Federalism, Subnational Constitutionalism, and the Protection of Minority Rights in the United States

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Both within Europe and beyond its borders, a consensus has emerged that federal arrangements are crucial for securing minority rights. In the United States, however, the connection between federalism and the advancement of minority rights has been viewed as problematic at best.[1] James Madison observed in Federalist #10 that in smaller governmental units majority faction was more common and minorities therefore more vulnerable. More recently, federalism skeptics have focused on America's sad history of racial oppression, noting that slavery was an institution established and maintained by state law and that racial subordination was an avowed policy of Southern states until the 1960's.[2] This record led one distinguished political scientist, William Riker, to conclude that if you like racism, you'll love federalism.[3] And certainly there is a state constitutional dimension to this, one that encompasses but goes beyond black/white relations. Antebellum state constitutions in the South supported slavery, while Northern constitutions restricted black voting and black civil rights.[4] Southern state constitutions of the late nineteenth century introduced racist provisions dealing with voting, education, and marriage, while the constitutions in California and Oregon discriminated against Asian immigrants and those of other states against Mormons.[5] During the late twentieth century, states have adopted constitutional amendments that critics have labeled anti-immigrant and anti-minority--for example, provisions in Arizona and Florida mandating English as the official language, and a ban in California on benefits to illegal immigrants.[6] Given this record, it is small wonder that American minority groups have typically looked to the federal government rather than to state governments--and in particular to the federal judiciary--as the main guarantor of their rights.

This suggests a paradox--or at least an apparent paradox. Although generally federalism and subnational constitutionalism are viewed as promoting the rights of minorities, in the United States, the progenitor of modern federalism and a pioneer in subnational constitutionalism, they are frequently viewed as endangering minority rights. How is this discrepancy to be explained?

One possible response is to distinguish between types of federalism based on the character of the component units. Those who espouse federalism as a mechanism to enhance minority rights typically envision it as empowering regionally concentrated minorities, enabling them to dominate politically in those component units in which they are a numerical majority. They thus assume a federal system whose component units reflect, rather than cross-cut, ethnic and/or religious cleavages, and they conceive of rights primarily in political terms, in terms of (a limited) self-determination, presumably with the assumption that political authority will ensure the security of language, cultural,

civil, and other rights. In contrast, it is often noted that in the United States the component units (states) do not embody the racial, religious, or other cleavages of the American polity, and that litigation regarding the rights of minorities has focused more on civil than on political rights. Thus, although there have been numerous cases dealing with the Equal Protection Clause of the Fourteenth Amendment, the vast majority of these cases have focused not on the exercise of political power by minorities but on how that power is exercised upon them. Simply put, the usual response to the paradox I have proposed is to deny that there is a paradox. American federalism is aberrant because it is decisively different from the federalism practiced or contemplated in multi-ethnic federations. From this one might well draw the conclusion that there is nothing for those federations to learn from the American federal experience with regard to the protection of minority rights.

Doubtless, there are important differences between American federalism and Belgian, Nigerian, or Swiss federalism. Yet, ultimately the dichotomy between federal arrangements that reflect cleavages and those that cross-cut them is too neat and simple. For one thing, federal systems–whatever their character–face many of the same problems. Majority faction is not an American invention, nor is it a peculiarly American disease. Even federal systems whose component units are designed to empower ethnic or other primordial groups must deal with the problem of majority faction. One might even suggest that these federal systems merely displace the problem of majority faction to their component units. In fact, the threat of majority faction may be particularly acute in those units. Madison in Federalist #10 tied the propensity to majority faction to the homogeneity of the populace in small republics, to the existence of shared characteristics or interests that could unify a majority and provide a basis for it to tyrannize. Establishing component units that correspond with the ethnic divisions within a polity is, in a sense, creating small republics based on shared and highly valued characteristics. Thus, if Madison's analysis is correct, the potential for majority faction is high, and the rights of ethnic minorities within those units are correspondingly insecure. But whatever the validity of this extension of Madison's analysis, it seems clear that the different ways in which component units are designed in various federations does not alleviate his concern about the security of minority rights within those units. In that sense, then, no sharp distinction exists between American federalism and other federalisms.

For another thing, the United States is no stranger to ethnically defined units within its borders. Native American (Indian) tribes/nations, more than 550 of which have been officially recognized by the federal government, are bound together by ethnicity, language, and history; and they govern territorial holdings ("Indian country") that encompass altogether more than 52 million acres.[7] These tribes devise their own constitutions, elect their own leaders, and exercise significant governing authority, albeit as "internal dependent nations" within the borders of the United States.[8] Indeed, "American Indians are unique in the world in that they represent the only aboriginal peoples still practicing a form of self-government in the midst of a wholly new and modern civilization that has been transported to their lands."[9] The division of authority

between the federal government and tribal governments is distinct from the more familiar division of authority between the federal government and state governments.[10]

This study examines these two distinct divisions of authority--between nation and state and between nation and tribe--and assesses what each teaches about the protection of the rights of minorities in the American context--and perhaps beyond that context as well. I begin by describing American state constitutions and then examine their role in protecting the rights of minorities.

STATE CONSTITUTIONALISM AND THE RIGHTS OF MINORITIES

The States Within the Constitutional Framework

The position and powers of the fifty American states are safeguarded by the federal Constitution. The Constitution confers only limited powers on the federal government, and the Tenth Amendment confirms that all residual powers not prohibited to the states by the Constitution "are reserved to the States respectively, or to the People." Although the scope of federal power has increased during the twentieth century, since 1990 the U.S. Supreme Court has displayed a renewed interest in safeguarding state power and curtailing federal overreaching.[11] In addition, the Constitution grants extraordinary protection to the territorial integrity of the states, forbidding tampering with state boundaries not only by congressional legislation but also by the normal processes for constitutional amendment (Article VI, section 3). The Constitution also secures to the states a role in the selection of federal officials and in the processes of the federal government. Initially, state legislatures selected senators, and even after the Seventeenth Amendment (1913) instituted popular election of senators, states still enjoy equal representation in the Senate. And as long as they do not discriminate on the basis of race, gender, or other factors, the states set eligibility requirements for voting in both national and state elections. Finally, constitutional amendments require ratification by three-quarters of the states (Article V).

Constitutional Creation and Constitutional Change

Even before the American colonies declared their independence from England, some of the new states embarked on the task of constitutional creation.[12] By early in the nineteenth century, the process of constitutional creation had become standardized: citizens would vote to hold a convention, elect those who would serve as convention delegates, and by referendum determine whether to ratify the convention's proposals. When states have revised (replaced) their existing constitutions, they have employed the same procedure. Altogether, the states have held more than 240 constitutional conventions and adopted 146 constitutions. Only nineteen states still retain their original constitutions, and a majority of states have established three or more.

During the twentieth century, the pace of state constitutional revision slowed, but the pace of state constitutional amendment increased. Current state constitutions average more than 120 amendments, with most amendments adopted since 1940. The states utilize various mechanisms for proposing constitutional amendments. States may call constitutional conventions to propose amendments, but the cost of conventions generally makes this unattractive. Most amendments are proposed by state legislatures. Eighteen states currently permit constitutional amendments to be proposed by a simple majority in each house of the legislature, five more by simple majorities in two sessions with an intervening election, and nine by a three-fifths vote in each house. In recent years, proposed amendments have often originated in constitutional commissions, groups of experts and notables appointed by the legislature or executive to develop proposals for consideration by the legislature or--in the case of Florida--for direct submission to the people for ratification. These commissions provide expert assistance to the legislature, while allowing it to keep control over what proposals are submitted for popular consideration.

Eighteen states employ the constitutional initiative, which empowers citizens to propose amendments directly to the voters (sixteen states) or to the legislature before submission to the voters (Massachusetts and Mississippi). To place an initiative on the ballot, supporters must collect signatures on petitions in support of the initiative. Although states differ as to the level of support that must be obtained, typically the level is a percentage of the turnout at the last election for governor or a percentage of the state population. Some states, in order to prevent one region of the state from dominating the process, require that a certain number of signatures be obtained from each county. Once the requisite number of signatures has been obtained and certified by the secretary of state, the constitutional initiative is placed on the ballot.

Regardless of the mode of proposing amendments, the mode of ratification remains the same--popular referendum. In forty-four states, only a simple majority vote in a referendum is required to ratify amendments proposed by state legislatures. No state mandates a minimum turnout level to ratify an amendment. One state, Delaware, permits amendment of its constitution by an extraordinary majority in the legislature, without popular ratification. Of the eighteen states that permit amendment by constitutional initiative, thirteen permit ratification of proposals by a simple majority of those voting on the measures.

State Constitutional Design

Because state governments can exercise all residual powers not conferred on the federal government nor prohibited to them by the federal Constitution, it is common to distinguish the federal Constitution as a document granting powers and state constitutions as documents of limitation.[13] This function of state constitutions, not surprisingly, dictates their form. Generally speaking, because of the necessity to enunciate specific limitations on otherwise virtually unlimited governmental power, most

state constitutions contain a high level of detail with respect to the structure and operations of government.

Other factors likewise promote uniformities among state constitutions. The federal Constitution does not mandate that state constitutions contain specific provisions or address certain matters.[14] But, federal constitutional provisions do affect the structure and operation of state governments by restricting the range of choice for state constitution-makers or by inducing states to alter their constitutions to bring them into conformity with federal requirements. Article IV, section 4 of the federal Constitution from the outset directed the federal government to "guarantee to every State in this Union a Republican Form of Government;" and Article VI, section 2 upheld the supremacy of federal law within its sphere over "any Thing in the Constitution or Laws of any State." Article I, section 10 imposes various restrictions on state power--for example, states cannot enter into treaties, impair the obligations of contracts, or coin money. Subsequent amendments have added to the federal constitutional restrictions on the states by imposing requirements relating to voting and to the apportionment of state legislatures, requiring that boundaries be drawn to ensure that legislative districts are equal in population. ("One person, one vote.") Likewise important have been the incorporation under the Fourteenth Amendment of most provisions of the federal Bill of Rights (that is, making those provisions, which had only been applicable against the federal government, applicable against state governments as well) and the more aggressive review of state constitutions by the federal judiciary. Thus, the U. S. Supreme Court has struck down a Colorado constitutional amendment infringing on the rights of homosexuals as a denial of equal protection of the laws, the Maryland Constitution's religious test for state officials as a violation of the First Amendment, and an Arkansas constitutional amendment limiting the consecutive terms that a member of Congress from Arkansas could serve under the Qualifications Clause of Article I.[15] Often the effects of such rulings on state constitutions have extended beyond the provisions that have been invalidated by rendering unenforceable analogous provisions in other state constitutions and by encouraging states to amend their constitutions to eliminate provisions inconsistent with federal constitutional law.

Finally, even in the absence of legal requirements to do so, state constitution-makers have borrowed extensively from other state constitutions. This is hardly surprising. It is natural for state constitution-makers to examine how other states have attempted to solve common problems and to emulate their (perceived) successes. This interstate borrowing (or horizontal federalism, as it has been called) has promoted uniformities both in the general design of state constitutions and in their specific provisions.[16] For example, structurally, all states have adopted presidential (rather than parliamentary) systems, instituted a separation of powers, and (with the exception of Nebraska) lodged law-making authority in bicameral legislatures. And all states have guaranteed a common set of fundamental rights.

Nevertheless, it is easy to overstate the commonalities among American state constitutions.[17] State constitutions reflect the reigning political perspective at the time

of their adoption, and as these have changed over the 225 years of the nation's history, so too have state constitutions. Eighteenth-century state constitutions, for example, were short documents that placed few restrictions on the people's representatives. Late-nineteenth-century constitutions, in contrast, were lengthy documents containing numerous restrictions on state legislatures, based on the "belief that legislatures are by nature utterly careless of the public welfare, if not hopelessly corrupt."[18] Most twentieth-century state constitutions sought to eliminate excessive restrictions on legislative authority and to strengthen state executives in order to promote a more vigorous response to the problems confronting the states. However, in those states with the constitutional initiative, the last decades of the twentieth century witnessed a proliferation of amendments designed to restrict state legislatures and circumvent ordinary politics by constitutionalizing policy choices through "constitutional legislation."

In addition to changes in constitutional fashion, intrastate politics has promoted interstate differences in constitutions, affecting the subjects that state constitutions addressed and how they addressed them. For example, Idaho's Constitution has articles on water rights and on livestock, and California's on water resources development.[19] Moreover, general uniformities do not preclude important differences. For example, although all states have adopted a presidential system, they differ in the number of independently elected executive officers, as well as in the scope of budgetary, appointive, and veto powers vested in the governor.[20] Finally, the ease of constitutional change affects the frequency of constitutional change and thus the contents of state constitutions. States in which amendment is easy tend to contain provisions reflecting shifting political majorities, whereas those in which it is more difficult tend to have more stable and shorter constitutions.[21]

State Declarations of Rights

The same set of fundamental rights found in the federal Bill of Rights and the Fourteenth Amendment--the freedoms of speech and of the press, religious liberty, protections for defendants, and guarantees of equality--are likewise found in state declarations of rights. Nonetheless, there are important differences between state and federal guarantees, and these affect the interpretation of state constitutions. Many state guarantees are more specific than their federal counterparts. For example, in addition to prohibiting governmental establishment of religion, nineteen states specifically bar religious tests for witnesses or jurors, and thirty-five prohibit expenditures for "any sectarian purpose."[22] In addition, many state declarations of rights contain additional protections that have no federal analogue. Thus, thirty-nine states guarantee access to a legal remedy to those who suffer injuries, and eleven expressly protect a right to privacy.[23] Furthermore, in contrast to federal practice, states have not treated their declarations of rights as sacrosanct but have amended them with some frequency. Some amendments have expanded rights--several states added protections of gender equality during the 1970s and guarantees of victims' rights in the 1980s and 1990s.[24]

Other amendments have curtailed rights. Since 1970, Texas has restricted the right to bail, Massachusetts and California have reinstated the death penalty, and Florida has circumscribed rights against unreasonable searches.[25] Finally, although the federal Bill of Rights only protects against governmental invasions of rights, some state guarantees expressly prohibit private violations of rights--Louisiana's ban on private discrimination is an example.[26] Other state provisions lend themselves to extension to private violations of rights. For example, the free-speech guarantees in forty-four states affirmatively protect speech rights without specifying against whom, and these provisions have been interpreted in some states to protect speech rights on private property open to the public, such as shopping malls.[27]

This greater scope and specificity of rights protections extends to the rights of minorities as well. The federal Constitution secures religious liberty (First Amendment), guarantees the voting rights of African-Americans and of women (Fifteenth and Nineteenth Amendments), and mandates that no person should be denied the "equal protection of the laws" (Fourteenth Amendment). State protections are more capacious. State religion clauses do not simply forbid interference with the free exercise of religion, as the First Amendment does, but rather offer positive recognition of the right to worship God and delineate specific governmental actions that would infringe on religious liberty. Pennsylvania's guarantee is illustrative:

> All men have a natural and indefeasible right to worship God according to the dictates of their own consciences; no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority can in any case whatever control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.[28]

State provisions recognize that religious liberty encompasses freedom of action as well as freedom of belief, although some states stipulate that this does not "excuse acts of licentiousness" or justify "practices inconsistent with the peace and safety" of the state.[29] Finally, various state constitutions forbid discrimination on the basis of religion; outlaw religious tests for voting, testifying in court, or holding public office; and exempt believers from state military duty on the basis of their religious or conscientious scruples.[30]

Some state constitutions, like their federal counterpart, emphasize the protection of minority rights by guaranteeing the equal protection of the laws.[31] Other state equality provisions, however, are designed primarily to ensure that no special privileges should be reserved for a favored few. The Texas Constitution, for instance, decrees that "no man, or set of men, is entitled to exclusive separate public emoluments, or privileges."[32] Fifteen states specifically ban discrimination on the basis of the basis of race, color, or national origin; and eighteen do so on the basis of gender. More recent provisions may expressly protect other groups as well. Thus, Florida forbids

discrimination on the basis of handicap, and Louisiana on the basis of "physical condition" or "culture."[33] Finally, a few state constitutions specifically recognize and protect ethnic minorities within their borders. Thus the Montana Constitution "recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity." The New Mexico Constitution encourages teachers to learn both English and Spanish, guarantees the education rights of students of Spanish ancestry, and provides for the publication of all legal enactments in both languages.[34] The Hawaiian Constitution mandates a "Hawaiian education program consisting of language, culture and history in the public schools," and the renewed interest in Hawaiian ethnic identity during the 1970s led to the addition of an entire article devote to "Hawaiian Affairs."[35]

State Constitutional Interpretation and the New Judicial Federalism

The state supreme court is the authoritative interpreter of a state's constitution. That is to say, if a case raises a matter of state constitutional law, the state supreme court's determination of that issue is final and not subject to review by any other court, not even the U.S. Supreme Court.[36] Since the early 1970s, state judges have shown an increased willingness to invoke state declarations of rights to secure rights unavailable under the U.S. Constitution. This new judicial federalism, as it has been labeled, marks a major shift in the role of state courts. For although state courts occasionally contributed to state constitutional development prior to the 1970s, state judges overall had been far less aggressive than their federal counterparts in promoting constitutional change. This reticence had been particularly apparent in the civil-liberties realm. Although conditions may have seemed ripe for the development of state civil-liberties law during the nineteenth and early twentieth centuries, when the U.S. Supreme Court had not yet applied the requirements of the federal Bill of Rights against state and local governments, no such development occurred. State constitutional litigation during this period rarely involved civil-liberties issues, so that state courts failed to develop a coherent body of law relating to freedom of speech, religious liberty, or equality. From 1950 to 1969, in only ten cases did state judges rely on state guarantees to afford greater protection than was available under the federal Constitution. However, from 1970 to 2000, they did so in more than one thousand cases.

State Constitutional Law and the Rights of Minorities

The question remains, however, as to how important state constitutional guarantees have been in safeguarding the rights of minorities. A comprehensive response to that question would be a massive undertaking, requiring consideration not only of judicial rulings under state constitutions but also of the effect such provisions have had on state legislation and the responses of governmental institutions and state electorates to those rulings. Nevertheless, some preliminary observations are possible.

In general, state equality guarantees have not served as important sources of independent protection for minorities. A leading commentary on state constitutional law has concluded that "[s]tate constitutional litigation on behalf of minority or politically disfavored groups over rights to equal treatment remains largely dominated by fourteenth amendment equal protection doctrine."[37] A survey of state rulings found that equality claims before state supreme courts have focused less on "discrimination based on some kind of identifiable personal trait, such as race, gender, illegitimacy, or alienage" than on "less obvious kinds of distinctions."[38] Moreover, in challenges involving traits such as race or gender, litigants have tended to invoke the federal Equal Protection Clause in addition to state equality guarantees, and state courts have overwhelmingly based their rulings on federal rather than state law.[39] As a rule, then, federal constitutional law and statutory law (such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965) have tended to dominate judicial decisions.

Race and Ethnicity

Nowhere is this federal dominance more evident than in the protection of the rights of racial or ethnic minorities. Nevertheless, two state initiatives are noteworthy. From 1963-1979, the California Supreme Court interpreted the state's equal protection clause to provide greater protection than its federal analogue, holding that segregation in public schools violated the state constitution, even if the segregation was not *de jure*, and imposing on districts an affirmative duty to integrate schools.[40] However, in 1979 California voters amended the state constitution to outlaw the use of busing to achieve integration unless that remedy was required by the federal Constitution, and the U.S. Supreme Court ruled that the state's decision to conform to federal law rather than continue its enhanced protection did not violate the federal Constitution.[41] More recently, the Connecticut Supreme Court concluded in *Sheff* v. *O'Neill* that the Connecticut Constitution required the Connecticut Legislature to provide students with substantially equal educational opportunity, that the racial and ethnic isolation within Connecticut schools deprived students of that equal educational opportunity, and that the Legislature therefore had an obligation to remedy this constitutional violation by ensuring all students with access to unsegregated education.[42] Finally--and more controversially--California voters endorsed by initiative Proposition 209, which provided that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[43] While proponents of the measure hailed it as a victory for civil rights, opponents contended that by banning affirmative action, the amendment had the effect of diminishing the life-chances of minority group members.

Beyond those three initiatives, mention should also be made of various state constitutional rulings that, although not framed in terms of racial discrimination, have attacked inequalities that disproportionately disadvantaged minorities. In its famous *Mount Laurel* rulings, the New Jersey Supreme Court held that the state constitution forbade municipalities from using zoning regulations to exclude potential residents with

low or moderate incomes and imposed on the municipalities an affirmative obligation to provide housing opportunities for the less fortunate.[44] And over the past three decades, supreme courts in fifteen states have relied on their state constitutions to invalidate systems of public school finance that resulted in unequal education for students in poorer (usually urban) school districts.[45]

Gender

The U.S. Supreme Court has refused to recognize gender as a "suspect classification" under the federal Constitution and thus requires a less exacting scrutiny of governmental actions based on gender distinctions than it does for those based on race or national origin.[46] This, together with the inclusion of express guarantees of gender equality in eighteen state constitutions, might have led to the development of a state constitutional jurisprudence of gender equality. Although there are certainly more state constitutional rulings dealing with gender equality than with racial equality, they are still quite limited. In part, the availability of federal statutes prohibiting gender discrimination in employment, housing, and other areas has encouraged litigants to bring their cases in federal rather than state courts and to rely on federal statutory law instead of state constitutions. In part, too, the limited litigation under state guarantees of gender equality reflects the success of legislative reform. Either simultaneous with the adoption of these state constitutional guarantees or immediately following their adoption, several states revised their laws to root out gender discrimination, thereby removing many bases for litigation. Thus, state guarantees of gender equality may have had a significant effect, even if they did not dramatically increase the number of rulings striking down gender discrimination.[47]

Sexual Orientation

In *Bowers* v. *Hardwick* the U.S. Supreme Court rejected a challenge by a gay male plaintiff to Georgia's neutrally worded criminal sodomy statute, refusing to create a broad constitutionally protected zone of privacy for consensual sexual conduct.[48] Yet ten years later, in *Romer* v. *Evans*, the Court struck down a Colorado constitutional amendment that banned local governments from prohibiting discrimination on the basis of sexual orientation.[49] Despite express protection for privacy rights in some state declarations of rights and the recognition of an implicit right to privacy by judges in other states, the states too have had a mixed record in dealing with sexual minorities. Beginning in the 1970s, some state courts relied on state constitutional privacy rights to strike down laws criminalizing consensual sexual activity between adults, although others have refused to do so.[50] Some states and localities have protected gays and lesbians against discrimination, but as the Colorado constitutional amendment illustrates, others have sought to deny such protection. Finally, after the Hawaii Supreme Court ruled in *Baehr* v. *Lewin* that the state constitution prohibited the state from limiting the right to marry to opposite-sex couples, Hawaii in 1998 amended its constitution to restrict marriage to opposite-sex couples, and four other states likewise passed referenda limiting the marriage rights of same-sex couples.[51] But the Vermont

Supreme Court in *Baker* v. *State* that the Vermont Constitution mandated that same-sex couples were entitled to the same legal rights and benefits of marriage as opposite-sex couples.[52] The court directed the legislature to craft a law that would meet this constitutional obligation either by legalizing same-sex marriages or by creating an equivalent partnership structure. (The Vermont Legislature choce the latter alterntive.)

Protections for Groups

Two states, Montana and New Mexico have recognized constitutionally their obligations to Native Americans and to Americans of Spanish ancestry, respectively. However, these provisions have not become important independent protections for minority rights. In Montana, the "legal and practical effects [of the guarantee] have been minimal," and "there is an increasing sense of sense of separation between the Montana tribes and the rest of the state."[53] In New Mexico, courts have ruled that neither the recognition of rights under the Treaty of Guadalupe Hidalgo nor the protection against discrimination for children of Spanish descent conferred a right to have the Spanish language and culture preserved and continued in public schools.[54]

Finally, as a result of an amendment to the Hawaiian Constitution in 1978, the state government is obliged to "protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua's tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights."[55] In its rulings interpreting the provision, the Hawaii Supreme Court has reaffirmed the state's obligation, while recognizing the need to balance traditional rights with the requirements of modern society.[56] As shall be seen, Hawaii's recognition of the need to protect the way of life of an aboriginal people is not unique in the American context. It finds parallel in the efforts to secure the autonomy of Native American nations, a topic that shall be addressed shortly.

Conclusions and Questions

In Federalist #51 James Madison observed that the division of power between nation and state afforded a "dual protection" for rights. Our survey of the protection of minority rights under state declarations of rights, however, suggests that those guarantees have played a distinctly subsidiary role in the system of dual protection. During the twentieth century, minority-group litigants overwhelmingly preferred to base their claims on federal law and to pursue them in federal forums rather than in state courts. Moreover, when arguing before state tribunals that their rights had been violated, they typically relied on the federal Constitution exclusively or on the federal Constitution and state constitution jointly. Despite the rise of the new judicial federalsim, state judges have only infrequently based their rulings exclusively on state guarantees of minority rights. Exceptions to this pattern of federal predominance have occurred primarily when federal courts have rejected the arguments of minority-group members, and they have been forced to rely on state courts and state guarantees to

achieve their ends. Thus, state courts and state constitutions played the central role in school-finance litigation only after the Supreme Court in *San Antonio Independent School District* v. *Rodriguez* rejected a challenge to Texas's reliance on the local property tax as the primary basis for funding education, holding that Texas's system did not violate the Equal Protection Clause, even if it resulted in substantial interdistrict disparities in per-pupil expenditures.[57] Similarly, the New Jersey Supreme Court's aggressive role in exclusionary zoning litigation occurred in the face of federal disinterest, and the challenges to restriction of marriage to opposite-sex couples were filed in state courts and relied on state constitutions because the Supreme Court had demonstrated its lack of sympathy for gay rights claims in *Bowers* v. *Hardwick*.[58]

In part, historical factors account for this pattern. The policy of racial subordination in the Southern states, together with the failure of state courts to secure the protections of the law to black litigants and defendants even in egregious cases, produced well-founded skepticism about the commitment of state courts to equal rights. The record of state courts stood in sharp contrast to the leadership shown by the federal courts in the struggle for civil rights, and this leadership both instilled a trust in federal courts and federal law and created a habit of reliance on federal remedies. In part, too, tactical considerations have prompted litigants to pursue their claims in federal courts when they have a choice between federal or state forums. After all, recognition of a federal constitutional right by the U.S. Supreme Court would have national implications, whereas the results of a favorable outcome in a state court would be felt only within the borders of the state. In addition, it should also be noted that prior to the twentieth century, state courts and state law were sometimes more responsive to minority-group concerns than were their federal counterparts.[59]

Nonetheless, the fact that American federalism and American state constitutions have not played a central role in the protection of the rights of minorities raises important questions. Is the record of American state declarations of rights a product of unique historical factors, or is it indicative of a problem endemic to federal systems? Are the rights of minorities in federal systems more secure only if they comprise a majority within component units? If they do not, are their rights even less secure, because of the increased danger of majority faction?

TRIBAL RIGHTS WITHIN THE AMERICAN POLITY

At the time that European colonization of North America began, it is estimated that the Indian population of the continent numbered more than twelve million, organized into various tribes or nations, each sharing a common language and ethnicity.[60] The mode of production differed from tribe to tribe: many emphasized hunting and gathering, while others engaged in agriculture, but generally tribes held property in common rather than in individual allotments. The systems of government likewise differed, ranging from the sophisticated confederal arrangement of the Iroquois Federation to less formalized structures in many tribes; however, few Indian nations

possessed written constitutions. When European explorers and settlers came to North America, they adopted contradictory positions regarding the status of Indian nations. On the one hand, they recognized the tribes as sovereign entities by entering into treaties with them, and they acknowledged tribal property rights by purchasing land from them. On the other hand, the Europeans also denied tribes the status of nations by purporting to have "discovered" an unoccupied continent, and they rejected Indian property rights by laying down claims to possess and rule the land that they "discovered."[61] This ambivalence regarding the status of Indian nations has persisted to the present day, at times resulting in efforts to eliminate tribes as distinct entities and at times leading to efforts to reinvigorate tribal self-government.

When the American colonies declared their independence, the United States inherited the problem of how to relate to Indian tribes. The Articles of Confederation, the nation's first constitution, assigned Congress the responsibility for "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated" (Article IX, section 1). In fact, this grant of authority was less expansive than it appears, because many states maintained extravagant western land claims, which in effect placed most tribes within their borders.

The federal Constitution, in contrast, granted the power to deal with Indian tribes to the federal government exclusively.[62] Indeed, eleven Western state constitutions contain "disclaimer provisions," inserted as a condition for their admission to the Union, which expressly recognize their lack of authority over Indian tribes.[63] The most direct grant of authority is found in the Commerce Clause (Article I, section 8, paragraph 3), which gives Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Clause reveals the distinctive position of tribes within the governing scheme--they are not simply foreign nations (otherwise inclusion of "with the Indian Tribes" would be redundant), but commerce with them is not simply domestic commerce either (otherwise, it would fall under "among the several States"). The only other mention of Indians occurs in the formula for apportionment of representation and direct taxes (Article I, section 2, paragraph 3), which excludes "Indians not taxed" from the population base. This rather obscure phrase, which reappears in the Fourteenth Amendment's discussion of representation (section 2), acknowledges Indian nationhood, at least obliquely. For it implies that Indians who were taxed, who had assimilated and become part of the American body politic, should be represented in government; whereas those who were not taxed would not be represented, because they were not part of the United States, but instead members of another nation. Other constitutional grants and prohibitions, although not focusing directly on relations with Indian tribes, confirm that such relations are exclusively the domain of the federal government. For example, agreements between the United States and tribes are likely to take the form of treaties, and the Constitution both awards the treaty power to the President with the advice and consent of the Senate (Article II, section 2, paragraph 2) and prohibits states from entering into treaties (Article I, section 10, paragraph 1). The Constitution’s reaffirmation of

previously negotiated treaties (Article VI, section 1) is particularly important, because most of these treaties were with Indian tribes, thereby confirming that tribal sovereignty predated the Constitution and continued after its adoption. Similarly, Congress is given sole authority to govern territory belonging to the United States (Article IV, section 3, paragraph 2), thus enabling it to set rules for areas within the borders of the United States claimed by and occupied by Indian tribes, a power enhanced by the cession of state territorial holdings to the federal government. And, of course, the power to conduct military operations against external foes lay with the federal government (Article I, section 8, paragraph 11), as did the power to protect states against violence arising within their borders (Article IV, section 4).

Yet if the Constitution makes clear the exclusive authority of the federal government to deal with Indian nations, it does not clarify the scope of federal power over those nations or the powers that they retained, that is, their right of self-government. Such a constitutional division of authority is crucial in safeguarding the political rights of minorities within federal systems. Nonetheless, the omission in this case is hardly surprising. Insofar as tribes were analogous to foreign nations, there was no reason for the Constitution to define their powers, any more than there was for the Constitution to have defined the powers of France or Great Britain. And during the Founding era the analogy between tribes and foreign nations made intuitive sense, because tribes were close to military equals of the United States. In addition, the Constitution needed to address the respective spheres of the federal and state governments, because its major aim was to reallocate powers between nation and state. However, because the constitutional reallocation did not affect tribal powers -- those powers were "both preconstitutional and extraconstitutional"--the adoption of the Constitution afforded no occasion to define their scope.[64] Only when the status of the tribes shifted from rough equals to "internal dependent nations" did the respective spheres of the federal government and tribes--or, put differently, the right of tribes to self-government free from federal direction or intrusion--emerge as a major issue.[65] Let me survey the key issues in the relationship between the federal government and the Indian nations.

Self-Determination

Perhaps the basic political right, particularly for internal nations within multi-national countries, is the right of self-determination--the power to determine the fundamental character, membership, and future course of the political society of which one is a part. The right of self-determination of tribal nations is inevitably limited by their "internal, dependent" status, but it is not effaced. Nonetheless, as Chief Justice John Marshall noted in *Worcester* v. *Georgia*, "a weak state, in order to provide for its safety, may place itself under the protection of one more powerful, *without stripping itself of the right of government, and ceasing to be a state.*"[66] Moreover, Marshall insisted that this dependent status, together with the surrender of territory by Indian nations, imposed a fiduciary obligation upon the federal government.

This "trust relationship" appeared to promise the tribes federal support and protection. However, during the late nineteenth century, this promise of protection was transformed into a power to direct and control, based on claims of Indian incompetence and an insistence that it was in the Indians' interest to abandon their traditional practices and become "civilized." Thus, Congress sponsored efforts to assimilate Indians by supporting Christian missionaries who might convert and "civilize" the Indians, by banning tribal rituals, and by educating Indian youth at boarding schools off the reservations so as to root out tribal customs and practices.[67] Congress also attempted to eliminate tribal patterns of communal land ownership (discussed below). And it largely replaced tribal self-government with administration by the Bureau of Indian Affairs. In *United States* v. *Kagama* (1886) and *Lone Wolf* v. *Hitchcock* (1903), the Supreme Court upheld the extraordinary extension of congressional power.[68] Speaking for the Court in *Kagama*, Justice Miller described the tribes as "the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights."[69] From this he concluded that Congress possessed plenary power to protect tribes, transforming the trust relationship from a shield for the tribes into a weapon for the federal government.

With the enactment of the Indian Reorganization Act in 1934, federal policy shifted from assimilation to Indian self-determination through the revival of tribal governments. During the 1950s, policy shifted again, this time toward "termination," that is, the unilateral ending of the special relationship between tribes and the federal government. During the presidency of Richard Nixon, policy shifted back once more to self-determination, and subsequent presidents have followed Nixon's lead, at least rhetorically, in championing self-determination, reemphasizing the trust relationship, and repudiating termination.[70] Nevertheless, the prevailing case law appears to recognize no constitutional limits to congressional power to act as trustee for Indian nations, and thus the tribes' right to self-determination seems a matter of congressional grace rather than a matter of right, subject to the vagaries of policy shifts.

Authority Over a National Territory

During the late eighteenth and early nineteenth centuries, the American desire to expand beyond the coastal regions of the new nation into land claimed by the United States collided with Indian territorial claims. The purchase of land from Indian nations helped finesse the question of ownership, at least initially.[71] But the American appetite for expansion soon outran the tribes' willingness to relinquish their holdings, and thus the question of Indian land rights could not be avoided indefinitely. In a series of rulings over three decades, the Supreme Court under John Marshall outlined a doctrine of limited tribal land rights. In *Fletcher* v. *Peck* (1810), the Court concluded that tribes possessed a "right of occupancy" rather than full title to the land, although tribal consent was nonetheless required before the right of occupancy was extinguished.[72] Elaborating in *Johnson* v. *McIntosh* (1823), Marshall concluded that the tribes' "power to

dispose of the soil at their own will, to whomever they pleased, was denied by the original fundamental principle [of] discovery."[73]

Subsequent congressional legislation, however, diminished even this limited tribal authority over the disposition of tribal lands. In 1887 Congress enacted the General Allotment Act of 1887, often referred to as the Dawes Act, which provided for allotment of tribal lands in severalty to individual Indians and the sale of surplus lands to white homesteaders. Whatever the motivations underlying the Dawes Act–and these ranged from the conviction that Indian progress required individual ownership of land to the desire to open Indian land to non-Indians– its effects were dramatic and disastrous. Before this policy was abandoned, federal sale of "surplus" lands plus the sale of holdings by individual Indians reduced tribal land from 138 million acres to 52 million acres. The loss of communal control over land and its use also undermined the authority of tribal governments. (Indeed, this was precisely the aim of some supporters of the Act; as Theodore Roosevelt explained, “The General Allotment Act is a mighty pulverizing engine to break up the tribal mass."[74]) In addition, by opening the reservations for settlement by non-Indians, the Act destroyed close-knit tribal communities, jeopardized the separate development sought by Indian nations, and undermined their efforts to maintain traditional lifestyles. From a practical standpoint, the fact that reservations included large numbers of non-Indian residents--in some instances even a majority of the reservation population--complicated the exercise of political and judicial jurisdiction (see below). Charles Wilkinson’s summary of the political effects of the Dawes Act thus seems altogether accurate: “With the land base slashed back once again and with strange new faces within most reservations, tribal councils and courts went dormant. The BIA [federal Bureau of Indian Affairs] moved in as the real government."[75]

Authority to Institute a Government

Indian nations had instituted their own governments prior to the European colonization of North America, and they never surrendered their authority to create and re-create their political institutions. The federal Constitution does not restrict the form that those governments take: whereas it mandates that state governments be "republican," it imposes no such requirement on tribal governments.[76]

In practice, however, by the late nineteenth century the BIA had largely displaced traditional Indian governments as the effective governing authority in Indian country. To reverse this transformation of Indian nations from self-governing peoples to administered subjects, Congress in 1934 adopted the Indian Reorganization Act (IRA), which sought to reinvigorate Indian self-government by encouraging tribes to draft constitutions. Yet the scope of tribal authority under the IRA was circumscribed. If a tribe voluntarily subjected itself to the IRA (and most tribes did), it obliged to submit its constitution for approval by the BIA, and any subsequent amendment or revision of the constitution was also subject to BIA approval. Even some tribes, such as the Cherokees, that devised non-IRA constitutions voluntarily subjected themselves to BIA

review. When the Cherokees subsequently sought to eliminate that review in revising their constitution in 1999, they found the Bureau reluctant to approve the constitution and relinquish control.

Authority to Conduct Foreign Affairs

One attribute of nationhood is the power to enter into agreements with other sovereign nations through government-to-government negotiations. Since Independence, Indian tribes have entered into almost 400 treaties with the United States; and after 1871, when the United States formally renounced treaty-making with tribes, it continued to negotiate bilateral agreements ("treaty substitutes") that were approved by both houses of Congress.[77] In the early 1970s some Indian groups advocated a resumption of treaty-making with the federal government.

However, as Chief Justice Marshall indicated in *Johnson* v. *McIntosh*, the doctrine of discovery, under which the European colonizers purportedly gained title to territory occupied by Indian tribes, had the effect of diminishing the treaty-making authority of Indian nations.[78] One element of the doctrine of discovery was that the European power that discovered and occupied a territory gained exclusive title to the land. This country that held title could transfer the land to another country, as occurred when Britain ceded territory to the United States at the conclusion of the Revolutionary War. However, the Indian tribes, as mere occupants of land under the authority of one sovereign, could not transfer it to the authority of another sovereign. Thus, although Indian nations could enter into agreements to dispose of land they occupied, the doctrine of discovery decreed that they could only dispose of their holdings to the country that held title to the land. Indeed, as Marshall explained, the limit on Indian treaty-making went beyond the conveying of land:

> They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.[79]

At the beginning of the twentieth century, the Supreme Court in *Lone Wolf* v. *Hitchcock* undermined the authority of even those treaties that tribes were permitted to negotiate.[80] Rejecting a challenge to congressional action in violation of a treaty, the Court concluded that Congress could unilaterally abrogate treaties with Indian tribes by subsequent legislation, because it had “plenary power” in Indian affairs. This ruling in effect made U.S.-tribal treaties binding only on the contracting tribe, which lacked the power to violate a treaty without suffering repercussions. In addition, *Lone Wolf* created the danger that even when Congress enacted general regulatory laws that did not specifically mention tribes, these laws might be interpreted to override treaty commitments by implication thereby jeopardizing tribal prerogatives. However, the

federal judiciary, at least in recent years, has sought to avoid this result by reading statutes in the light of the special trust relationship between tribes and the federal government, as well as the federal commitment to tribal self-government. Thus, it has generally refused to abrogate treaty rights in the absence of explicit statutory language indicating a congressional intent to do so.[81]

Authority to Administer Justice

The right of self-government includes the authority to administer civil and criminal justice within the boundaries of the political society. Indeed, according to one scholar, this jurisdiction represents "the cornerstone of tribal sovereignty."[82] For Indian tribes, however, this power is circumscribed. For cases exclusively involving tribal members, tribes for most of the nineteenth century retained criminal and civil jurisdiction. Thus in 1883 in *Ex Parte Crow Dog*, the Supreme Court recognized the exclusive power of tribes to make criminal laws and punish Indians who committed crimes against other Indians in Indian territory.[83] For cases involving non-Indians or members of other tribes, the United States and Indian nations by treaty apportioned jurisdiction between their sets of courts. The Choctaw and Chickasaw Treaty of 1866, for example, gave those tribes both civil and criminal jurisdiction over non-Indians as well as Indians within their territory.[84]

Since the late nineteenth century, however, tribal authority to administer justice has come under severe attack. In 1887 Congress responded to *Crow Dog* by enacting the Major Crimes Act, which withdrew tribal jurisdiction over major crimes (such as murder, rape, and robbery) regardless of whether the victim and/or the alleged perpetrator was an Indian, and it placed this jurisdiction in the federal courts.[85] That same year, the Secretary of the Interior initiated the creation of Courts of Indian Offenses under the Bureau of Indian Affairs, which were designed to replace traditional Indian courts. In 1953 Congress adopted Public Law 280, which authorized six states--Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin--to exercise criminal and civil jurisdiction in Indian country and authorized other states to likewise assume jurisdiction.[86] Acting on that invitation, nine additional states had claimed some or all of the jurisdiction that Public Law 280 allowed, before Congress amended the Act to require tribal consent for state assumption of jurisdiction.[87] In the Indian Civil Rights Act of 1968, Congress restricted the authority of tribes to develop their own standards of due process by extending various guarantees of the Bill of Rights--including most of the Fourth, Fifth, and Sixth Amendments--to Indian country. It also limited the jurisdiction of tribal courts to sentences not exceeding one year's imprisonment and a $5,000 fine or both.[88] Finally, in *Oliphant* v. *Suquamish Indian Tribe* the Supreme Court ruled that Indian nations have no general criminal jurisdiction over non-Indians even in Indian country.[89]

Lessons and Conclusions

> The essential promise, made to tribes primarily in nineteenth-century treaties and treaty substitutes, is that the tribes would be guaranteed a measured separatism on their reservation homelands, free to rule their internal affairs outside of state compulsion but subject to an overriding federal power and duty of protection.[90]

Judging from the history that we have recounted, it is fair to conclude that the promise has been only incompletely honored. What does that history teach that might be pertinent to those contemplating federal arrangements to protect the rights of minorities?

One obvious lesson is that if one wishes to secure some measure of subnational autonomy, it is not sufficient to rely on the good faith of the federal government: constitutional protections for subnational autonomy are vital. Conceivably, these protections could take two forms. One possibility is that subnational units could be accorded representation in the councils of the federal government, so that their concerns could be addressed and their needs accommodated in federal legislation.[91] Thus, in the United States, state governments were directly represented in the Senate, at least until the Seventeenth Amendment replace election by state legislatures with direct popular election. Even now the argument for limited judicial review of federalism disputes rests on the purported adequacy of this political guarantee of state interests.[92] Indeed, federal systems could go further, by providing enhanced representation for ethnically based component units, as occurs in Canada for the province of Quebec, or by instituting super-majority requirements for legislation directly affecting those units. As we have shown, Indian nations have no representation in the federal government, perhaps in part because of their anomalous constitutional position: they are not simply component units but are instead semi-autonomous entities. But whatever the cause, this has hampered their efforts to protect their rights and interests. A second form of constitutional protection for the measured autonomy of subnational units involves *express* recognition of that autonomy: the powers of subnational units could be constitutionalized. These constitutional protections may be only "parchment barriers," but they can serve as a deterrent to legislative invasions of powers and can provide a basis for judicial enforcement of constitutional limits.[93] In the United States, the presence of guarantees of state authority has helped the states maintain their vitality despite considerable expansion of national power. In contrast, the absence of guarantees of tribal authority in the federal Constitution has led to the conclusion that congressional power over the tribes is plenary, and this in turn has encouraged the federal government to invade tribal prerogatives, sometimes to serve the interests of the non-Indian citizenry or at other times to "civilize" or "protect" the Indian population.

Another lesson of the Indian experience in the United States is the difficulty of maintaining group rights in a system predicated on individual rights. The anomaly of Indian group rights has prompted two responses on the part of the federal government. At times the federal government has sought to destroy the underpinnings of Indian group rights by striving to diminish or eliminate group identity, replacing tribal identity with identity as an American. During the late nineteenth and early twentieth centuries,

this took the form of a campaign to assimilate Indians into the general population, to treat them as simply a collection of individuals sharing a common ancestry.[94] The Dawes Act, transforming communal property ownership into individual allotments, provides one example. The concerted effort to de-tribalize Indian children by banning Indian languages, Indian dress, and Indian ceremonies in schools represents another. A third would be the federal government's extension of American citizenship to assimilated Indians in an effort to wean Indians from their tribal allegiances. During the twentieth century, the now-discarded policy of termination was potentially the most severe threat to continuing tribal identity. Alternatively, the federal government has ignored tribes altogether and extend rights to Indians as individuals in a way that undermined tribal self-government. Thus, the Dawes Act gave property rights to individual Indians but did so by eliminating tribal ownership and control over property. The extension of American citizenship to all Indians in 1924 gave individuals new rights (at least in theory) but did so by imposing a new, non-tribal identity on Indians. Finally, the Indian Civil Rights Act of 1968 extended many of the protections of the Bill of Rights to Indians but did so by imposing new requirements on tribal governments that limited their opportunity to devise their own approaches to balancing communal concerns and individual rights claims.

One suspects that this tension between the American emphasis on individual rights and the tribes' insistence on their collective identity and collective rights will be a continuing source of conflict. To the extent that other federal systems share the individualistic ethos prevalent in the United States, they are likely to experience the same conflict.

FINAL THOUGHTS

Yet it would be inappropriate to end on too negative a note. Overall, the record of the United States in protecting rights is fairly good. The same can be said for state constitutions and for American federalism. The limited contribution that state constitutions have made to the protection of the rights of minorities does not mean that they have played no role in protecting rights. In fact, over the past three decades, state courts have relied on state constitutions in more than 1000 cases to extend protections unavailable under the federal Constitution in the areas of free speech, freedom of religion, privacy rights, and the rights of suspects and criminal defendants.[95] And if state electorates have on occasion adopted constitutional amendments that have curtailed rights, they have as frequently adopted amendments extending them--for example, the guarantees added to state declarations of rights during the last three decades dealing with the right to privacy, with gender equality, and with the rights of victims of crims.[96]

NOTES

1. For overviews, see Ellis Katz and G. Alan Tarr, eds., *Federalism and Rights* (Lanham, MD: Rowman & Littlefield, 1996), and David L. Shapiro, *Federalism: A Dialogue* (Evanston, IL: Northwestern University Press, 1995).

2. Michael P. Zuckert has succinctly summarized this perspective, noting that appeals to federalism were viewed as merely "thinly veiled attempts to maintain segregation and other morally suspect social practices." See his "Toward a Corrective Federalism: The United States Constitution, Federalism, and Rights," in Katz & Tarr, *Federalism and Rights*, p. 75.

3. William H. Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown, 1964), p. 245.

4. See, for example, Ohio Const. of 1802, Art. 4, sec. 1; Mich. Const. of 1835, Art. 2, sec. 1; Mich. Const. of 1850, Art. 7, sec. 1; and Minn. Const. of 1857, Art. 7, sec. 1. for an overview of racial exclusion from the franchise, see Eric Foner, "From Slavery to Citizenship: Blacks and the Right to Vote," in Donald w. Rogers, ed., *Voting and the Spirit of American Democracy* (Urbana: University of Illinois Press, 1990).

5. The Southern disenfranchisement of African-Americans after Reconstruction is chronicled in J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restrictions and the Establishment of the One-Party South 1890-1910* (New Haven, CT: Yale University Press, 1974). On the disenfranchisement of the Chinese and of the Mormons, see Calif. Const. of 1879, art. 2, sec.1; and Idaho Const. of 1889, art. 6, sec. 3. More generally, see David Alan Johnson, *Founding the Far West: California, Oregon, and Nevada, 1840-1890* (Berkeley: University of California Press, 1992), pp. 252-256; and Dennis Colson, *Idaho's Constitution: The Tie That Binds* (Moscow: University of Idaho Press, 1991), chapter 8.

6. On English as an official language, see Ariz. Const., Art. 28; Calif. Const., Art. 3, sec. 6; and Fla. Const., Art. 2, sec. 9. Proposition 187, which restricted benefits to legal residents, was adopted by California voters in 1994 but struck down by a federal court, and the state decided not to appeal the ruling. See *League of United Latin Am. Citizens v. Wilson*, 908 F.Supp. 755 (C.D.Cal. 1995).

7. The population of two million Indians represents a sizable increase from earlier in the twentieth century. Population trends within Indian nations are discussed in Joane Nagel, *American Indian Ethnic Renewal: Red Power and the Resurgence of Identity and Culture* (New York: Oxford University Press, 1996), chapter 4.

8. This phrase is taken from Justice John Marshall's famous opinion in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). For a perceptive overview of Marshall's jurisprudence in historical context, see Jill Norgren, *The Cherokee Cases: The Confrontation of Law and Politics* (New York: McGraw-Hill, 1996). In discussing American Indians, I shall use the terms "tribe" and "nation" synonymously. For a discussion of usage in official documents, such as treaties, see William C. Sturtevant, "Tribe and State in the Sixteenth and Twentieth Centuries," in Elisabeth Tooker, ed., *The Development of Political Organization in Native North America* (Proceedings of the American Ethnological Association, 1979).

9. Vine Deloria, Jr., and Clifford Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (New York: Pantheon Books, 1984), p. 2.

10. As a federal district court put it in *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (1959): "Indian tribes are not states. They have a status higher than that of states." In theory, of course, tribes could have been incorporated into the nation as states. An historical footnote is of interest in this regard. The Delaware Treaty of 1778 declared: "And it is further agreed on between the contracting parties should it for the future be conducive for the mutual interest of both parties to invite any other tribes who have been friends to the interest of the United States, to join the present confederation, and to form a

state of whereof the Delaware nation shall be the head, and have a representation in Congress." Quoted in Vine Deloria, Jr., and David E. Wilkins, Tribes, Treaties, and Constitutional Tribulations (Austin: University of Texas Press, 1999), p. 8.

11. See, e.g. *Morrison* v. *Olson*, 120 S.Ct. 1740 (2000); *Alden* v. *Maine*, 119 S.Ct. 2240 (1999); *Printz* v. *United States*, 521 U.S. 898 (1997); *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996); and *Lopez* v. *United States*, 514 U.S. 549 (1995).

12. Four states actually devised their constitutions prior to the formal declaration of independence, and two employed slightly revised versions of their colonial charters as constitutions. See G. Alan Tarr, Understanding State Constitutions (Princeton, NJ: Princeton University Press, 1998), chapter 3; Donald S. Lutz, Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions (Baton Rouge: Louisiana State University Press, 1980); Willi Paul Adams, The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era (Chapel Hill: University of North Carolina Press, 1980); and Gordon S. Wood, The Creation of the American Republic, 1776-1787 (New York: Norton, 1969).

13. Provisions in modern state constitutions may be adopted to overcome earlier judicial interpretations of the constitution which prohibited the exercise of power in question. For example, the New York Constitution authorized the Legislature to create a system of workers' compensation to take the place of the tort liability system for workplace injuries after a court decision concluding such a system was in violation of the state constitution. Such provisions are grants of power, or at least the removal of limitations. States also may insert grants of power in their constitutions to remove constitutional doubt or to ratify preexisting practices.

14. The only exception to this involves the admission of states to the Union. Article IV, section 3 of the U.S. Constitution, in empowering congress to admit new states to the Union, in effect gives it the power to establish the conditions under which they will be admitted. in the enabling acts by which it authorizes prospective states to devise constitutions and apply for statehood, Congress can impose conditions as to the substance of state constitutions, and state constitution-makers must meet those conditions in order to secure a favorable vote on admission. Moreover, if a proposed constitution contains provisions of which Congress or the President disapproves, either can refuse to approve legislation admitting the state until the offending provisions are altered or removed. However, the impact of these congressional mandates has been limited.

15. *Romer v. Evans*, 517 U.S. 620 (1996); *Torasco v. Watkins*, 367 U.S. 488 (1961); and *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

16. See G. Alan Tarr and Mary Cornelia Porter, *State Supreme Courts in State and Nation* (New Haven, CT: Yale University Press, 1988), pp. 27-34.

17. For detailed consideration of the historical development of state constitutions, see G. Alan Tarr, *Understanding State Constitutions* (Princeton, NJ: Princeton University Press, 1998), chapters 3-5.

18. Charles C. Binney, *Restrictions upon Local and Special Legislation in State Constitutions* (Philadelphia: Kay and Brother, 1894), p. 9.

19. Idaho Const., Arts. 15-16, and Calif. Const., Art. 10A.

20. For a valuable analysis of interstate differences in constitutional grants of power to governors, see Thad Beyle, "Governors: The Middlemen and Women in Our Political System," in Virginia Gray and Herbert Jacob, eds., *Politics in the American States: A Comparative Analysis*, 6th ed. (Washington, DC:

CQ Press, 1996).

21. Donald S. Lutz, "Toward a Theory of Constitutional Amendment," *American Political Science Review* 88 (June 1994): 355-370.

22. See G. Alan Tarr, "Church and State in the States," *Washington Law Review* 64 (Winter 1989): 87-110. A useful compilation of state guarantees is: Ronald K. L. Collins, Jr., "Bills and Declarations of Rights Digest," in *The American Bench*, 3d ed. (Sacramento: Reginald Bishop Forster and Associates, 1985-86).

23. On the state constitutional right to a remedy, see David Schuman, "The Right to a Remedy," *Temple Law Review* 65 (Winter 1992): 1197-1227. On the state constitutional right to privacy, see Ken Gormley and Rhonda G. Hartman, "Privacy and the States," *Temple Law Review* 65 (Winter 1992): 1279-1323.

24. See G. Alan Tarr and Mary Cornelia Porter, "Gender Equality and Judicial Federalism: The Role of State Appellate Courts," *Hastings Law Quarterly* 9 (Summer 1982): 953, Table A. On victims' rights provisions, see Jennifer Friesen, *State Constitutional Law: Litigating Individual Rights, Claims and Defenses*, 2nd ed. (Charlottesville, VA: Michie, 1996), pp. 813-814.

25. Tex. Const., Art. 3, sec. 11(a); Mass. Const., Part I, Art. 12; Calif. Const., Art I, sec. 27; and Fla. Const., Art. I, sec. 12.

26. La. Const., Art. 1, sec. 12.

27. For a discussion of these cases, see G. Alan Tarr, "State Constitutionalism and `First Amendment' Rights," in Stanley Friedelbaum, ed., *Human Rights in the States* (Westport, CT: Greenwood Press, 1988).

28. Pa. Const., Art. I, sec. 3. For a listing of state provisions, see Friesen, *State Constitutional Law*, pp. 259-268.

29. See, e.g., Wash. Const., Art I, sec. 11.

30. See, e.g., Ala. Const., Art. I, sec. 3; Kan. Const. Bill of Rights, sec. 7; and Colo. Const., Art. X, sec. 2(a).

31. For a thorough analysis of the various state guarantees and their underlying premises, see Robert F. Williams, "Equality Guarantees in State Constitutional Law," *Texas Law Review* 63 (March-April 1985): 1195-1224.

32. Tex. Const., Art. I, sec. 3. For an analysis of this sort of equality guarantee, see David Schuman, "The Right to `Equal Privileges and Immunities:' A State's Version of `Equal Protection,'" *Vermont Law Review* 13 (Spring 1988): 221-245.

33. Fla. Const., Art. I, sec. 2; La. Const., Art. I, sec. 3.

34. Mont. Const., Art. X, sec. 1, para. 2; and N.M. Const., Art. XII, sec. 8, 10, and Art. XX, sec. 12.

35. Haw. Const., Art. X, sec. 4, and Art. XII. For discussion of the factors leading to the adoption of the "Hawaiian Affairs" amendments, see Anne Feder Lee, *The Hawaii State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1993), pp. 170-171.

36. The fact that state courts, rather than federal courts, render the authoritative interpretation of state

constitutions should not obscure that other state actors also play an important role. In many states, the Attorney General of the state is authorized to render formal opinions, including those interpreting the state constitution, to state and local governmental officials. These opinions are not binding, but they do carry a good deal of weight in government deliberations. See Thomas R. Morris, "State Attorneys General as Interpreters of State Constitutions," *Publius: The Journal of Federalism* 17 (Winter 1987): 133-152. Furthermore, the ease of state constitutional amendment means that state supreme court rulings may be the beginning of a dialogue rather than the end of a process. See Douglas S. Reed, "Popular Constitutionalism: Toward a Theory of State Constitutional Meanings," *Rutgers Law Journal* 30 (Summer 1999): 871-932.

37. Friesen, *State Constitutional Law*, p. 146.

38. Susan P. Fino, "Judicial Federalism and Equality Guarantees in State Supreme Courts," *Publius: The Journal of Federalism* 17 (Winter 1987): 58-59. Fino found that only 27 percent of equality challenges were based on such personal traits.

39. Ibid., pp. 60-61. Overall, only 6.7 percent of all decisions rested exclusively on state law, and these predominantly involved areas of traditional state concern--e.g., bar regulation cases, Sunday closing cases and zoning cases--rather than protection of minority rights.

40. *Crawford* v. *Board of Education*, 551 P.2d 28 (1976); *Jackson* v. *Pasadena City School District*, 382 P.2d 878 (1963).

41. Calif. Const., Art. I, sec. 7, upheld in *Crawford* v. *Board of Education of the City of Los Angeles*, 458 U.S. 527 (1982).

42. *Sheff* v. *O'Neill*, 678 A.2d 1267 (Conn. 1996). This ruling went beyond the requirements of Brown v. Board of Education, 347 U.S. 483 (1954), which required states to remedy only *de jure* racial segregation, i.e., segregation that resulted from actions of the state.

43. Calif. Const., Art 1, sec. 31.

44. *Southern Burlington County NAACP* v. *Township of Mount Laurel*, 336 A.2d 713 (1975); *Southern Burlington County NAACP* v. *Township of Mount Laurel*, 456 A.2d 390 (1983).

45. For a survey of this litigation, as well as a listing of those states that have invalidated state systems of school finance, see G. Alan Tarr, *Judicial Process and Judicial Policymaking*, 2nd ed. (Belmont, CA: Wadsworth, 1999), chapter 11.

46. See, e.g., *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Craig* v. *Boren*, 429 U.S. 190 (1976); and *United States* v. *Virginia*, 518 U.S. 515 (1996).

47. See Tarr and Porter, "Gender Equality and Judicial Federalism," 927-929.

48. 478 U.S. 186 (1986).

49. 517 U.S. 620 (1996).

50. Compare *Morales* v. *State*, 826 S.W.2d 201 (Tex. Ct. App. 1993) and *Commonwealth* v. *Wasson*, 785 S.W.2d 67 (Ky. App. Ct.1990), *aff'd*, 842 S.W.2d 487 (Ky. 1992) with *Christensen* v. *State*, 468 S.E.2d 188 (Ga. 1996).

51. 852 P.2d 44 (1993), overturned by Haw. Const., Art. I, sec. 23. For discussion of *Baehr* and its aftermath, see Reed, "Popular Constitutionalism." On developments in other states, see Mark Strasser, "Same-Sex Marriage Referenda and the Constitution: On *Hunter*, *Roemer*, and Electoral Process Guarantees," *Albany Law Review* 64 (2001): 949-981.

52. *Baker* v. *State*, 744 A.2d 864, (Vt. 1999).

53. Larry M. Elison and Fritz Snyder, *The Montana State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 2001), p.178.

54. *Lopez Tijerina* v. *Henry*, 48 F.R.D. 27 (D.N.M. 1969); appeal dismissed, 398 U.S. 922 (1970). See Chuck Smith, *The New Mexico State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1996), pp. 33-34 and 139-140.

55. Haw. Const., Art. XII, sec. 7. An *ahupua* is a land division, usually wedge-shaped, and extending from the mountains at its narrowest to the sea at its widest. See Lee, *Hawaii State Constitution*, pp. 179-180.

56. See *Pele Defense Fund* v. *Paty*, 837 P.2d 1247 (Haw. 1992), and *Kalipi* v. *Hawaiian Trust Co*., 656 P.2d 745 (Haw. 1982).

57. *San Antonio Independent Board of Education* v. *Rodriguez*, 411 U.S. 1 (1973).

58.The New Jersey Supreme Court announced its initial ruling on exclusionary zoning in 1975 in *Southern Burlington County NAACP* v. *Township of Mount Laurel*, 336 a.2d 713 (N.J. 1975). However, its aggressive intervention in *Mount Laurel II* in 1983--*Southern Burlington County NAACP* v. *Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983)--followed the U.S. Supreme Court's rejection of an effort to involve it in the issue in *Warth* v. *Seldin*, 422 U.S. 490 (1975). In *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), the Supreme Court upheld a Georgia law that outlawed sodomy.

59. The plight of fugitive slaves in the era prior to the Civil War is a prime example; see *Prigg* v. *Pennsylvania*, 41 U.S. (16 Pet.) 536 (1842), and Paul Finkleman, "*Prigg* v. *Pennsylvania* and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Opinion," *Civil War History* 25 (March 1979): 5-35. For an interesting general overview of the protection of rights in the nineteenth and early twentieth centuries, see John J. Dinan, *Keeping the People's Liberties: Legislators, Citizens, and Judge as Guardians of Rights* (Lawrence: University Press of Kansas, 1998).

60. Henry F. Dobyns, *Their Number Become Thinned: Native American Population Dynamics in Eastern North America* (Knoxville: University of Tennessee Press, 1983). The issue of population size is controversial, because European (and later American) territorial claims rested on a doctrine that the land was unoccupied (*territorium res nullius*). See, for example, Francis Jennings, *The Invasion of North America: Indians, Colonialism, and the Cant of Conquest* (New York: W.W. Norton, 1975). Currently, the Native American population is roughly two million.

61. The "doctrine of discovery" is a key element in understanding the European and American perspective on the rights of Indian tribes. Particularly helpful discussions are found in Robert A. Williams, Jr., The American Indian in Western Legal Thought: The Discourses of Conquest (New York: Oxford University Press, 1990), and S. James Anaya, Indigenous Peoples in International Law(New York: Oxford University Press, 1996).

62. See Deloria and Wilkins, Tribes, Treaties, and Constitutional Tribulations, chapter 3, for a useful survey of pertinent constitutional provision.

63. See David E. Wilkins, "Tribal-State Affairs: American States as 'Disclaiming' Sovereigns," *Publius: The Journal of Federalism* 28 (Fall 1998): 55-81.

64. Charles F. Wilkinson, American Indians, Time, and the Law (New Haven: Yale University Press, 1987). p. 112.

65. This famous characterization of the tribes is drawn from Chief Justice John Marshall's opinion in *Cherokee Nation* v. *Georgia*, 30 U.S. (6 Pet.) 1, 17 (1831).

66. *Worcester* v. *Georgia*, 31 U.S. (7 Pet.) 515, 560 (1832), (emphasis added).

67. See Henry E. Fritz, *The Movement for Indian Assimilation, 1860-1890* (Philadelphia: University of Pennsylvania Press, 1963); Francis P. Prucha, *American Indian Policy in Crisis: Christian Reformers and the Indian, 1865-1900* (Norman: University of Oklahoma Press, 1976); and Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (New York: Cambridge University Press, 1984).

68. *United States* v. *Kagama*, 118 U.S. 375 (1886); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).

69. 118 U.S. 375, 383-384.

70. On the Indian Reorganization Act and its effects, see Graham D. Taylor, *The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934-45* (Lincoln: University of Nebraska Press, 1980); on termination policy, see Larry W. Burt, *Tribalism in Crisis: Federal Indian Policy, 1953-1961* (Albuquerque: University of New Mexico Press, 1982); and on the transformation of Indian policy during the Nixon administration, see George Pierre Castile, *To Show Heart: Native American Self-Determination and Federal Indian Policy, 1960-1975* (Tucson: University of Arizona Press, 1998). Useful overviews include: Russell L. Barsh and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley: University of California Press, 1980), Stephen Cornell, *The Return of the Native: American Indian Political Resurgence* (New York: Oxford University Press, 1988); and Emma R. Gross, *Contemporary Federal Policy Toward American Indians* (Westport, CT: Greenwood Press, 1989).

71. Thus, the Northwest Ordinance of 1787 spelled out the initial policy: The utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress...."

72. *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1810). Justice William Johnson offered considerably more support for tribal rights in his concurring opinion: “the uniform practice of acknowledging [the tribes'] right to soil, by purchasing from them, and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their right to soil." (10 U.S. at 146-47)

73. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574.

74. Quoted in Wilkinson, *American Indians, Time, and the Law*, p. 19.

75. Ibid., p. 21. For more general analyses of the General Allotment Act and its consequences, see Delos S. Otis, *The Dawes Act and the Allotment of Indian Lands* (Norman: University of Oklahoma Press, 1973); Loring B. Priest, *Uncle Sam's Stepchildren: The Reformation of United States Indian Policy, 1865-1887* (New Brunswick, NJ: Rutgers University Press, 1942); and Ronald L. Trosper, "Mind Sets and Economic Development on Indian Reservations," in Stephen Cornell and Joseph P. Kalt, eds., *What Can Tribes Do?* (Los Angeles: University of California Indian Studies Center, 1992). Not every scholar has viewed the

transfer of ownership from tribes to individuals as a negative development; see, for example, Terry L. Anderson, *Sovereign Nations or Reservations? An Economic History of American Indians* (San Francisco: Pacific Research Institute for Public Policy, 1995).

76. "The United States shall guarantee to every State in this Union a Republican Form of Government" (U.S. Constitution, Article IV, section 4).

77. Wilkinson, *American Indians, Time and the Law*. p. 8.

78. Johnson v. McIntosh 21 U.S. (8 Wheat.) 543 (1823).

79. *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831).

80. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903). This ruling has been subjected to scathing critique; see, for example, David E. Wilkins, "The U.S. Supreme Court's Explication of `Federal Plenary Power:' An Analysis of Case Law Affecting Tribal Sovereignty, 1886-1914," in John R. Wunder, ed., *Native American Sovereignty* (New York: Garland, 1996).

81. Pertinent cases include: *Menominee Tribe of Indians* v. *United States,* 391 U.S. 404 (1968); *Morton* v. *Mancari*, 417 U.S. 535 (1974); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978); and *United States* v. *Dion*, 476 U.S. 734 (1986). For a useful analysis of this issue, see Wilkinson, *American Indians, Time, and the Law*, pp. 46-52.

82. Robert B. Porter, "Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies," *Columbia Human Rights Law Review* 28 (1997): 238.

83. 109 U.S. 556 (1883).

84. The discussion draws upon Gavin Clarkson, "Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary Analysis" (unpublished paper, Harvard Business School, 2001).

85. 18 U.S.C. sec. 1153. The Act was upheld in *United States* v. *Kagama*, 109 U.S. 556 (1886).

86. 18 U.S.C. sec. 1162. For discussion of the threat to tribal autonomy posed by Public Law 280, see Carole Goldberg-Ambrose, *Planting Tail Feathers: Tribal Survival and Public Law 280* (Los Angeles: American Indian Studies Center, 1998).

87. 25 U.S.C. sec. 1326. Since adoption of this legislation, no Indian nation has consented to state assumption of jurisdiction. See Carole Goldberg, "Public Law 280 and the Problem of `Lawlessness' in California Indian Country," in Johnson, *Contemporary Native American Political Issues*, p. 198.

88. 25 U.S.C. sec. 1301 et seq. For an attempt to unravel the intricacies of the criminal jurisdiction of tribal courts, see Robert N. Clinton, "Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze," *Arizona Law Review* 18 1976): 503-583.

89. 435 U.S. 191 (1978).

90. Wilkinson, *American Indians, Time, and the Law*, pp. 4-5.

91. This underlies John Hart Ely's famous argument in *Democracy and Distrust; A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

92. The case for a limited judicial role in protecting the division of power between nation and state is enunciated in Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago: University of Chicago Press, 1980). For judicial endorsement of this perspective, see *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

93. Indians seem a prime example of a "discrete and insular minority" deserving of enhanced judicial protection. See the famous Footnote 4 of *United States* v. *Carolene Products Company*, 304 U.S. 144 (1938). There is some evidence, at least on a rhetorical level, that courts have recognized that responsibility of heightened scrutiny--see, for example, *Seminole Nation* v. *United States*, 316 U.S. 286, 296-297 (1942).

94. This campaign to assimilate Indians paralleled efforts to "Americanize" European immigrants to the United States, who were also depicted as groups with individuals with a common ancestry. For obvious reasons, the term "Americanize" could not be used with regard to Indians, so it was replaced by "civilize."

95. For an overview of the record of state courts interpreting state constitutions, see G. Alan Tarr, "The New Judicial Federalism in Perspective," *Notre Dame Law Review* 72 (May 1997): 1097-1118. For surveys of pertinent judicial rulings, see the annual "Developments in State Constitutional Law," published in *Rutgers Law Journal* since 1989.

96. See Janice C. May, "Constitutional Amendment and Constitutional Revision Revisited," *Publius: The Journal of Federalism* 17 (Winter 1987): 153-179, and Janice C. May, "Amending State Constitutions 1996-97," *Rutgers Law Journal* 30 (Summer 1999): 1025-1057.