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. . . .
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> [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. . . .
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> 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. . . .
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> 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.
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> 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.