davis, *Louisiana*: *A Narrative History* (Baton Rouge: Claitor's, 1971), pp. 89–141.

29. Cecil Morgan, ed., *The First Constitution of the State of Louisiana* (Baton Rouge: Louisiana State University Press, 1968), pp. 9–10.

30. La. Const., ART. IV, SEC. 11 (1812).

31. Morgan, ed., *First Louisiana Constitution,* pp. 11–12.

32. Ibid., pp. 5–9.

33. General arguments regarding the epistemological quality of language have been advanced most notably by Noam Chomsky, *Language and Politics*, Carlos P. Otero, ed. (Montreal, Canada: Black Rose, 1988), pp. 106–125. The idea that there are fundamental distinctions between English and French language legal and constitutional concepts, and their relationship to different legal systems and philosophical traditions, is addressed in detail in James T. McHugh, "Is the Law 'Anglophone' in Canada?", in *The American Review of Canadian Studies* 23, no. 3 (Autumn 1993): 407–424.

34. Constitution de l'etat de la Louisiane, preamble (1812).

35. This *antebellum* history of Louisiana (including the various sentiments, circumstances, and events that led to its secession from the United States) is explored in

Peyton McCrary, *Abraham Lincoln and Reconstruction*: *The Louisiana Experiment* (Princeton, NJ: Princeton University Press, 1978), pp. 19–65.

36. *Proceedings of the Louisiana State Convention* (New Orleans: J. O. Nixon, 1861), p. 47, with the emphasis included within the original text.

37. The Reconstruction era in Louisiana and the constitutional development that was part of it are addressed in Joe Gray Taylor, *Louisiana Reconstructed*, *1863–1877* (Baton Rouge: Louisiana State University Press, 1974), pp. 53–113.

38. This relationship of the 1898 Louisiana Constitution to the state's post-Reconstruction history is noted in Allan P. Sindler, *Huey Long's Louisiana* (Baltimore, MD: Johns Hopkins University Press, 1956), pp. 13–26; and C. Vann Woodward, *Origins of the New South*: *1877–1913* (Baton Rouge: Louisiana State University Press, 1951), pp. 208–216.

39. La. Const., ART. I (1898).

40. Mark T. Carleton, "The Louisiana Constitution of 1974," in *Louisiana Politics*: *Festival in a Labyrinth*, James Bolner, ed. (Baton Rouge: Louisiana State University Press, 1982), p. 15.

41. Carleton, in *Louisiana Politics,* Bolner, ed., pp. 15–17.

42. An example can be found in La. Const., ART. 36 (1921).

43. Some of the political and legal consequences of this constitutional manifestation within Louisiana, especially in terms of the persistent desire for reform in this area, are addressed in Emmet Asseff and R. B. Highsaw, *Civil Service in the Louisiana Local Units of Government* (Baton Rouge: Louisiana State University Press, 1951), pp. 6–8, 17–23.

44. William Ivy Hair, *The Kingfish and His Realm* (Baton Rouge: Louisiana State University Press, 1991), p. 18.

45. The career of Huey Long, including its comparison to the careers of other Louisiana politicians of the twentieth century, is offered in Sindler, *Huey Long's Louisiana,* pp. 34–52.

46. Huey P. Long, *Every Man a King* (Chicago: Quadrangle, 1964), pp. 255–256.

47. Robert Penn Warren, *All the King's Men* (San Diego: Harcourt, Brace, Jovanovitch, 1982), p. 72.

48. Some of the essential political, social, and cultural considerations that contributed to the drafting and adoption of the 1974 Louisiana Constitution are addressed in Carleton, *Louisiana Politics,* in Bolner, ed., pp. 15–21.

49. A good evaluation of the 1974 Louisiana Constitution, particularly in terms of that document's Declaration of Rights, is provided in Richard P. Bullock, "The Declaration of Rights of the Louisiana Constitution of 1974," in *Louisiana Law Review* 51, no. 4 (March 1991): 787–820.

50. 269 So.2d 450 (La. 1972), at 451.

51. Ordinance 828 MCS, Section 49–2.

52. 269 So.2d 450 (La. 1972), at 454.

53. 405 U.S. 518 (1972). The Louisiana high court previously had refused to issue a writ of certiorari to Mallie Lewis, without comment, except for a short dissent from the refusal by Justice Dixon, 244 So.2d 993 (La. 1971). Lewis appealed to the federal system, and the United States Supreme Court, in view of its recent decision in *Gooding vs. Wilson*, remanded the case to Louisiana, which, consequently, resulted in the 1972 Louisiana Supreme Court ruling, the subsequent further federal appeal, and the 1974 United States Supreme Court decision upon this issue.

54. 415 U.S. 130 (1974).

55. 415 U.S. 130 (1974), at 132, n. 2.

56. 415 U.S. 130 (1974), at 135–136.

57. 415 U.S. 130 (1974), at 141.

58. 148 So.2d 584 (La. 1963), especially at 588–593. This theme was also raised within the 2002 case of *Benson vs. City of Marksville,* 812 So.2d 687 (2002).

59. 148 So.2d 584 (La. 1963), at 589–590.

60. 97 So. 440 (La. 1923), at 446.

61. 43 So.2d 223 (La. 1919).

62. 9 Rob. 411.

63. 9 La.Ann. 561.

64. 11 La.Ann. 303.

65. 11 La.Ann. 338.

66. 12 La.Ann. 169.

67. 115 So. 740 (La. 1928).

68. 140 So. 13 (La. 1932).

69. 496 So.2d 281 (La. 1986), at 287.

70. This point has been noted and examined by Jenkins, "The Declaration of Rights," *Loyola Law Review* 21 (1975): 9; Hargrave, "The Declaration of Rights of the Louisiana Constitution of 1974," *Louisiana Law Review* 35 (1974): 1; and *Records of the Louisiana Constitutional Convention of 1973*, 12 (August 28, 1973): at 46, and (August 29, 1973): at 38.

71. 529 So.2d 384 (La. 1988), at 387.

72. A survey of these precedents includes *Hainkel vs. Henry*, 313 So.2d 577 (La. 1975); *State of Louisiana vs. Mallery*, 364 So.2d 1,283 (La. 1978); *Swift vs. State of Louisiana*, 342 So.2d 191 (La. 1977); *State of Louisiana vs. Griffin*, 495 So.2d 1,306 (La. 1986); *City of Lake Charles vs. Henning*, 414 So.2d 331 (La. 1982); and *Harry's Hardware, Inc. vs. Parsons*, 410 So.2d 735 (La. 1982), among other cases. It is very useful to compare these cases with pre-1974 precedents that affirm similar fundamental values within the Louisiana constitutional tradition, such as *Interstate Oil Pipeline Co. vs. Guilbeau*, 46 So.2d 113 (La. 1950); *State of Louisiana ex rel. Porterie, et al. vs. Smith, et al.*, 166 So. 72 (La. 1936); *Graham, et al. vs. Jones, et al*., 7 So.2d 688 (La. 1942); *State of Louisiana vs. Cullom*, 70 So. 338 (La. 1915); *Department of Highways of Louisiana vs. Southwestern Electric Power Company*, 145 So.2d 312 (La. 1962); and *State of Louisiana vs. City of New Orleans* 91 So. 533 (La. 1922), among other cases.

73. Examples from other states within this area that draw upon similar jurisprudential arguments but which, nonetheless, suggest a less categorical tone include *Board of Education of Jefferson County vs. State of Alabama ex rel. Carmichael* 187 So. 414 (Ala. 1939); *American Amusement Company, Inc. vs. Michigan Department of Revenue*, 283 N.W.2d 803 (Mich.App. 1979); and *Halbruegger vs. City of St. Louis*, 262 S.W. 379 (Mo. 1924), among other cases. The most important federal precedent that has confirmed this judicial perspective regarding the general nature of state constitutional traditions is *United States vs. Jacobs*, 306 U.S. 363 (1939), although the United States Supreme Court continued to emphasize the restraining effect of individual rights and liberties upon the powers of state, as well as federal, governments, especially when public financing is not at issue.

74. 529 So.2d 384 (La. 1988), at 387–388.
75. 192 So.2d 554 (La. 1966), at 556.
76. 434 So.2d 375 (La. 1983), at 376–377.
77. 556 So.2d 545 (La. 1990), at 551.
78. The Louisiana Supreme Court appeared to find some guidance, in this respect, from legal scholarship upon the subject, such as Comment, "Child Custody Disputes between Parents and Non-Parents," *Loyola Law Review* 25 (1979): 71.
79. 388 So.2d 696 (La. 1980).
80. 21 So.2d 819 (La. 1947).
81. 290 So.2d 675 (La. 1974).
82. 62 So.2d 641 (La. 1952).
83. 105 So.2d 228 (La. 1958).
84. 81 So.2d 8 (La. 1955). This matter also was raised within the 2002 case of *State of Louisiana ex rel. J. S. W. vs. Reuther,* La. App. 2 Cir LEXIS 2732 (2002).
85. Sir Robert Filmer, *Patriarcha*, Peter Laslett, ed. (New York: Garland, 1984), pp. 57–58.

Chapter 7: Utah: A Liberal Theocracy

1. A typical example of this sort of evaluation can be found in Thomas G. Alexander, "Utah's Constitution: A Reflection of the Territorial Experience," *Utah Historical Quarterly* 64, no. 3 (Summer 1996): 264–203.
2. An overview of this historical experience is provided in Charles S. Peterson, *Utah*: *A Bicentennial History* (New York: W. W. Norton, 1977), pp. 26–53.
3. This formative influence is stressed in Norman F. Furniss, *The Mormon Conflict* (New Haven, CT: Yale University Press, 1960), pp. 1–20.
4. American constitutional texts generally acknowledge, to some degree, this ideological dominance, such as Laurence Tribe, *American Constitutional Law* (Mineola, NY: Foundation Press, 1988), pp. 1–22.
5. This perspective is widely accepted. It is summarized and critiqued in many texts, including Ronald Dworkin, "Liberalism," in *Liberalism and Its Critics*, Michael Sandel, ed. (New York: New York University Press, 1984), pp. 60–79; C. B. Macpherson, *The Life and Times of Liberal Democracy* (New York: Oxford University Press, 1990), pp. 1–22; George H. Sabine and Thomas L. Thorson, *A History of Political Theory* (Fort Worth, TX: Holt, Rinehart and Winston, 1973), pp. 608–680; and Giovanni Sartori, *The Theory of Democracy Revisited* (Chatham, NJ: Chatham House, 1987), pp. 367–398.
6. Susan P. Fino, *The Role of State Supreme Courts in the New Judicial Federalism* (Westport, CT: Greenwood, 1987), pp. 6–12. G. Alan Tarr and Mary Cornelia Porter, *State Supreme Courts in State and Nation* (New Haven, CT: Yale University Press, 1988), pp. 54–68.
7. This perspective has become a prevailing one, and it is summarized especially well in Terrance Ball and J. G. A. Pocock, *Conceptual Change and the Constitution* (Lawrence, KS: University Press of Kansas, 1988), pp. 1–12.
8. The libertarian ascendancy over American social and political development during the Enlightenment period has been attributed to that "fragment" of English society (consisting largely of economic mercantilists and religious dissenters) who migrated to, and dominated, this emerging society. This classic, but controversial, theory is advanced in Louis Hartz, *The*

Founding of New Societies (New York: Harcourt, Brace, and World, 1964), pp. 1–20. Another notable, but somewhat controversial, attempt to provide an empirical analysis of the libertarian dominance of American society is provided in Seymour Martin Lipset, "Canada and the United States: The Cultural Dimension," in *Canada and the United States*: *Enduring Friendship*, *Persistent Stress* (Englewood Cliffs, NJ: Prentice-Hall, 1985), pp. 109–160.

9. An interesting parallel exists between a "millennial" movement among many Mormons that anticipated a moral transformation of humanity and the development of a "secular millennialism" among disciples of the Enlightenment. The belief in a millennial period in which Christ would return to Earth and establish a thousand-year reign of harmonious and righteous rule has found adherents among different Christian sects, and Joseph Smith Jr. has been cited as inspiring such a movement among many of his followers, Klause J. Hansen, *Quest for Empire*: *The Political Kingdom of God and the Council of Fifty in Mormon History* (Lincoln: University of Nebraska Press, 1967), pp. 3–23. Such anticipation among some Mormons assumed that superstition and ignorance would be replaced by truth, reason, and a moral transformation of all humanity, Richard Lloyd Anderson, "Joseph Smith and the Millenarian Time Table," *Brigham Young University Studies* 3, no. 1 (Spring/Summer 1961): 55–66; and Mario S. De Pillis, "The Quest for Religious Authority and the Rise of Mormonism," *Dialogue* 1, no. 1 (Fall 1966): 68–88. The secular Enlightenment in the American colonies similarly inspired a millennial expectation in which reason, itself (rather than a traditional religious event), would herald a similar rule of human perfection, Henry F. May, *The Enlightenment in America* (Oxford: Oxford University Press, 1976), pp. 153–176.

10. The dominance of this interpretive orthodoxy remained relatively unchallenged until the 1960s, and its most definitive scholarly expressions could be found within such classic texts as Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace and World, 1955), pp. 1–32; and John C. Miller, *Origins of the American Revolution* (Stanford, CA: Stanford University Press, 1966), pp. 169–180.

11. These basic parameters of Lockean liberalism are described in John Dunn, *The Political Thought of John Locke* (Cambridge: Cambridge University Press, 1969), pp. 87–95; and Martin Seleger, *The Liberal Politics of John Locke* (New York: Praeger, 1969), pp. 180–208. A classic expression of tolerance, in this respect, can be derived from John Locke, *A Letter Concerning Toleration*, James H. Tully, ed. (Indianapolis, IN: Hackett, 1983), pp. 23–28.

Locke's concept of religious tolerance was more restricted, though, than a twenty-first century understanding, especially in terms of a tolerance of Christian denominations, as revealed in John Locke, A Letter Concerning Toleration, James H. Tully, ed. (Indianapolis: Hackett, 1983), pp. 28–45.

12. The "harm principle" finds its seminal expression in the writings of John Stuart Mill. Its origins, however, preceded his writings and provided the prevailing tenet of political theory that the utilitarian tradition initially sought to challenge. Its classic articulation can be found in John Stuart Mill, *On Liberty*, Elizabeth Rapaport, ed. (Indianapolis, IN: Hackett, 1978), pp. 73–91. This general understanding of the parameters of modern liberalism, especially within American society, are discussed in Judith J. Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), pp. 227–293.

13. The central place of humans within the universe in Protestant theology, especially during the Age of Reason, is treated in J. A. C. Fagginger Auer, *Humanism versus Theism* (Ames, IA: Iowa State University Press, 1981), pp. 29–40; Henri Bremond,

Autour de l'humanisme: *d'Erasme à Pascal* (Paris: Editions Bernard Grasset, 1937), pp. 43–59.

14. Medieval values that shaped, and were shaped by, Roman Catholicism are discussed by such prominent scholars of the period as Isidore of Seville, *Etymologies*: *Book II*, *Rhetoric*, Peter K. Marshall, ed. (Paris: Société d'Edition "Les Belles Lettres", 1983), pp. 50–58. The influence of other medieval Catholic scholars (including Saint Augustine of Hippo, Saint Bonaventure, Odon Rigaud, Saint Albertus Magnus, and Gratian) in shaping this world view is examined in Robert Warren Carlyle and Alexander James Carlyle, *History of Mediæval Political Theory in the West* (Edinburgh: William Blackwood and Sons, 1936), 1: 111–129; and Stanley Chodorow, *Christian Political Theory and Church Politics in the Mid-Twelfth Century*: *The Ecclesiology of Gratian's Decretum* (Berkeley: University of California Press, 1972), pp. 99–111. The apex of this development in religious, political, and legal thought is found within the writings of Saint Thomas Aquinas. His writings are copious, but two representative examples that reflect medieval Catholic thought within this area are Saint Thomas Aquinas, *Summa Theologiæ*, Thomas Gilby and T. C. O'Brien, trans. (Cambridge: Blackfriars, 1966), 28: 11–21, 51–73; and Saint Thomas Aquinas, *Truth*, Robert W. Mulligan, trans. (Chicago: Henry Regnery, 1952), 1: 200–252. A critical evaluation of this Thomistic thought is provided in John Finnis, "Nature, Reason, and God in Aquinas," in *St. Thomas Aquinas on Politics and Ethics*, Paul E. Sigmund, ed. (New York: W. W. Norton, 1988), pp. 190–198; and Ralph McInerny, *St. Thomas Aquinas* (Boston: G. K. Hall, 1977), pp. 63–70.

15. Calvinists and other Protestants who dominated the early American colonies imbued them with liberal values. This political and ideological influence is addressed in Alice M. Baldwin, *The New England Clergy and the American Revolution* (New York: Frederick Ungar, 1965), pp. 22–31; Francis J. Bremer, *Shaping New Englands*: *Puritan Clergymen in Seventeenth Century England and New England* (New York: Twayne, 1994), pp. 82–88; Donald S. Lutz, *The Origins of the American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), pp. 17–19; and Michael Walzer, *The Revolution of the Saints* (Cambridge, MA: Harvard University Press, 1965), pp. 1–65.

16. Humanism does not offer a uniform or comprehensive philosophical system. It is a tradition of political thought that includes all philosophical and theological systems that emphasize individual humans as the ontological origin of all ethical and practical considerations. The various approaches within humanist thought find specific common ground through a shared acceptance of the basic values of liberty, tolerance, and the use of human reason as the most appropriate tool for achieving general and specific goals. It is broad enough to include theistic, as well as secular, perspectives. A general overview of humanist thought is provided in Corliss Lamont, *The Philosophy of Humanism* (New York: Frederick Ungar, 1982), pp. 107–115; Albert William Levi, *Humanism and Politics* (Bloomington, IN: Indiana University Press, 1969), pp. 1–20; and Gabriel Rey, *Humanisme et surhumanisme* (Paris: Hachette, 1951), pp. 17–27.

Catholic hostility towards, and Protestant sympathy with, these goals are discussed in Alan Bullock, *The Humanist Tradition in the West* (London: Thames and Hudson, 1985), pp. 45–47, 52–61, 100–101. Many modern Catholics, however, have become reconciled with humanist values and even have provided especially progressive theological responses (particularly in terms of the development of "liberation theology") to the modern world. An overview of this approach is provided in Julio Silva Solar, "St.

Thomas and Property—a View from the Christian Left in Chile," in *St. Thomas Aquinas on Politics and Ethics*, Paul E. Sigmund, ed. (New York: W. W. Norton, 1988), pp. 178–180.

17. The Protestant approval of property, both as a tangible commodity and as a theoretical value (including its central place in the Calvinist tradition of "predestination"), is addressed in Stephen Foster, *The Long Argument*: *English Puritanism and the Shaping of New England Culture*, *1570–1700* (Durham, NC: University of North Carolina Press, 1991), pp. 213–230.

The Mormon recognition, and implied approval, of this relationship of Puritan and liberal values within the secular realm is glossed in Noel B. Reynolds, "The Doctrine of an Inspired Constitution," in *By the Hands of Wise Men*: *Essays on the United States Constitution*, Ray C. Hillam, ed. (Provo, UT: Brigham Young University, 1979), pp. 4–7.

18. This Mormon conceptualization of the family, the community, and authority within them is revealed as part of official church teachings in Joseph Smith Jr., *The Doctrine and Covenants of the Church of Jesus Christ of Latter Day Saints*, Orson Pratt Sr., ed. (Westport, CT: Greenwood Press, 1971), pp. 250–251, 288. It is addressed critically in Gordon Shepherd and Gary Shepherd, *A Kingdom Transformed*: *Themes in the Development of Mormonism* (Salt Lake City, UT: University of Utah Press, 1984), pp. 85–88.

19. The Mormon belief that God evolved from human origins, and that all humans can achieve a similar divinity, is explained by a contemporary European commentator in M. Etourneau, *Les Mormons* (Paris: Bestel, 1856), pp. 180–202; and, from a more recent North American perspective, in Jan Shipps, *Mormonism* (Urbana, IL: University of Illinois Press, 1985), pp. 143–144.

20. The Mormon emphasis upon actions over faith, and the belief in the infinitely "good" capacity of each person, is expressed in the "13th Article of Faith" of the Church of Jesus Christ of Latter Day Saints. It is given authoritative expression in Smith, *Doctrine and Covenants,* pp. 45–53, and it is critiqued in William J. Whalen, *The Latter Day Saints in the Modern World* (South Bend, IN: Notre Dame University Press, 1967), pp. 96–101.

21. The humanist's secular perspective upon this belief in the "perfectibility" of each person within the broad context of civil society is provided in Wilson H. Coates, Hayden V. White, and J. Salwyn Schapiro, *The Emergence of Liberal Humanism* (New York: McGraw-Hill, 1966), pp. 3–35, and Lamont, *Philosophy of Humanism,* pp. 107–115.

22. The centrality of Mormon sacramental concepts, including justification and the belief in "Spirit gifts," is addressed in James E. Talmage, *A Study of the Articles of Faith* (Salt Lake City, UT: Church of Jesus Christ of Latter Day Saints, 1952), pp. 470–483; and Whalen, *Latter Day Saints,* pp. 111–112.

23. "Temple work" and its spiritual associations for Mormons are discussed in Leonard J. Arrington and Davis Bitton, *The Mormon Experience* (New York: Alfred A. Knopf, 1979), pp. 470–483. The concept of "sealing" on behalf of the deceased is based upon significant assumptions that are addressed in William Alexander Linn, *The Story of the Mormons* (New York: Russell and Russell, 1963), pp. 287–289.

24. The relationship of the Mormon belief in "perfectibility" and the concept of salvation finds an interesting expression with the Mormon approach to the scientific concept of evolution, as explored in Erich Robert Paul, *Science*, *Religion*, *and Mormon*

Cosmology (Urbana, IL: University of Illinois Press, 1992), pp. 173–177. Again, it finds a significant parallel in the political and social thought of the Age of Reason, even when moral instinct, rather than reason, alone, is held to be a necessary source for humans to achieve true justice and improvement. This point is stressed in David Hume, "Selections from the Treatise on Human Nature," in *Classics of Moral and Political Theory*, Michael L. Morgan, ed. (Indianapolis, IN: Hackett, 1992), pp. 832–845; it is critiqued in Norman Kemp Smith, *The Philosophy of David Hume* (New York: Macmillan, 1941), pp. 268–280.

25. The structure and purpose of this "lay" priesthood was established doctrinally in Smith, *Doctrine and Covenants,* pp. 383–389. Gordon Shepherd and Gary Shepherd, "Sustaining a Lay Religion in Modern Society: The Mormon Missionary Experience," in *Contemporary Mormonism*, Marie Cornwall, Tim B. Heaton, and Lawrence A. Young, eds. (Urbana, IL: University of Illinois Press, 1994), pp. 161–181.

26. Thomas G. Alexander, *Mormonism in Transition*, *1890–1930* (Urbana, IL: University of Illinois Press, 1986), pp. 180–211.

27. The nineteenth-century development of this institutional structure is explored in Arrington and Bitton, *Mormon Experience,* pp. 206–219.

28. This hierarchy and its authority are declared officially in Smith, *Doctrine and Covenants,* pp. 383–389; they are evaluated critically in Thomas F. O'Dea, *The Mormons* (Chicago: University of Chicago Press, 1975), pp. 160–165.

29. O'Dea, *The Mormons,* pp. 180–181.

30. The prodigious economic cooperation, industrious planning, and disciplined effort of the Mormon community has been one of the most conspicuous features of the members of this religious tradition, and this activity has contributed overwhelmingly to the prosperity of Utah. Its development is described in John Heinerman and Anson Shupe, *The Mormon Corporate Empire* (Boston: Beacon Press, 1985), pp. 1–28; and William J. McNiff, *Heaven on Earth*: *A Planned Mormon Society* (Philadelphia: Porcupine Press, 1972), pp. 25–47. The coordinated approach of this successful economic development, and its philanthropic results, are evaluated in Garth Mangum and Bruce Blumell, *The Mormons' War on Poverty* (Salt Lake City: University of Utah Press, 1993), pp. 52–74. However, the practice of exclusivity in Mormon business dealings and the generally corrupting influence that often is associated with capitalism may have resulted in a commercial effort among Mormon businesses and other enterprises that has not always achieved this ideal standard and image, as argued in Anson Shupe, *The Darker Side of Virtue* (Buffalo: Prometheus, 1991), pp. 9–21.

31. Arrington and Bitton, *Mormon Experience,* pp. 109–126. However, in all other cases Mormons have demonstrated a strong inclination to favor the values and practices of laissez-faire capitalism, L. Dwight Israelsen, "Mormons, the Constitution, and the Host Economy," in Hillam, ed., *By the Hands of Wise Men,* pp. 59–81.

32. The early years of this territorial period are evaluated in Dale L. Morgan, *The State of Deseret* (Logan: Utah State University Press, 1987), pp. 29–66.

33. John J. Flynn, "Federalism and Viable State Government—The History of Utah's Constitution," *Utah Law Review* (September 1966): 315.

34. Constitution of the State of Deseret, ART. 8, SECS. 1–3 (1848).

35. Gustive O. Larson, *The* "*Americanization*" *of Utah for Statehood* (San Marino, CA: Huntington Library, 1971), pp. 1–36.

36. The process that resulted in these unsuccessful constitutional conventions and bids for statehood are addressed in Flynn, "Feudalism and Viable State Government," pp. 314–321; Gustive O. Larson, "Government, Politics, and Conflict," in *Utah's History*, Richard D. Poll, ed. (Provo, UT: Brigham Young University Press, 1978), pp. 243–256; Edward Leo Lyman, *Political Deliverance*: *The Mormon Quest for Utah Statehood* (Urbana, IL: University of Illinois Press, 1986), pp. 7–40; and Wayne Stout, *History of Utah* (Salt Lake City: Stout, 1967), 1: 208–226, 454–469.

37. The political compromises that made Utah's admission to the American Union possible are explained in Thomas G. Alexander, *Utah*: *The Right Place* (Salt Lake City: Gibbs Smith, 1995), pp. 126–155; Flynn, "Feudalism and Viable State Government," pp. 322–324; Larson, "Government, Politics, and Conflict," in Poll, ed., pp. 265–282; Gustive O. Larson and Richard D. Poll, "The Forty-Fifth State," in "Government, Politics, and Conflict," Poll, ed., pp. 387–404; Lyman, *Political Deliverance,* pp. 185–221; and Morgan, *The State of Deseret,* pp. 67–90.

38. The resulting influence of the various constitutions of the federal, and many state, governments upon the development of the Utah Constitution is analyzed in Flynn, "Federalism and Viable State Government," pp. 311–325.

39. The Utah judiciary, like the judicial systems of many other states, has proven to be more activist in its approach to constitutional issues regarding religious freedom. However, the structure and tone of the Utah Constitution remains consistent with the broader American tradition, in this respect, Lester J. Mazor, "Notes on a Bill of Rights in a State Constitution," *Utah Law Review* (September 1966): 326–350.

40. Mormon leaders made certain to arrange for a non-Mormon delegation that was proportionally large, Flynn, "Feudalism and Viable State Government," pp. 322–324.

41. *Official Report of the Proceedings and Debates of the Utah Constitutional Convention* (Salt Lake City: Starr Printing Co., 1898), 1: 229–262. The length of the deliberations of the relevant constitutional committee on the Utah Bill of Rights is not made clear within the proceedings, although it appears to have been relatively brief. There are no records for the proceedings of any of the convention's committees.

42. *Utah Constitutional Convention*, 1: 239–231.

43. Ut. Const., ART. I, SEC. 1 (1896).

44. Ut. Const., ART. I, SEC. 14 (1896).

45. 232 U.S. 383 (1914), at 391.

46. This trend among most state courts is noted in Paul G. Cassell, "The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example," *Utah Law Review*, no. 3 (1993): 756, especially n. 21.

47. John Patrick Diggins, "Theory and the American Founding," in *America in Theory*, Leslie Berlowitz, Denis Donoghue, and Louis Manand, eds. (New York: Oxford University Press, 1988), pp. 3–25; Daniel J. Elazar, *The American Constitutional Tradition* (Lincoln: University of Nebraska Press, 1988), pp. 18–23.

48. Thomas L. Pangle, *The Spirit of Modern Republicanism*: *The Moral Vision of the American Founders and the Philosophy of John Locke* (Chicago: University of Chicago Press, 1988), pp. 1–36.

49. Steven M. Dworetz, *The Unvarnished Doctrine*: *Locke*, *Liberalism*, *and the American Revolution* (Durham, NC: Duke University Press, 1994), p. 189.

50. Dworetz, *Unvarnished Doctrine,* p. 186.

51. 220 P. 704 (1923), at 705.

52. 220 P. 704 (Utah 1923), at 707–708.

53. The issue was not fully revisited until the 1960 Utah Supreme Court case of *State of Utah vs. Tommy Fair* In that brief decision, the rejection of the exclusionary rule under Utah constitutional law that had been established in *Aime* was, essentially, upheld, 353 P.2d 615 (Utah 1960).

The fact that most states rejected the exclusionary rule as the proper device for guaranteeing the search and seizure provisions of their own constitutional traditions was demonstrated empirically in *Elkins, et al. vs. United States*, 364 U.S. 206 (1960), at 224–232. This wide rejection by American state courts also is noted in Paul G. Cassell, "The Mysterious Creation of Search and Seizure Exclusionary Rules under State Constitutions: The Utah Example," *Utah Law Review* (1993): 795.

54. This federal precedent applied the same basic reasoning that had been used in *Weeks* in reaching a majority opinion in support of using the exclusionary rule as the most constitutionally sound judicial procedure for insuring governmental compliance with search and seizure protections. The disagreement with the constitutional interpretations of many states (like Ohio and Utah) was not a matter of fundamental values as much as an issue of the most appropriate judicial techniques in support of enforcement, 367 U.S. 643 (1961).

55. Cassell, "Mysterious Creation of Search and Seizure," p. 765.

56. 742 P.2d 89 (Utah 1987).

57. 794 P.2d 460 (Utah 1990), at 465.

58. 794 P.2d 460 (Utah 1990), at 466, quoting 68 N.Y.2d 296 (1983), at 304 which, in turn, was quoting *People of New York vs. Johnson*, 66 N.Y.2d 398 (1981), at 497.

59. 794 P.2d 460 (Utah 1990), at 469–470.

60. 794 P.2d 460 (Utah 1990), at 471.

61. This expectation and failure is noted in Brad C. Smith, "Be No More Children: An Analysis of ART. I, SEC. 4 of the Utah Constitution," *Utah Law Review*, no. 4 (1992): 1,431–1,450.

62. 711 P.2d 264 (Utah 1985), at 265–271.

63. 711 P.2d 264 (1985), at 272–273.

64. 711 P.2d 264 (1985), at 264.

65. 638 P.2d 537 (Utah 1981).

66. 750 P.2d 1219 (Utah 1988), at 1221.

67. It is interesting to compare the punishment of seditious speech that criticizes or challenges sovereign authority (and which is constitutionally unacceptable within the American tradition) with restrictions upon pornography and obscenity (which are regarded as being constitutionally acceptable within American jurisprudence) that defy the standards of a sovereign community. These examples of suppressed speech are described in constitutional law texts, such as David M. O'Brien, *Constitutional Law and Politics* (New York: W. W. Norton, 1995), 2: 369–376, 418–424.

68. 586 P.2d 429 (Utah 1978), at 431–432.

69. 586 P.2d 436 (Utah 1978).

70. 354 U.S. 476 (1957).

71. 394 U.S. 561 (1969).

72. 413 U.S. 15 (1973).

73. 413 U.S. 49 (1973).

74. This standard, and the cases that created it, are discussed in Tribe, *American Constitutional Law,* pp. 904–919.

75. 413 U.S. 15 (1973), at 30.

76. A thorough articulation of this republican challenge to the dominance of libertarian legal interpretations within the American judicial establishment is Miriam Galston, "Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy," *California Law Review* 82, (1994): 331–371.

77. Gordon S. Wood, *The Creation of the American Republic*, 1776–1787 (Durham, NC: University of North Carolina Press, 1969), p. 58.

78. One of the most esteemed sources that declares this definitive conclusion is Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law," *Harvard Law Review* 42, no. 2 (Spring 1928): 149–185; no. 3 (Summer 1928): 365–409. Another, frequently quoted source that describes this Lockean influence is Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), pp. 92–95, 156–166. More recent scholarly sources that confirm the dominance of the liberal tradition (including its libertarian tendencies) include Russell L. Caplan, "The History and Meaning of the Ninth Amendment," *Virginia Law Review* 69, no. 2 (March 1983): 223–268; and Calvin R. Massey, "Federalism and Fundamental Rights," *Hastings Law Journal* 38, no. 2 (January 1987): 305–344.

79. That Lockean influence has been credited, by the most celebrated of the formative common law authorities, in Sir William Blackstone, *Commentaries on the Laws of England* (New York: Garland, 1978), 1: 42–44, 121–122.

80. This glaring inconsistency between the "moralistic" approach of the federal and state judiciaries towards pornography and obscenity and the dominant American judicial trend towards a more libertarian interpretation of civil rights and liberties is addressed in Louis Henckin, "Morals and the Constitution," *Columbia Law Review* 63, no. 3 (1963): 391–414; and Earl Finbar Murphy, "The Value of Pornography," *Wayne Law Review* 10, no. 4 (1964): 655–680.

An alternative approach that has been offered by one prominent feminist legal scholar is the treatment of pornography as a form of discrimination against women because it objectifies them as being limited to the role of submissive "pleasure giver." It would be treated as a violation of constitutional equal protection guarantees, rather than posing an arguable harm against women, Catharine A. MacKinnon, *Feminism Unmodified* (Cambridge, MA: Harvard University Press, 1987), pp. 163–197.

81. Compare, for example, the following Utah cases with similar federal cases that are mentioned within this essay: *City of St. George vs. Brent Turner*, 860 P.2d 929 (1993); *State of Utah vs. Arthur Gary Bishop*, 753 P.2d 439 (1988); *State of Utah vs. Robert Jordan, Jr.*, 665 P.2d 1280 (1983); *State of Utah vs. Randy Taylor*, 664 P.2d 439 (1983); *State of Utah vs. James Piepenburg*, 602 P.2d 702 (1979); *State of Utah vs. International Amusements*, 565 P.2d 1112 (1977); and *State of Utah vs. Kipp Phillips, et al.*, 540 P.2d 936 (1975).

82. This persecution, and its long-term effects sociopolitical effects, are examined in Arrington and Bitton, *Mormon Experience,* pp. 44–64; William J. McNiff, *Heaven on Earth*: *A Planned Mormon Society* (Philadelphia: Porcupine Press, 1972), pp. 25–47; and

(with an emphasis upon the judicial persecution of Mormons in New York, Ohio, Illinois, and Missouri and the legal lessons and values that were derived from that experience) Edwin Brown Firmage and Richard Collin Mangrum, *Zion in the Courts* (Urbana, IL: University of Illinois Press, 1988), pp. 48–124.

83. 870 P.2d 916 (1993), at 60–61.

84. Utah jurists make copious reference to the constitutional precedents of other states, especially since the framers of the Utah Constitution made conscious use of the examples of both neighboring states and the states of the northeastern United States, as admitted, for example in *Utah Constitutional Convention*, vol. I, pp. 229–262. This influence is noted in Cassell, "Mysterious Creation of Search and Seizure," pp. 799–806, and Brad C. Smith, "Be No More Children," pp. 1,431–1,454.

85. This background influence of Mormon elites (which was shared by most of the mass membership of the church) is noted in Newell G. Bringhurst, *Brigham Young and the Expanding American Frontier* (Boston: Little, Brown, and Co., 1986), pp. 1–22; Klaus J. Hansen, *Quest for Empire* (Lincoln: University of Nebraska Press, 1970), pp. 31–42.

86. "Interpretivism" refers to a group of specific jurisprudential approaches that stress the importance of the "original intent" of constitutional clauses in order to preserve the "democratic" nature of the process against the subjective opinions of judicial elites. This approach is defended in Raoul Berger, *Government by Judiciary* (Cambridge, MA: Harvard University Press, 1977), pp. 1–10; and Robert Bork, *The Tempting of America* (New York: The Free Press, 1990), pp. 251–265.

87. The particular importance of an historical analysis towards gaining a meaningful interpretation of the Utah Constitution is emphasized by one of the state's most distinguished jurists, Christine M. Durham, "Employing the Utah Constitution in the Utah Courts," *Utah Bar Journal* 2, no. 1 (November 1989): 25–26.

Of course, gaining an historical perspective is crucial for all constitutional analysis, both state and federal. But it is arguable that, in the case of Utah (especially in terms of its Mormon heritage), this sort of analysis assumes an even greater, though subtle, significance. This argument is nearly impossible to demonstrate empirically. However, examples of this tendency include the Utah Supreme Court's interpretivist treatment, at different times in its history, of the "open courts" provision that is found in Utah Constitution, ART. I, SEC. 11 (1896), in which the court's attentiveness to historical analysis is considerable. Typical cases, in this respect, include *Brown vs. Wightman*, 151 P. 366 (Utah 1915); and *DeBry vs. Salt Lake County*, 835 P.2d 981 (Utah Ct. App. 1992).

88. Ut. Const., preamble (1896).

89. 803 P.2d 1268 (Utah Ct. App. 1990), at 1271–1272.

90. 803 P.2d 1268 (Utah Ct. App. 1990), at 1272–1273.

91. 803 P.2d 1268 (Utah Ct. App. 1990), at 1273–1274.

92. Vague appeals to historical analysis of the Utah constitutional tradition can be found in cases such as *Kimball vs. Grantsville City*, 57 P. 1 (Utah 1899); *People of Utah ex rel. O'Meara vs. Salt Lake City Council*, 23 Utah 13 (1900); *State of Utah ex rel. Wells vs. Tingey*, 24 Utah 225 (1902); *State of Utah ex rel. Breeden vs. Lewis*, 26 Utah 120 (1903); *Salt Lake City vs. Christensen Co.*, *Sanipoli vs. Pleasant Valley Coal Co.*, 86 P. 865 (Utah 1906), 34 Utah 38 (1908); *Wadsworth vs. Santaquin City*, 83 Utah 321 (1933); *State of Utah vs. Johnson*, 100 Utah 316 (1941); *Duchesne County vs.*

Utah State Tax Commissioner, 104 Utah 365 (1943); and, since *Bobo*, *State of Utah vs. Rowe*, 806 P.2d 730 (Utah Ct. App. 1991); *State of Utah vs. Thompson*, 810 P.2d 415 (Utah 1991); and *Society of Separationists, Inc. vs. Taggart*, 862 P.2d 1339 (Utah 1993), among other cases.

93. This sense of time and history arguably is more essential to Mormon theological values than it is within other Western religious traditions. This Mormon preoccupation with history is explored in Paul M. Edwards, "Time in Mormon History," in *New Views of Mormon History*, Davis Bitton and Maureen Ursenbach Beecher, eds., (Salt Lake City: University of Utah Press, 1987), pp. 387–406. This concept also is glossed in Shipps, *Mormonism,* pp. 41–65, and Whalen, *Latter Day Saints,* pp. 158–160.

94. Michael Perry, *The Constitution*, *the Courts*, *and Human Rights* (New Haven, CT: Yale University Press, 1982), pp. 3–24.

95. These practices, and their underlying theological rationale, are explained in Arrington and Bitton, *Mormon Experience,* pp. 301–304; and Talmage, *Study of the Articles of Faith,* pp. 470–483.

96. Edwards, "Time in Mormon History," in Bitton and Beecher, eds., *New Views of Mormon History,* p. 389.

97. Martin B. Hickman, "J. Reuben Clark Jr.: Constitution and Fundamentals," in Hillam, ed., *By the Hands of Wise Men,* p. 43.

98. Shipps, *Mormonism,* pp. 111–112.

99. This desire to accommodate federal standards within the Utah political and constitutional regimes is noted in Eugene E. Campbell, "Pioneers and Patriotism: Conflicting Loyalties," in Bitton and Beecher, eds., "Time in Mormon History," pp. 307–322.

100. Ut. Const., ART. I, SEC. 4 (1896).

101. Ut. Const., ART. III, SEC. 4 (1896).

102. Ut. Const., ART. X, SECS. 1, 8, 9 (1987).

103. Once polygamy ceased to exist as a divisive issue (as it had been especially for the Republican Party and much of its constituency), the primary focus of the federal government was upon less controversial institutional concerns, Alexander, *Utah,* pp. 201–203.

104. Additional cases in which Utah courts have upheld a stringent liberal standard regarding *institutional*, rather than moral, church, and state relations include *Gubler vs. Utah State Teachers' Retirement Board*, 192 P.2d 580 (Utah 1948); *Thomas vs. Daughters of Utah Pioneers*, 197 P.2d 477 (Utah 1948); and *Manning vs. Sevier County*, 517 P.2d 549 (Utah 1973).

105. 11 Utah 2d 196 (1960), at 198–200.

106. 11 Utah 2d 196 (1960).

107. 11 Utah 2d 196 (1960), at 201–202.

108. 11 Utah 2d (1960), at 204.

109. 11 Utah 2d 196 (1960), at 205.

110. 463 U.S. 783 (1983).

111. 403 U.S. 602 (1971).

112. 870 P.2d 916 (1993), at 930–935.

113. 870 P.2d 916 (Utah 1993), at 920–930, 935–936.

114. 870 P.2d 916 (Utah 1993), at 935–936.

115. 870 P.2d 916 (Utah 1993), at 939–940.

116. 870 P.2d 916 (Utah 1993), at 942.

117. 870 P.2d 916 (Utah 1993), at 946–947.

118. A history of the rise and development of this practice among members of the Mormon community within Deseret and Utah can be found in B. Carmen Hardy, *Solemn Covenant*: *The Mormon Polygamous Passage* (Urbana, IL: University of Illinois Press, 1992), pp. 1–20.

119. Arrington and Bitton, *Mormon Experience,* pp. 194–205; Irene M. Bates and E. Gary Smith, *Lost Legacy* (Urbana, IL: University of Illinois Press, 1996), pp. 59–71. There is no mention of this practice in the *Book of Mormon*, but Joseph Smith, Jr. claimed that he received a revelation that condoned, but did not mandate, the practice of "plural marriage" under certain circumstances, Smith, *Doctrine and Covenants,* p. 473–474.

Interestingly, many Mormon women defended this practice for a variety of reasons, including the supportive extended family structure that resulted from the plural marriage arrangement. In particular, many women discovered and nurtured a strong bond with their fellow wives that provided an impetus for them to become actively involved in the social, economic, professional, and, even, political community, Jill Mulvay Derr, "'Strength in Our Union': The Making of Mormon Sisterhood," in *Sisters in Spirit: Mormon Women in Historical and Cultural Perspective*, Maureen Ursenbach Beecher and Lavina Fielding Anderson, eds. (Urbana, IL: University of Illinois Press, 1987), pp. 163–168.

120. This political maneuver on the part of the church leadership is described in Arrington and Bitton, *Mormon Experience,* pp. 244–246. The Church of Jesus Christ of Latter Day Saints not only refused to sanction this practice, further, but its leadership also persecuted those members of the church who continued to practice it (including through excommunication) for their disobedient and, consequently, immoral behavior. Also, it appears that the vast majority of Mormons are embarrassed by its legacy, Whalen, *Latter Day Saints,* pp. 283–288.

121. Ut. Const., ART. III, SEC. 1 (1896).

122. 3 Utah 2d 315 (1955), at 315–320.

123. Utah Criminal Code, SEC. 55-10-32.

124. These themes became most prominent once the issue of polygamy and the activities of the Mormon "political kingdom" give way to less secular concerns. They are articulated in Hansen, *Quest for Empire,* pp. 131–146.

125. 77 Utah 247, at 254, quoted in 3 Utah 2d 315 (1955), at 342.

126. This attitude is described in B. L. Campbell and E. E. Campbell, "The Mormon Family," in *Ethnic Families in America*, C. H. Mindel and R. W. Habenstein, eds. (New York: Elsevier, 1981), pp. 379–416, and Shepherd and Shepherd, "Sustaining a Lay Religion," pp. 85–88.

127. 3 Utah 2d 315 (1955), at 345.

128. This ideal is explored in Hubert Bancroft, *History of Utah* (San Francisco: History Company, 1890), p. 565; Hansen, *Quest for Empire,* pp. 66–68; and Shepherd and Shepherd, "Sustaining a Lay Religion," pp. 60–61. It is defended by a prominent nineteenth-century Mormon scholar in Parley P. Pratt, *Key to the Science of Theology* (Salt Lake City: Deseret News Publishing Co., 1893), pp. 79–81.

129. This theme has been expressed forcefully by Mormon religious, political, and legal authorities including Richard L. Bushman, "Virtue and the Constitution," in Hillam,

ed., *By the Hands of Wise Men,* pp. 1–28 (with an emphasis upon the fact that public virtue should be practiced, but must not be mandated by government, pp. 14–21); and Noel B. Reynolds, "The Doctrine of an Inspired Constitution," in Hillam, ed., Ibid., pp. 29–38.

130. This acceptance of conventional biblical principles is addressed in Philip L. Barlow, *Mormons and the Bible* (New York: Oxford University Press, 1991), pp. 215–228.

131. Alma 13:17–19, The Book of Mormon, Joseph Smith Jr., trans. (Salt Lake City: Church of Jesus Christ of Latter Day Saints, 1986), p. 242.

132. This important role of governing forces is demonstrated when government was overthrown and righteousness, subsequently, was lost in 3 Nephi, 6–7, Book of Mormon, pp. 411–414.

133. Joseph Smith Jr., *Doctrine and Covenants,* pp. 483–484.

134. 3 Utah 2d 315 (1955), at 345–348.

135. 3 Utah 2d 315 (1955), at 346.

136. 3 Utah 2d 315 (1955), at 347–348.

137. Terry S. Kogan, "Legislative Violence Against Lesbians and Gay Men," *Utah Law Review*, 1994: 216, 231–232.

138. This heritage is examined in Leonard J. Arrington, Feramorz Y. Fox, and Dean L. May, *Building the City of God* (Urbana: University of Illinois Press, 1992), pp. 1–14.

139. The claim of the plaintiffs that Utah's abortion laws violated the freedom of speech, freedom of conscience and worship, disestablishment, freedom from unwarranted searches and seizures, and reasonableness of economic legislation clauses (ART. I, SECS. 1, 3, 4, 14, 15, and 24) of the Utah Constitution were rejected in this case within the opinion of Judge J. Thomas Greene, 794 F.Supp. 1528 (1992), at 1534–1528. He acknowledged that religious beliefs could have motivated Mormon, and other denominational, Utah legislators, in this respect. However, even if the purpose of the statute "happens to coincide with the tenets of some or all religions," such a relationship is coincidental, since nonreligious inspiration also could be cited in support of the values that provide a basis for such a statute, 794 F.Supp. 1528 (1992), quoting from the United States Supreme Court precedent of *Harris vs. McRae*, 448 U.S. 297 (1980). Related themes are addressed within the 2002 case of *Williams vs. Jeffs,* 451 Utah Adv. Rep. 9 (2002).

140. This relationship has been especially strained because of the strong presence and influence of religious institutions upon American society, in general. An overview of this relationship is offered in W. Cole Durham, Jr. and Alexander Dushku, "Traditionalism, Secularism, and the Transformative Dimensions of Religious Institutions," *Brigham Young University Law Review,* (1993): 421–430. The United States Supreme Court pointedly has avoided discussing this relationship, especially within the realm of issues that are as ethically controversial as abortion. However, Justice Steven's dissenting opinion in *Webster vs. Reproductive Health Services* warned against the possible effect of this sort of theological influence, 492 U.S. 492 (1989). This concern is addressed briefly in David M. O'Brien, *Storm Center*: *The Supreme Court in American Politics* (New York: W. W. Norton, 1993), pp. 49–50.

141. Of course, that influence is regarded as being essential by many Mormons, for a corrupt civil authority can undermine the building of an earthly utopia. However,

the basic constitutional principles of the United States have been generally been idealized and defended by Mormon legal practitioners and scholars, since they have been regarded as providing a "divinely inspired" defense of human liberty, Firmage and Magnum, *Zion in the Courts,* pp. 5–9.

Chapter 8: Vermont: A Republic Apart

1. Ira Allen might have stated, for example, that "[a]ll nature have reason to shudder at such laws taking place again, as have once taken all their property from them," but his other comments from this piece rely on much more pragmatic claims and appeals to conventional evidence, Ira Allen, *Miscellaneous Remarks of the Proceedings of the State of New York Against the State of Vermont* (Hartford: Vermont Historical Society reproduction—Hannah Watson, 1777), p. 8.

2. Peter S. Onuf, *The Origins of the Federal Republic* (Philadelphia: University of Pennsylvania Press, 1983), p. 134.

3. Ethan Allen, *A Vindication of the Conduct of the General Assembly of the State of Vermont* (Montpelier: Vermont Historical Society reproduction, 1979), as well as the proceedings surrounding the original Vermont constitutional conventions in *Vermont State Papers*, William Slade, ed. (Middlebury: J. W. Copeland, 1823), pp. 49–73, provides an excellent example of this position.

4. A brief discussion of this preamble, and its subsequent deletion from this constitution after Vermont was admitted to the union, is provided in *Vermont Legislative Directory* (Montpelier: Office of the Secretary of State, 1993), p. 2.

5. Sir William Blackstone *Commentaries on the Laws of England*, William Draper Lewis, ed. (Philadelphia: Rees Welsh and Co., 1897), 2:474–487, regarding the laws of land ownership, and pp. 897–917, regarding the theory and rules governing the concept of contract.

6. Onuf, *Origins of the Federal Republic,* p. 132. In fact, as Ethan Allen alludes in a prologue to his book on deism, it probably seemed easier for Vermonters to address natural law and natural rights in the context of religion than the context of politics and government, Ethan Allen, *Nature the Only Oracle of Man* (New York: Scholars' Facsimiles and Reprints, 1940), pp. v–vii.

The theoretical understanding of natural law at this time suffered generally from misinterpretation based on vague theoretical perceptions of this legal tradition, partly due to the way in which theorists like John Locke confused the hierarchical, transhistorical, overarching, universal principles of natural law for the atomistic, civil, constraining principles of liberalism. Nonetheless, rights claims that invoked natural law (and the idea of natural rights loosely associated with that tradition) provided an enormous emotional appeal and moral support for the ideologically revolutionary political, legal, and economic ideas of this time among both elites and the populace at large. This theoretical difficulty is addressed in Ian Shapiro, *The Evolution of Rights in Liberal Theory* (Cambridge: Cambridge University Press, 1988), pp. 100–118, and in Lloyd Weinreb, *Natural Law and Justice* (Cambridge: Harvard University Press, 1987), pp. 90–94.

7. An excellent consideration of the conflict of these ideological concepts and values is provided in John Phillip Reid, *The Concept of Liberty in the Age of the American Revolution* (Chicago: University of Chicago Press, 1988), pp. 68–83.

8. Montesquieu was not a populist, but his interpretation of the British constitutional tradition seems to have favored a stronger competition among the separate "branches" of government than did Locke, Charles de Secondat, Baron de Montesquieu, *De l'esprit des lois*, Jean Breathe de la Gressaye, ed. (Paris: Societe des Belles Lettres, 1955), 2: 39–58.

9. John Locke, "Second Treatise on Civil Government," in *Two Treatises of Government*, Peter Laslett, ed. (Cambridge: Cambridge University Press, 1960), pp. 287–293.

10. A classical treatment of this theme is Edward S. Corwin, "The Higher Law Origins of the United States Constitution," *Harvard Law Review* 42, no. 2: 149–185; no. 3: 365–409.

11. This motivation is discussed in greater detail in David A. J. Richards, "Founders' Intent and Constitutional Interpretation," in *America in Theory*, Leslie Berlowitz, Denis Donoghue, and Louis Menand, eds. (Oxford: Oxford University Press, 1988), especially pp. 26–34.

12. Vermont Declaration of Independence, 1777 (Montpelier: reproduction—Vermont Historical Society, 1977).

13. Constitution of the Republic of Vermont, 1777 (Montpelier: reproduction—Vermont Historical Society: 1977). This preamble was regarded as anachronistic and unnecessarily provocative, once Vermont became a state, and it was deleted when the state constitution was amended in 1793.

14. The first authority to draw attention to this relationship between the Vermont and Pennsylvania documents, including the aspects in which Vermont made additions or alterations, is Daniel Chipman, *A Memoir of Thomas Chittenden* (Middlebury: Daniel Chipman, 1849), pp. 26–39.

15. This emphasis colored much of the approach of the various state governments and their respective constituents towards questions of federal union and state constitution-making. This theme is evident in Onuf, *Origins of the Federal Republic,* pp. 12–20.

16. Vt. Const., ch. I, ART. 1 (1793).

17. A consideration of this judicial comparison is offered in John N. Shaeffer, "A Comparison of the First Constitutions of Vermont and Pennsylvania," in *In a State of Nature*: *Readings in Vermont History*, H. Nicholas Muller, III and Samuel B. Hand, eds. (Montpelier: Vermont Historical Society, 1982), pp. 56–57.

18. Vt. Const., ch. I, ART. 3 (1793).

19. Vt. Const., ch. II, SEC. 7 (1793). These and other differnces are discussed in greater detail in Schaeffer, "A Comparison," pp. 54–62.

20. Shaeffer, Ibid., p. 56.

21. A comparative examination of these American and Canadian executive and legislative structures (focusing especially on the role of the "legislative council") is available in Robert A. MacKay, *The Unreformed Senate of Canada* (Toronto: Macmillan of Canada, 1963), pp. 12–32.

22. This administrative relationship is discussed in H. Nicholas Muller, III, "Early Vermont State Government: Oligarchy or Democracy?, 1778–1815," in Muller and Hand, eds., *In a State of Nature,* pp. 81–85.

23. However, it also should be considered in terms of the importance of noncomformist Protestantism in the migration and early development patterns of Vermont society and its influence on Vermont's early culture. Some towns jealously guarded their

authority of imposing particular religious values through local laws and regulations, especially those towns that emphasized a strict Calvinist tradition. This influence is discussed in Randolph A. Roth, *The Democratic Dilemma* (Cambridge: Cambridge University Press, 1987), pp. 15–40.

24. Little doubt remains, from the very few records that exist of the proceedings of the Vermont constitutional convention at Westminster and Windsor, in 1777, that this concern was formost in the mind of the delegates, John A. Williams, ed., *The Public Papers of Governor Thomas Chittenden* (Montpelier: Secretary of State for Vermont, 1969), pp. 33–54.

25. Locke, "Second Treatise on Civil Government," p. 368.

26. E. P. Thompson, *Whigs and Hunters* (New York: Random House, 1975), p. 21.

27. Charles A. Beard's thesis stated that the framers of the United States Constitution were searching primarily for a form of government that would best protect their various personal economic interests, and that "classical" liberalism provided the necessary theoretical framework for such a government. This belief was widely accepted, until the 1950s. This theory is expounded in Charles A. Beard, "An Economic Interpretation of the Constitution," in *The Declaration of Independence and the Constitution*, Earl Latham, ed. (Lexington, MA: D. C. Heath and Co., 1976), pp. 180–202, with editorial comments, pp. 179–180.

28. These interests are mentioned in Samuel B. Hand and P. Jeffrey Potash, "Nathaniel Chipman: Vermont's Forgotten Founder," in *A More Perfect Union*, Michael Sharman, ed. (Montpelier: Vermont Historical Society, 1991), pp. 34–36.

29. The political longevity of Vermont's political elite is documented in Muller, "Early Vermont State Government," pp. 82–83.

30. Quoted in Muller, Ibid., p. 80.

31. In fact, it can be argued that this was *the* dominant theme guiding Vermont's early political development, as suggested in Frank M. Bryan, *Yankee Politics in Rural Vermont* (Hanover, NH: The University Press of New England, 1974), pp. 3–11, and Roth, *Democratic Dilemma,* pp. 15–40.

32. This system of representation was changed when reapportionment was introduced to Vermont, in the 1960s. Reapportionment eventually changed the composition and direction of state politics and weakened the influence of towns and rural areas over central state policy. This change to Vermont's constitutional tradition may have prompted a stronger desire for more political control at the local level. This effect of legislative reapportionment upon Vermont politics is addressed in Frank M. Bryan, *Politics in the Rural States* (Boulder, CO: Westview Press, 1981), pp. 209–213.

33. Onuf, *Origins of the Federal Republic,* p. 142.

34. This ideological conflict in American society involves a wide range of variants, from a moderately decentralizing antifederalism, to republican autonomy, to anarchism, which is explored in Cathy D. Matson and Peter S. Onuf, *A Union of Interests* (Lawrence: University Press of Kansas, 1990), pp. 124–146. Understandably, any of these variants could be regarded favorably among individual Vermont landowners, although it would seem that antifederalism and republicanism were the most popular themes.

35. Vt. Const., ch. I, ART. 18 (1793).

36. A theoretical problem remains regarding whether or not the theoretical interests of Vermont's political and economic elite truly reflected the interests of the rest of the population. Although the question of land claims was pervasive, these elites still had

interests which differed from many other Vermont inhabitants, especially since they had more to gain and lose. This theoretical problem has its classical expression in Antonio Gramsci, *Selections from the Prison Notebooks*, Quintin Hoare and Geoffrey Nowell Smith, eds. (New York: International Publishers, 1972), pp. 93–122.

37. Vermont voters were predominantly, but far from uniformly, "republican" during these early years. Indeed, in national elections, that part of Vermont west of the Green Mountains was predominantly republican and supported John Adams, during the election of 1798. Nonetheless, within the more populous area east of the Green Mountains, an overwhelming republican electorate supported Thomas Jefferson, giving him and his party an overall electoral victory in that state, David M. Ludlum, *Social Ferment in Vermont* (New York: Columbia University Press, 1939), pp. 13–24.

38. Nathaniel Chipman, *Principle of Government* (New York: Da Capo Press, 1970), p. 121.

Chipman's attitudes on constitutional theory also are discussed in Morton J. Horwitz, *The Transformation of American Law* (Cambridge: Harvard University Press, 1977), pp. 24–25.

39. These conflicts included the legislative struggle over the Betterment Act, in 1784, which Chipman and other republicans opposed. This act would have compensated those persons (such as Thomas Chittenden, the Allen brothers, and Matthew Lyons) for improvements they had made to land that they had confiscated and which the Redemption Act of 1780 returned to their original Loyalist owners. It was a model case of a centralized concept of property rights in opposition to a decentralized concept of rights, based upon local concerns and interests, and it is discussed in Hand and Potash, "Nathaniel Chipman," Sharman, ed., *A More Perfect Union,* pp. 32–35.

40. This aspect of liberal theory received special early emphasis in John Stuart Mill, *On Liberty*, Elizabeth Rapaport, ed. (Indianapolis, IN: Hackett Publishing Co., 1978), pp. 53–71; it continues to play a prominent consideration in the planning of governmental initiatives in the United States and other liberal democratic societies.

41. A broad overview of pragmatism, its premises, its relationship to liberal democracy and its essential values is provided in Edward C. Moore, *American Pragmatism*: *Pierce*, *James*, *and Dewey* (New York: Columbia University, 1961), pp. 1–15.

42. The very strong reinforcing influence that Vermont's culture, values, and institutions had upon Dewey's pragmatism is evaluated in Steven C. Rockefeller, *John Dewey*: *Religious Faith and Democratic Humanism* (New York: Columbia University Press, 1991), pp. 30–42.

43. These ideas are expressed within such writings as John Dewey, *Philosophy and Civilization* (New York: Milton, Balch, and Co., 1931), pp. 13–35.

44. Dewey, *Philosophy and Civilization,* pp. 281–282.

45. The vital political legacy of pragmatism, in terms of both motivating the development of the interventionist state and promoting the active judicial protection of individual rights and liberties, is addressed in David W. Marcell, *Progress and Pragmatism*: *James*, *Dewey*, *Beard*, *and the American Idea of Progress* (Westport, CT: Greenwood Press, 1974), pp. 322–334.

46. William H. Kilpatrick, "Dewey's Influence on Education," in *The Philosophy of John Dewey*, Paul Arthur Schlipp and Lewis Edwin Hahn, eds. (Carbondale: Southern Illinois University Press, 1971), pp. 335–368.

47. John Dewey, "The Future of Liberalism," in *John Dewey*: *the Essential Writings*, David Sidorsky, ed. (New York: Harper and Row, 1977), p. 206.

48. Another area that illustrates this republican/centralist and republican/decentralist dichotomy is foreign affairs. The "Haldimand Affair" (in which certain Vermont officials negotiated with British authorities regarding the possibility of Vermont renewing some form of imperial relationship with Great Britain) might provide an interesting example of this sort of conflict, see James Benjamin Wilbur, *Ira Allen* (Boston: Houghton Mifflin Co., 1928), 1:168–291.

However, a more easily discernible example would be the controversy regarding Vermont's participation in the Anglo-American War of 1812, including the question of observing economic sanctions imposed by the federal government. This controversy is examined in this light in Edward Brynn, "Patterns of Dissent: Vermont's Opposition to the War of 1812," in Muller and Hand, *In a State of Nature,* pp. 105–116.

49. Frank Smallwood, "Vermont," in *The Political Life of the American States*, Alan Rosenthal and Maureen Moakley, eds. (New York: Praeger, 1984), p. 295.

50. *Report of the Act 200 Study Committee*, Jonathan N. Brownell, chair (Montpelier: Office of the Secretary of State, 1988), Report 2, p. 1.

51. Smallwood, "Vermont," in Rosenthal and Moakley, *Political Life* pp. 304–307.

52. This change is described by Frank Bryan as a shift from a "community axiom" (favored by interactive and independent individuals) to a "system axiom" (favored by "cosmopolitan" individuals who take a broader "arms length" approach to political issues) in Bryan, *Yankee Politics*, pp. 254–260. Arguably, though, a competition between these approaches has existed throughout Vermont's history, with the former approach dominating the political culture of the state, until recently.

53. A brief history of the political struggles surrounding environmental and development legislation in Vermont can be found in Charles Morrissey, *Vermont*: *A Bicentennial History* (New York: W. W. Norton and Co., 1981), pp. 80–94.

54. Green Mountain Citizens for Planning, *Act 200* (Montpelier: Office of the Secretary of State, 1988), pamphlet no. 2.

55. Green Mountain Citizens, pamplet no. 4.

56. The philosophical arguments in support of maintaining and enhancing this particular type of local government (also cited as "shire democracy") within Vermont is addressed in greater detail in Frank Bryan and John McClaughry, *The Vermont Papers*: *Recreating Democracy on a Human Scale* (Chelsea, VT: Chelsea Green Publishing Co., 1989), pp. 82–161.

57. *Burlington Free Press*, 21 April, 1988, p. 14A:2.

58. *Burlington Free Press*, 4 June, 1988, p. 11A:4.

59. *Burlington Free Press*, 4 June, 1988, p. 11A:4.

60. That sort of debate also is a reflection, in many ways, of the "classical," against "reform," liberalism debate. A discussion of the parameters of this debate (specifically regarding liberal democratic theory) is available in C. B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1990) pp. 69–115, while a broad overview of competing "ideologies" in modern American society is offered in Kenneth M. Dolbeare, Patricia Dolbeare, and Jane A. Hadley, *American Ideologies* (Chicago: Markham Publishing Co., 1980), pp. 25–128.

61. This lack of political identity arguably posed a problem for early Vermont leaders who sought to justify their actions in establishing an independent government for this community. "The founders of Vermont had to create a state where no true community had existed," Onuf, *Origins of the Federal Republic,* pp. 128–129.

62. Hannah Arendt, *On Revolution* (New York: Viking Press, 1963), p. 254. This subject also is raised in John Patrick Diggins, "Theory and the American Founding," in *America in Theory,* Berlowitz, Donaghue, and Menand, eds., pp. 12–16.

63. Carried to its logical extreme, this belief might not be incompatable with a revisionist anarchical vision that would accept an *extremely* minimal role for local governent. Organized "cooperation" might be useful, or even necessary, to the harmony and success of that community. This possibility is addressed in Robert Paul Wolff, *In Defense of Anarchism* (London: Harper and Row, 1976), pp. 102–110.

64. This ultimate tendency of republican societies to conform to the vision, if not the interests, of the elite is discussed in Diggins, "Theory and the American Foundling," pp. 16–20.

65. It is interesting to compare this model with the models developed in Bryan, *Yankee Politics*, pp. 251–265.

66. The Vermont judiciary appears to have practiced, during its early history, judicial restraint regarding constitutional matters, consistent with an "anti-federalist" approach to the relationship of American courts to the governmental process. This interpretation of the proper constitutional role of the judiciary was consistent with the Lockean perspective of a government that consists exclusively of two branches, as expressed in John Locke, "The Second Tract on Government," in *Locke: Political Essays*, Mark Goldie, ed. (Cambridge: Cambridge University Press, 1997), pp. 70–72; and critiqued in Jerome Huyler, *Locke in America: The Moral Philosophy of the Founding Era* (Lawrence: University Press of Kansas, 1995), pp. 156–159. This twofold interpretation was contrasted with Montesquieu's conceptualization of three branches of constitutional government, including the judicial branch, as expressed in Charles Secondat, Baron de Montesqieu, *The Spirit of the Laws*, Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone, trans and eds. (Cambridge: Cambridge University Press, 1989), pp. 156–166; and critiqued in Anne M. Cohler, *Montesquieu's Comparative Politics and the Spirit of American Constitutional Law* (Lawrence: University Press of Kansas, 1988), pp. 158–169; and Paul Verniere, *Montesquieu et l'Esprit des lois ou la raison impure* (Paris: Société d'Edition d'Enseignement Supérieur, 1977), pp. 68–77.

The federal judiciary rejected this restrained interpretation under the leadership of the former Federalist politician and United States Supreme Court Chief Justice, John Marshall, as expressed within the seminal case of *Marbury vs. Madison*. This conflict regarding the interpretation of the proper role of the judiciary within the American style of government is evaluated in Robert Lowry Clinton, *Marbury v. Madison and Judicial Review* (Lawrence: University Press of Kansas, 1989), pp. 4–30; and Paul W. Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* (New Haven: Yale University Press, 1997), pp. 9–17.

The role of the Council of Censors seems to have resembled the role of the *Conseil constitutionnel* under the civil law system of the French Fifth Republic, in which a nonjudicial body (dominated, appropriately, by political scientists) provides guidance regarding conflicts of constitutional interpretation, as explained in William Safran, *The*

French Polity (New York: Longman, 1998), pp. 238–242. Even this French "quasi-judicial" body has provoked fears of constitutional domination by judges, as expressed in François Luchaire, *Le Conseil constitutionnel* (Paris: Economica, 1980), pp. 30–31.

67. The history and orientation of this constitutional institution are summarized at the beginning of an excellent collection of its proceedings, in Gregory Sanford, ed., *Records of the Council of Censors of the State of Vermont* (Montpelier: Vermont Secretary of State, 1991), pp. xi–xii.

That account notes, nonetheless, that the activities of the Council of Censors did not result in a Vermont judiciary that practiced total restraint regarding constitutional matters. The Vermont Supreme Court did assert itself early in the eighteenth century when it opposed legislative encroachments upon conventional judicial matters, especially within cases such as *Pearl vs. Allen*, 2 Tyler 311 (1802); *Dupy qui tam vs. Wickwire*, 1 D. Chip. 237 (1814); *Bates vs. Kimball, Adm.*, 2 D. Chip. 77 (1824); *Staniford vs. Barry, Adm.* Brayton 315 (1825); and *Ward vs. Barnard*, 1 Aikens 121 (1825).

68. *Council of Censors*, pp. 157–158.

69. Vt. Const., Ch. I, ART. 11 (1793).

70. 146 Vt. 221 (1985), at 223.

71. 146 Vt. 221 (1985), at 226.

72. 146 Vt. 221 (1985), at 224.

73. 148 Vt. 324 (1986), at 329. The principle advanced by this case of a more stringent standard of privacy under the Vermont Constitution would be reinforced and expanded in State of Vermont vs. Jonathan L. Sprague, 2003 Vt. 20; 2003 Vt. LEXIS 19.

74. 389 U.S. 347 (1967), at 360.

75. 466 U.S. 170 (1984), especially at 178 and 180, n. 11.

76. 587 A.2d 988 (1991 Vt.), at 991.

77. 587 A.2d 988 (1991 Vt.), at 995.

An elaboration of this interpretation of the constitutional rights and obligations of Vermont's landowners is provided in *Cabot vs. Thomas*, 514 A.2d 1,034 (1986 Vt.), especially at 1,037–1,038.

78. 587 A.2d 988 (Vt. 1991), at 992.

79. 587 A.2d 988 (Vt. 1991), at 997.

80. 587 A.2d 988 (Vt. 1991), at 998.

81. 587 A.2d 988 (Vt. 1991), at 998–999.

82. The importance of that tradition continued to be evident within Vermont. Between 1987 and 1994, the average number of Vermont resident fishing and hunting licenses sold (including those years in which a substantial increase in the cost of those licenses was experienced) was 140,429, excluding trapping, bow and arrow, turkey, muzzleloader, and junior licenses. That average figure represents approximately half of the resident adult population of the state (based upon the 1990 federal census figures), including senior citizens. These figures are extracted from unpublished sources provided by the Vermont Fish and Wildlife Department and the United States Bureau of the Census.

83. This popular concept has had a profound effect upon the state's self-image. Indeed, the sixteen day deer season has been regarded by many "real" Vermonters as being something akin to a "national pasttime" of Vermont. The prominent place that hunting and fishing has assumed within the historical, political, economic, and cultural life of Vermont and Vermonters is addressed in W. Storrs Lee, *The Green Mountains of Vermont* (New York: Henry Holt and Co., 1955), pp. 219–235. It has been important to

Vermonters of both European and Abenaki descent in terms of sport, culture, and, even, survival, Ralph Nading Hill, *The Winooski*: *Heartway of Vermont* (New York: Rinehart and Co., 1949), pp. 270–271. It also has been a source for Vermont folklore, as noted in Bertha S. Dodge, *Tales of Vermont Ways and People* (Harrisburg, PA: Stackpole Books, 1977), pp. 73–74. The significance of the Vermont deer herd, itself, especially in terms of the near extinction of the Vermont red deer, the subsequent regulation of hunting, and the successful introduction of the Virginia whitetail deer to that state, is noted within the Federal Writers' Project description of Vermont, Ray Bearse, ed., *Vermont*: *A Guide to the Green Mountain State* (Boston: Houghton Mifflin, 1966), pp. 33–34, 127–131.

84. Lee, *Green Mountains of Vermont,* p. 219.

85. Vt. Const., ch. II, SEC. 67 (1793). Within the original constitution of the Republic of Vermont, this provision was found within Chapter II, Section 39.

86. 514 A.2d 1,034 (Vt. 1986), at 1,037.

87. These laws were enforced zealously by English and Scottish courts. Minor infractions were remedied with such grossly disproportionate punishments (including frequent imposition of capital punishment) that they eventually provoked a profound movement for reform among ultilitarian legal and political theorists, which was reflected in the writings of such eminent critics as Jeremy Bentham, *The Works of Jeremy Bentham*, John Bowring, ed. (Edinburgh: William Tait, 1843), 2:491–534; and John Austin, *Lectures on Jurisprudence*, Robert Campbell, ed. (London: John Murray, 1885), 1:171–174. The criticism of these laws offered by Vermont citizens, politicians, and jurists has been echoed by eminent modern scholars, including E.P. Thompson, *Whigs and Hunters* (New York: Random House, 1975), pp. 245–269.

88. 35 A. 323 (Vt. 1896), at 328.

89. 35 A. 323 (Vt. 1896), at 328.

90. 514 A.2d 1,034 (Vt. 1986), at 1,037.

91. In the 1982 case of *State of Vermont vs. Ludlow Supermarkets, Inc.*, the parameters of Chapter I, ART. 7 of the Vermont Constitution (which prohibits government actions that are initiated and pursued for the purpose of "particular enoulment") were determined, by the Vermont Supreme Court, to be more stringent than the "equal protection" clause of the Fourteenth Amendment to the United States Constitution. Therefore, as a result of that state constitutional interpretation, Vermont's "Sunday Closing Law" (13 V.S.A. SECS. 3351–3358), which was enacted in order to protect the economic viability of the state's small stores and service oriented businesses, was held to be unconstitutional, 448 A.2d 791 (Vt. 1982), especially at 794–796.

92. Vt. Const., ch. I, ART. 7 (1793).

93. Vt. Const., ch. II, ART. 68 (1793).

94. The plaintiffs wanted the Vermont Supreme Court to regard any disparity as a prima facie constitutional violation, while state defense attorneys argued that the practical difficulties of providing rigid equality for *any* state service, including education, should provide a rational basis for disparities, 692 A.2d 384 (Vt. 1997); 1997 Vt. LEXIS 13, at 5–11.

The conflict between these contrasting jurisprudential approaches reflect differences in the perceived capacity of government (especially the executive branch) to fulfill its duties in an entirely efficient manner, and not, generally, differences in fundamental philosophical values that provide the ultimate bases for constitutional systems,

95. 692 A.2d 384 (Vt. 1997); 1997 Vt. LEXIS 13, at 16.

96. 692 A.2d 384 (Vt. 1997); 1997 Vt. LEXIS 13, at 20–21.

97. 692 A.2d 384 (Vt. 1997); 1997 Vt. LEXIS 13, at 26.

98. Ira Allen, "The Natural and Political History of the State of Vermont," in *Collections of the Vermont Historical Society* (Montpelier: Vermont Historical Society, 1870), 1: 319, 482, quoted in 692 A.2d 384 (Vt. 1997); 1997 Vt. LEXIS 13, at 26–27.

99. 692 A.2d 384 (Vt. 1997); 1997 Vt. LEXIS 13, at 33–34. A challenge to ART. 60 was brought in the 2001 case of *Town of Bridgewater vs. Vermont Department of Taxes,* 787 A.2d 1234 (2001).

100. Vt. Const., CH. I, ART. 6.

101. These origins of these sentiments, especially in reference to other states and grievances held against them, are addressed in R. Shalhope, *Bennington and the Green Mountain Boys*: *The Emergence of Liberal Democracy in Vermont*, 1760–1850 (1996), pp. 70–97.

102. 744 A.2d 864 (Vt. 1999), at 875.

103. 744 A.2d 864 (Vt. 1999), at 876.

104. 744 A.2d 864 (Vt. 1999), at 876–877.

105. 744 A.2d 864 (Vt. 1999), at 878–879. A further unsuccessful constitutional to this interpretation and civil unions can be found within the 2001 case of *Brady vs. Dean,* 790 A.2d 428 (Vt. 2001).

Chapter 9: Wyoming: Communitarian Ideal

1. This problem, especially in terms of elite and mass discrepancies regarding perceptions of cultural norms (including deliberate ones) in relation to legal concepts and practices such as constitutional and human rights, is discussed in Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, NY: Cornell University Press, 1991), pp. 118–124.

2. This myth of the Old West within American society (including its policy manifestations in relation to western expansion, racism against indigenous peoples, and general support for the image of "rugged individualism") is explored in Anders Stephanson, *Manifest Destiny*: *American Expansionism and the Empire of Right* (New York: Hill and Wang, 1995), pp. 66–111.

3. An account of these original inhabitants of this region is provided in Lester C. Hunt, ed., *Wyoming*: *A Guide to Its History*, *Highway*, *and People* (Lincoln: University of Nebraska Press, 1981), pp. 49–57. A more specific account of the one of the most prominent people of this region can be found in Margaret Irvin Carrington, *Absaraka*, *Home of the Crows*, Milo Milton Quaife, ed. (Chicago: R. R. Donnelley, 1950), pp. 279–296.

4. These fundamental values that these native peoples have shared, in this region and elsewhere, are addressed in Sharon O'Brien, *American Indian Tribal Governments* (Norman: University of Oklahoma Press, 1987), pp. 14–33.

5. The early economic activity and settlement of this region is discussed in Neil R. Peirce, *The Mountain States of America* (New York: W. W. Norton, 1972), pp. 68–76.

6. The establishment of a military, and, eventually, an administrative presence throughout this region is noted in Paul L. Hedren, *Fort Laramie in 1876* (Lincoln: University of Nebraska Press, 1988), pp. 221–243.

7. The events leading to the establishment of the Territory of Wyoming, including the warfare waged against the native peoples of this region by the United States and local

migrants, are discussed in C. G. Coutant, *The History of Wyoming* (Laramie, WY: Chaplin, Spafford, and Mathison, 1899), 406–421, 621–635.

8. This story was confirmed during the debate on the issue of women's suffrage that occurred at Wyoming's constitutional convention in 1890 by one of its most active and prominent delegates, A. C. Campbell of Laramie, in *Journal and Debates of the Constitutional Convention of the State of Wyoming* (Cheyenne: The Daily Sun Book and Job Printing, 1893), p. 346.

9. This recognition of the right of Wyoming women to vote is addressed in T. A. Larson, *History of Wyoming* (Lincoln: University of Nebraska Press, 1978), pp. 64–94; and Peirce, *Mountain States,* pp. 80–85.

10. In fact, the debate upon this issue, during the state's constitutional convention, reflected this claim that women's suffrage was a "*fait accompli*" that would be unnecessarily troublesome to rescind. Furthermore, a practical concern existed that Wyoming society included many unmarried women who lacked a responsible male relative (such as a father or oldest son) and who controlled significant property interests and needed to be able to protect those interests through participation within the state's political process. Therefore, the actual debate upon this particular constitutional clause was not especially detailed or contentious; it can be found in *Wyoming Constitutional Convention*, pp. 344–378, 383–401. Additional, and, perhaps, more meaningful debate upon this, and other, constitutional issues may have occurred within closed committee meetings of the convention, but records of those proceedings do not exist.

11. This climate of conflict and hostility is presented in Helena Huntington Smith, *The War on Powder River* (New York: McGraw-Hill, 1966), pp. 93–134.

12. The Johnson County Cattle War (including its cultural, economic, political, and legal significance) is described and evaluated in Lewis L. Gould, *Wyoming*: *A Political History* (New Haven, CT: Yale University Press, 1968), pp. 137–158; and A. S. Mercer, *The Banditti of the Plains* (Norman: University of Oklahoma Press, 1955), pp. 127–144.

13. This image has provided a central premise for such classic Western movies as *Once upon a Time in the West*, *Butch Cassidy and the Sundance Kid*, and *Unforgiven*, as well as other films.

14. Owen Wister, *The Virginian*: *A Horseman of the Plains* (New York: Macmillan, 1957), pp. 24–25.

15. This fundamental economic battle between cattle and sheep interests is addressed in T. A. Larson, *Wyoming*: *A Bicentennial History* (New York: W. W. Norton, 1977), pp. 131–141.

16. This fundamental relationship between Wyoming's economy, culture, and its natural environment, is explored in Morris E. Garnsey, *America's New Frontier*: *The Mountain West* (New York: Alfred A. Knopf, 1950), pp. 41–68.

17. 7 Wyo. 117 (1897), at 120–123.

18. Wy. Const., ART. VI, SECS. 2, 9 (1890).

19. Examples of the prevalence of this perspective among Wyoming's constitutional delegates can be found in *Wyoming Constitutional Convention*, pp. 429–443.

20. Wyoming Constitutional Convention, pp. 372–373.

21. This tendency was noted by Chief Justice Walter Urbigkit within his dissent in the 1992 case of *Edward Everette Goettl vs. State of Wyoming*, 842 P.2d 549 (Wyo. 1992), at 558–559, 570–571.

22. A critique of this style of judicial interpretation and its claims regarding majoritarian theories of democracy is offered in Robert F. Nagel, *Constitutional Cultures*: *The Mentality and Consequences of Judicial Review* (Berkeley: University of California Press, 1989), pp. 22–26.

23. Raoul Berger, *Government by Judiciary* (Cambridge, MA: Harvard University Press, 1977), pp. 2–5.

24. 7 Wyo. 117 (1897), at 128. Passages that are found within quotation marks are quoted from a nineteenth-century legal text by a Judge Cooley, entitled *Cooley's Constitutional Limitations*. This text appears strongly to have influenced the members of this court, especially Justice C. J. Potter.

25. 7 Wyo. 117 (1897), at 138.

26. 7 Wyo. 117 (1897), at 135–136.

27. 7 Wyo. 117 (1897), at 147.

28. 7 Wyo. 117 (1897), at 143–145.

29. 7 Wyo. 117 (1897), at 133.

30. 7 Wyo. 117 (1897), at 149–159.

31. The "command theory" of law is explained in Dennis Lloyd [Lord Lloyd of Hampstead], *The Idea of Law* (London: Penguin, 1987), pp. 175–178.

This approach often is traced back to the classical conservative expression of "law as will," as articulated in Thomas Hobbes, *Leviathan* (Cleveland, OH: Meridian Books, 1963), pp. 166–168, 243–252. However, this judicial approach does *not* automatically suggest a conservative perspective; it *does*, however, reflect a belief in the superiority of moral claims *because* the community endorses them through the construction of law. This implication of command theory is explored in Herbert A. Deane, *The Political Ideas of Harold J. Laski* (Hamden, CT: Archon Books, 1972), pp. 43–52, and Harold J. Laski, *Authority in the Modern State* (Hamden, CT: Archon Books, 1968), pp. 63–69.

32. The most prominent alternative interpretive guide (which is not as prominent within Wyoming's constitutional history) to command theory emphasizes the *results* of a law (especially from a broader social science perspective), as opposed to its "command," and it is provided by that theory known as "legal realism," as described in Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1977), pp. 9–50, and Wilfred E. Rumble, *American Legal Realism* (Ithaca, NY: Cornell University Press, 1968), pp. 3–20.

33. The relationship of "command theory," strict legal positivism, and the building and maintenance of a political community is addressed in Ronald Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press, 1986), pp. 33–35.

34. There is a large and diverse body of literature from which this definition has been derived, much of which has been the product of Canadian scholarship, where this topic has been especially relevant, since the Canadian Charter of Rights and Freedoms has included a protection of so-called collective rights, as alluded in Peter H. Russell, Rainer Knopff, and F. L. Morton, *Federalism and the Charter* (Ottawa, Canada: Carleton University Press, 1989), pp. 605–678. These sources have explored this concept from a philosophical, as well as a narrowly legal, perspective. Sources that have offered especially good theoretical overviews of this concept include Allen Buchanan, "The Role of Collective Rights in the Theory of Indigenous Peoples' Rights," *Transnational Law and Contemporary Problems*, 89, no. 3 (Spring 1993): 89–108; J. Angelo Corlett, "The Prob-

lem of Collective Moral Rights," *Canadian Journal of Law and Jurisprudence* 7, no. 2 (July 1994): 237–259; Will Kymlicka, "Liberalism and the Politicization of Ethnicity," *Canadian Journal of Law and Jurisprudence* 4, no. 2 (July 1991): 239–256; and Leslie R. Shapard, "Group Rights," *Public Affairs Quarterly* 4, no. 2 (Summer 1990): 299–308.

35. A highly respected source that identifies this theoretical association is Joel Feinberg, *Freedom and Fulfillment* (Princeton, NJ: Princeton University Press, 1992), pp. 220–244. It also is explored, from the perspective of communitarian values and modern philosophy, in Peter Benson, "The Priority of Abstract Right, Constructivism, and the Possibility of Collective Rights in Hegel's Legal Philosophy," *Canadian Journal of Law and Jurisprudence* 4, no. 2 (July 1991): 257–291.

36. This legal and philosophical perspective is elaborated in Jean Baechler, "Individual, Group, and Democracy, Suzanne Stewart, trans., in *Democratic Community* [Nomos 35], John W. Chapman and Ian Shapiro, eds. (New York: New York University Press, 1993), pp. 15–40.

37. This sort of concern is raised especially by modern libertarians. It receives seminal exposition in John Stuart Mill, *On Liberty*, Elizabeth Rapaport, ed. (Indianapolis, IN: Hackett: 1978), pp. 53–71.

38. Wy. Const., ART. VIII (1890).

39. A general account of the protection of water interests within these various states can be found in Larson, *History of Wyoming*, pp. 418–423, 253–254; Duane A. Smith, *Rocky Mountain West*: *Colorado*, *Wyoming*, *Montana* (Albuquerque: University of New Mexico Press, 1992), pp. 129–132, 224–226, and A. Hutchins Wells, *Selected Problems in the Law of Water Rights in the West* (Washington, DC: United States Government Printing Office, 1942), pp. 64–109.

40. An account of the bureaucratic implications of this constitutional development can be found in Herman H. Traschel and Ralph M. Wade, *The Government and Administration of Wyoming* (New York: Thomas Y. Crowell, 1953), pp. 230–244.

41. *Wyoming Constitutional Convention*, pp. 498–499.

42. The actual convention debate regarding the preamble (which, in the original version, made conspicuous mention of God, the general welfare, and the legacy of future generations) and the Declaration of Rights of the Wyoming Constitution was relatively brief and noncontentious, as is noticeable in *Wyoming Constitutional Convention*, pp. 718–728.

43. Wy. Const., ART. I, SEC. 6 (1890).

44. Wy. Const., ART. VI, SEC. 1 (1890).

45. U.S. Const., amend. XIV, SEC. 1 (1868).

46. Robert B. Keiter, "An Essay on Wyoming Constitutional Interpretation," 21 *Land and Water Law Review*, 21, no. 2 (July 1986): 559. However, he also notes that Wyoming courts generally have followed federal precedents in deciding cases of this nature, Keiter, "An Essay on Wyoming," p. 559.

47. This move towards a "reform" liberalism within the American political and economic systems during the late nineteenth and early twentieth centuries is explored in Kenneth M. Dolbeare and Patricia Dolbeare, *American Ideologies* (Chicago: Markham, 1971), pp. 80–106. Political theories that emerged from the philosophical movement that became known as "pragmatism" provided a strong motivation and justification for these national policy developments (including the Progressive Era and the New Deal) emphasized

the relevance of practical experience to philosophical constructions and the political policies and institutions that they promote. This approach has provided an empirical, as well as a normative, basis for the adaptation of ideological constructs within modern political systems, and its American legacy is explained and defended in Andrew Feffer, *The Chicago Pragmatists and American Progressivism* (Ithaca, NY: Cornell University Press, 1993), pp. 264–270. The most prominent proponent of this approach (and, arguably, the most influential American philosopher of the twentieth century) defends it in John Dewey, *The Political Writings*, Debra Morris and Ian Shapiro, eds. (Indianapolis, IN: Hackett, 1993), pp. 133–152.

48. This struggle between interventionist American politicians and federal jurists who defended an unwritten "liberty of contract" (and its *laissez-faire* implications) that they determined to exist within the United States Constitution is described in Loren P. Beth, *The Development of the American Constitution* (New York: Harper and Row, 1971), pp. 216–248; Charles G. Haines, *The Revival of Natural Law Concepts* (New York: Russell and Russell, 1965), pp. 202–204; and Laurence Tribe, *American Constitutional Law* (Mineola, New York: Foundation Press, 1978), pp. 560–586.

49. 87 U.S.R. 660 (1874), at 663.

50. 198 U.S.R. 52 (1904), at 64.

51. An example includes 198 U.S.R. 52 (1904), at 52–65.

52. 198 U.S.R. 52 (1904), at 65.

53. 198 U.S.R. 52 (1904), at 68.

54. 84 P.2d 767 (Wyo. 1938).

55. 9 Wyo. 110 (1900).

56. Wy. Const., ART. X, SEC. 2 (1890).

57. 84 P.2d. 767 (Wyo. 1938), at 769.

58. 84 P.2d 767 (Wyo. 1938), at 769–770.

59. Charles Taylor, "Hegel: History and Politics," in *Liberalism and Its Critics*, Michael Sandel, ed. (New York: New York University Press, 1984), p. 185.

60. Jean-Jacques Rousseau, *Du Contrat social*, Ronald Grimsley, ed. (Oxford: Clarendon Press, 1972), p. 107.

61. Various delegates argued this point in *Wyoming Constitutional Convention*, pp. 497–512.

62. Perhaps, the most profound expression of that interpretation of the liberal tradition can be found in C. B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford: Oxford University Press, 1962), pp. 1–11.

63. 84 P.2d. 767 (Wyo. 1938), at 770.

64. 84 P.2d. 767 (Wyo. 1938), at 770.

65. 84 P.2d. 767 (Wyo. 1938), at 770.

66. 84 P.2d 767 (Wyo. 1938), at 770–771.

67. Wy. Const., ART. VII, SEC. 1 (1890).

68. 84 P.2d 767 (Wyo. 1938), at 771–772.

69. Cases that have reaffirmed this approach include *Beverly J. Eiselein vs. K-Mart, Inc.*, 868 P.2d 893 (Wyo. 1994), and a case that has had particular political significance, *In re: The General Adjudication of All Rights to Use Water in the Big Horn River System*, 899 P.2d 848 (Wyo. 1995).

70. 6 Wyo. 308 (1896).

71. 9 Wyo. 110 (1900), at 113–114.

72. 9 Wyo. 110 (1900), at 117.

73. 9 Wyo. 110 (1900), at 117–118.

74. 9 Wyo. 110 (1900), at 119.

75. Wy. Const., ART. I, SEC. 31 (1890).

76. 9 Wyo. 110 (1900), at 136–137.

77. That attitude was prevalent throughout the debates of the delegates to Wyoming's constitutional convention, and there was general agreement regarding these principles in support of a collective (via the government) ownership of water resources within that society, which is evident in *Wyoming Constitutional Convention*, pp. 289–297, 497–512, 534–537.

78. 37 Wyo. 488 (1927), especially at 494–496.

79. 594 P.2d 951 (Wyo. 1979).

80. 624 P.2d 751 (Wyo. 1981).

81. Cases that have reaffirmed these precedents and principles include *Basin Electric Power Corp. vs. State Board of Control*, 578 P.2d 557 (Wyo. 1978) *TR vs. Wahakie City Department of Public Assistance and Social Services*, 736 P.2d 712 (Wyo. 1987): *In The General Adjudication of All Rights to Use Water in the Big Horn River System,* 48 P.3d 1040 (Wyo. 2002), and *Masinter vs. Markstein,* 45 P.30 237 (Wyo. 2002).

82. Wy. Const., ART. I, SEC. 4 (1890).

83. 842 P.2d 549 (Wyo. 1992), at 557.

84. 842 P.2d 549 (Wyo. 1992), at 570. It is noted at the start of this case that Walter Urbigkit retired as Chief Justice of the Wyoming Supreme Court during the course of this appeal. However, he continued to serve on the court as an associate justice throughout the judicial terms that are examined in connection with this, and the following two, cases.

85. 842 P.2d 549 (Wyo. 1992), at 570–575. Chief Justice Urbigkit supported, on behalf of the court, this opinion regarding the expanded role of state governments and courts in protecting individual rights with references to the scholarship constitutional and legal theory authors such as Stewart G. Pollock, "State Constitutions as Separate Sources of Fundamental Rights," *Rutgers Law Review* 35, no. 4 (Summer 1983): 707–722; William J. Brennan, "State Constitutions and the Protection of Individual Rights," *Harvard Law Review*, 90, no. 3 (January 1977): 489–504 and Keiter, "An Essay on Wyoming," pp. 527–564.

86. 846 P.2d 604 (Wyo. 1993), at 611–612.

The use of the legal expression "citizens of Wyoming" arguably is, strictly speaking, inaccurate. Since the adoption of the Fourteenth Amendment to the United States Constitution, in 1868, citizenship has been defined at the national, rather than the state, level. Therefore, Saldana is, within this context, a citizen of the United States and, more accurately, a "resident" of Wyoming. This distinction, as well as its constitutional and theoretical implications, is discussed in James T. McHugh, "What is the Difference Between a 'Person' and a 'Human Being' within the Law?, *The Review of Politics* 54, no. 3 (Summer 1992): 445–461; and John E. Nowak, Ronald D. Rotunda, J. Nelson Young, *American Constitutional Law* (St. Paul: West, 1986), pp. 525–527.

87. 846 P.2d 604 (Wyo. 1993), at 624.

88. 846 P.2d 604 (Wyo. 1993), at 643–644.

89. 846 P.2d 604 (Wyo. 1993), at 624–664, and, especially, pp. 646–648. Other cases that reaffirm these precedents and principles include *Alexander Lewis Morris vs. State of Wyoming*, 908 P.2d 931 (Wyo. 1995); and *John Gronski vs. State of Wyoming*, 910 P.2d 561 (Wyo. 1996).

90. Wy. Const., ART. II, SEC. 1, ART. III, SEC. 1, and ART. IV, SEC. 1 (1890).

91. 800 P.2d 401 (Wyo. 1990), at 404–408.

92. 800 P.2d 401 (Wyo. 1990), at 412–420.

This sort of overlap regarding the separation of powers has been addressed particularly within the field of administrative law, as discussed in Ernest Gellhorn and Ronald M. Levin, *Administrative Law and Process* (St. Paul: West, 1990), pp. 8–34; and Bernard Schwartz, *Administrative Law* (Boston: Little, Brown, and Co., 1988), pp. 65–83.

93. 800 P.2d 401 (Wyo. 1990), at 415.

94. 800 P.2d 401 (Wyo. 1990), at 436–437. This issue was revisited within the 2001 case of *Shumway vs. Worthy,* 37 P.3d 361 (Wyo. 2001), and the 2002 case of *Daugherty vs. State of Wyoming,* 44 P.3d 28 (Wyo. 2002)

95. This combination of libertarian and communitarian features is noted in Garnsey, *America's New Frontier,* pp. 281–286.

Chapter 10: Conclusion

1. Arthur J. Kropp, "Reagan, Bush, and the Supreme Court," *University of Richmond Law Review*," 26, no. 3 (Spring 1992): 495–497; John W. Moore, "Righting the Courts, *National Journal*, 24, no. 4 (January 1992): 200–205.

2. This concern is raised in Jules L. Coleman, "Truth and Objectivity in Law," *Legal Theory*, 1, no. 1 (March 1995): 33–68, and Heidi Li Feldman, "Objectivity in Legal Judgements," *Michigan Law Review*, 92, no. 5 (March 1994): 1,187–1,255.

3. An excellent general affirmation of this principle is expressed in Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, Anne M. Cohler, Basia Carolyn Miller, Harold Samuel Stone, trans. and eds. (Cambridge: Cambridge University Press, 1989), pp. 154–186, 494–520.

4. An observation of this proclivity is offered in Ann Woolhandler, "Judicial Federalism and the Administrative State," *California Law Review*, 87, no. 3 (May 1999): 613–702.

5. This development is assessed in John C. Yoo, "Judicial Review and Federalism," *Harvard Journal of Law and Public Policy*, 22, no. 1 (Fall 1998): 197–206.

6. An historical overview is provided in Geoffrey Sawer, *Modern Federalism* (London: C. A. Watts and Co., 1969), pp. 117–124.

7. Implications of this trend are addressed in J. Clay Smith Jr., "Shifts of Federalism and Its Implications for Civil Rights," *Howard Law Review*, 39, no. 3 (1996): 737–756.

8. This development is well noted in Melanie St. Clair, "A Return to States Rights? The Rehnquist Court Revives Federalism," *Northern Illinois University Law Review*, 18, no. 2 (Spring 1998): 411–440.

9. The significance of these cases and judicial trends is considered in Yvonne Kauger, "Reflections on Federalism: State Constitutions' Roles as Nurturers of Individual Rights," *Emerging Issues in State Constitutional Law*, 1991, no. 4 (1991): 105–132.

10. This ideological competition is provided an excellent critique in Steven M. Dworetz, *The Unvarnished Doctrine* (Durham, NC: Duke University Press, 1990), pp. 3–38.

11. This traditional scholarship and ideological interpretation is well represented by Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law," *Harvard Law Review*, 42, nos. 2–3 (1928): 149–185, 365–409.

12. An eminent example of this scholarship is Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Belknap Press, 1967), pp. 55–93, 175–198.

13. Prime examples of this tradition of conflicting ideological interpretations of American constitutionalism are provided in Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace, and World, 1955), pp. 3–26, and J. G. A. Pocock, *The Machiavellian Moment* (Princeton, NJ: Princeton University Press, 1975), pp. 507–545.

14. These matters are encountered in Jenna Bednar, John Ferejohn, and Geoffrey Garrett, "The Politics of European Federalism," *International Review of Law and Economics*, 16, no. 3 (September 1996): 279–294; Anthony J. Long, "Federalism and Ethnic Self-Determination," *Journal of Commonwealth and Comparative Politics*, 29, no. 2 (July 1991): 192–211; Edward T. Swaine, "Subsidiarity and Self-Interest: Federalism at the European Court of Justice," *Harvard International Law Journal*, 41, no. 1 (Winter 2000): 1–128.

15. This matter is addressed more specifically in James T. McHugh, "Making Public Law 'Public': An Analysis of the Quebec Reference Case and Its Significance for Comparative Constitutional Analysis," *International and Comparative Law Quarterly* 49, (2000): 445–462.

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