

AFFIRMATIVE ACTION RECONCEIVED:  
A COMPARATIVE STUDY OF CONSTITUTIONAL PRECOMMITMENTS TO GROUP  
PREFERENCES FOR RACIAL MINORITIES AND WOMEN

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A DISSERTATION

in

Political Science

Presented to the Faculties of the University of Pennsylvania

in

Partial Fulfillment of the Requirements for the

Degree of Doctor of Philosophy

2015

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## DEDICATION

This dissertation is dedicated to all those who have helped me through this tumultuous journey and all of its unexpected twists and turns. Completion of this dissertation was made uncertain as a result of the onset of serious health concerns. Over the years, there were many times that I thought it would be best to leave Penn without finishing. Fortunately, with the encouragement of friends, family, my committee members and Penn staff I stayed, and I believe I am a better scholar, man and human being for it.

## ABSTRACT

### AFFIRMATIVE ACTION RECONCEIVED: A COMPARATIVE STUDY OF CONSTITUTIONAL PRECOMMITMENTS TO GROUP PREFERENCES FOR RACIAL MINORITIES AND WOMEN

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The nation-state's struggle with liberal individualism on the one hand and the recognition of group rights on the other is well documented in the literatures on constitutionalism, constitution-making, comparative politics and racial/ethnic relations. However, the manner in which this conundrum manifests in a state's acceptance or rejection of affirmative action has been under-discussed. Traditional approaches to the study of affirmative action are inadequate because they tend to circumscribe the universe of policies and programs that may qualify as affirmative action by focusing only on certain groups, issue domains or countries.

More specifically, current scholarship on affirmative action suffers from several substantive and methodological shortcomings: (1) a neglect of the constitutional foundations of affirmative action, (2) a fundamental definitional uncertainty when it comes to understanding what affirmative action actually is, (3) a lack of a clear analytical framework with which to classify various types of affirmative action policies, (4) a narrow focus on single-case studies, and (5) a paucity of inter-group and intra-group comparisons.

To address these lacunae, this study focuses on constitutional precommitments to affirmative action. Prior to any substantive analysis, this study first proposes a consensus definition of affirmative action and develops a universal typology and sub-typology with which to categorize, analyze and compare affirmative action precommitments. Next, this study employs a large N comparative methodology to examine the constitutions of 30 countries and categorize affirmative action precommitments through the use of constitutional textual analysis and secondary source

historical materials. Finally, this study compares affirmative action precommitments – both inter-group and intra-group – for racial/ethnic minorities and women across the sample.

There are three principal substantive findings. First, although liberal individualism remains central to the constitution-making process, all cases exhibited constitutional acknowledgement of some form of group rights and/or preferences. Second, for various reasons, racial/ethnic minorities tend to fare better than women when it comes to the overall prevalence of preferential constitutional precommitments. Third, historical evidence suggests that both endogenous and exogenous political pressures, such as internal ethnic conflicts and global human rights movements, matter when it comes to racial/ethnic minorities' or women's chances of having affirmative action provisions included in constitutions during the constitution-making process.

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CHAPTER 1  
INTRODUCTION

I. Introduction

The principal purpose of this project is to reconceptualize the idea, policy or set of policies commonly referred to as “affirmative action.” The study of affirmative action is important to our understanding of the political and social origins of human inequality itself, the processes and mechanisms that either evolve into or are manipulated into existence and then harnessed through institutions to reproduce the inequality. Whether systems of social stratification manifest organically as a result of friction created by pre-fsisting cleavages, or whether they are borne from the intent of exogenous forces in furtherance of a “divide and conquer” agenda, we know that systems of social and political inequality are ubiquitous, durable and more often than not memorialized into law. The question then becomes: how are these systems changed? One tool used by states is the implementation of policies that prefer the members of certain, usually subordinated, groups or classes. Thus, in the effort to cure the malady of human inequality, preferential policies pursued by the state, referred to as affirmative action, have become indispensable, and also controversial.

Current legal, academic and popular conceptions of affirmative action are inadequate for several reasons. First, affirmative action discourse, regardless of where it occurs, is inherently flawed because its assumptions, theories, hypotheses, findings and conclusions are largely constructed without a clear and robust definitional foundation. They lack definitional certainty because they neglect to answer the most basic question – “what *is* affirmative action?” The result has been a patchwork of literature, with evidence and conclusions that cannot reliably be compared. For example, some definitions focus on the beneficiary groups (blacks, women, etc.). Other approaches are flawed because they are more concerned with the means by which the policy or program is implemented (quotas, goals, etc.). Still others focus on policy domains such as employment or

education. These definitional approaches are simply too narrow to be applicable to a variety of political contexts.

This study specifically focuses on the prevalence, type and groups targeted by affirmative action precommitments found in constitutions because constitutions represent the fundamental embodiment of the legal foundations of liberal democracies and other forms of government. Although at its core this study will build from the comparative constitutional law research program, it also incorporates literature from democratic theory, constitutionalism, racial projects and other research programs. Comparative constitutional law has seldom been applied either methodologically or substantively to the literature on affirmative action. This study applies comparative constitutional law, constitutional textual analysis and comparative historical institutional analysis to answer seven important questions: (1) what *is* affirmative action; (2) how do we go about identifying constitutional precommitments to affirmative action; (3) what are the most basic types and sub-types of affirmative action precommitments; (4) can patterns be discerned in the way different countries incorporate affirmative action precommitments into their constitutions; (5) if so, what variables are the most salient; (6) how prevalent are affirmative action precommitments; and (7) do certain groups benefit more than others from affirmative action precommitments?

## II. Theoretical Framework

This study focuses on the prevalence, type and groups targeted by affirmative action precommitments in constitutions. In the post-colonial era, protections for certain groups have routinely been included in constitutions, and the inclusion of these protections have generally been viewed as compatible with the fundamental doctrines of liberal democracy. Indeed, given the global pervasiveness of racial and ethnic discrimination, group rights are integral to the achievement of equality in democracy. Although “group rights” is a broad term with many permutations, this project will focus specifically on affirmative action programs (also referred to as positive discrimination) as a vehicle that can help to ameliorate historical inequalities. Because they are preferential and not

merely protective, these programs have been controversial. These programs may include quotas or set-asides for government employment or education. They may also include power-sharing arrangements at the federal or sub-national level. Many nations have implemented positive action programs for racial, ethnic or other groups: India, Malaysia, Sri Lanka and SA, just to name a few. Although common, many scholars argue that positive action programs exacerbate racial antagonisms and that they are actually counterproductive.

Racial equality through affirmative action programs can be difficult to achieve because of the nature of the democratization process itself. One fundamental issue here is the way democracy itself is defined in the democratization literature. In a classic minimalist conception, Robert Dahl defines democracy as “a political system that has the quality of being completely or almost completely responsive to all its citizens” (Dahl, 1972, p. 2).<sup>1</sup> For Dahl, as public contestation and inclusiveness increase within a society, that society approaches polyarchy. Unlike hegemonic regimes, which are deficient in either one or both dimensions, polyarchy requires that individuals be able to: (1) formulate their preferences; (2) signify their preferences to their fellow citizens by individual and collective action; and (3) have their preferences weighed equally in the conduct of government (Dahl, 1972, p. 2).

Ultimately, degrees of democratization become a function of *public contestation* and *inclusiveness*. The first element of Dahl’s definition has come to embody the minimalist definition of democracy; the existence of free and fair elections with reasonable competition among parties, with a reasonable portion of the population able to exercise the franchise, is generally sufficient to pass the threshold test of a democratic polity. However, the inclusiveness dimension in Dahl’s analysis is of much more subsidiary importance than public contestation. Indeed, if a political system need only be responsive

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<sup>1</sup> The “almost” qualifier here is crucial, because it implicitly permits regimes to be categorized as democratic even when some minority of the population is prohibited from participating meaningfully in contested electoral politics, and thus does not share equitably in resource distribution and the selection of elected representatives.

to “almost” all citizens to be considered democratic, then what does this say about the relationship between democracy and equality? Unfortunately, prevailing measures of democracy do not adequately account for racial equality.

In addition to definitional issues, certain practical issues present a challenge to racial equality. For a transitioning state, the implementation of affirmative action programs could be disastrous because it could upset the delicate social economic and political balances that existed under the previous regime. Maintaining some semblance of institutional coherence while parties are formed, elections are held, and economic and political relationships are reconfigured is of critical importance lest an aborted transition or failed state result. Additionally, the viability of the modern state depends on the creation and maintenance of a robust and deep-seated national identity. Because this national identity necessarily supplants more particularistic loyalties, minority cultures may be eliminated or ignored. This fragility is exacerbated during the crucible of democratic transition; thus, peace and stability become far more important than equality simply because the survival of the state hangs in the balance. Simply put, for the newly democratizing state, the reality is that abrupt change equals risk because at its core the nation-state itself is a precarious geo-spatial aberration. To maintain political integrity, marginalized groups may be excluded from the bargaining process that leads to the drafting of a new constitution, because to engage in a new, perhaps radical, redistribution of political and economic resources at that time might jeopardize the success of transition. Unfortunately, an overly myopic preoccupation with the maintenance of equilibrium can leave any expectations of racial equality unfulfilled.

Even though we know that these affirmative action precommitments exist, they have been understudied by scholars of affirmative action and comparative constitutional law. All too often, scholars of affirmative action focus on the moral implications of affirmative action policies in a democratic society, the jurisprudence and legal particularities regarding a specific issue in a specific country, or on whether affirmative action “works” – whether the policies in question achieve their

purported goals, through economic or sociological analysis. Additionally, the field is dominated by a US-centric conception of race and state-society relations. Little room is left for alternative models or approaches to societal arrangements that originate in different geographical regions, legal traditions or histories of minority group marginalization. While insightful, these studies tend to ignore more preliminary inquiries, e.g. what affirmative action actually *is*. They also tend to only focus on specific countries, groups and issue domains. When taken in the aggregate, these shortcomings in the affirmative action literature have led to a misunderstanding of what policies qualify as affirmative action, a companion notion that affirmative action is rare or anachronistic and an almost visceral reaction to affirmative action as inimical to justice, fairness, equality and other foundational liberal tenets. This study posits that applying a comparative constitutional law approach to affirmative action can result in a much more expansive, nuanced and formalized reconceptualization of affirmative action.

This study improves on the existing literature in several ways. It attempts to formulate a consensus minimalist definition of affirmative action. This definition will then serve as the foundation for developing a typology of affirmative action precommitments through examination of constitutional provisions that confer group preferences. Specifically, two groups will be the subjects of intra-group and inter-group comparison – linguistic, ethnic, racial and national (LERN) minorities and women. There have been previous studies of constitutional precommitments to affirmative action; however, comparative studies have been relatively few, and those that have moved beyond the single-case study compare only a few cases. This project proposes that a large N comparative study of constitutional precommitments to affirmative action study, through the use of constitutional textual analysis, is warranted to better determine how prevalent they are generally, and how prevalent each type is, specifically. A large N study can also make use of comparative historical institutional analysis and help identify potential patterns in how these precommitments come into being, how

they operate over time and place, and pinpoint the variables and processes that make implantation and change more or less likely.

As intimated above, this project traces the idea and practice of constitutionalism from its liberal origins to its eventual embrace of group rights. This occurred because the imperatives of liberal individualism which originated in western political philosophy became relaxed when applied to the new post-WWII, non-western democracies. Both endogenous and exogenous variables played significant role in this development. From an endogenous perspective, the prevalence of deeply embedded – and oftentimes violently contested – social cleavages exerted pressure on constitution-makers to appease restive minority groups that threatened the integrity and stability of the fledgling state. Minority group demands were sometimes successful, as evidenced by the inclusion of a wide variety of minority rights constitutional precommitments. The manner in which these processes developed varied across geography and time. In each case the end result was a culturally particularistic reconceptualization of constitutionalism as a foundational principle of state institutional organization, in response to state-specific constellations of group interests. In addition, as these constellations shift over time, opportunity structures may present political openings for minority groups to gain constitutional group recognition previously denied during the state's founding, or to gain an expansion of group recognition already granted. Exogenous variables, such as international human rights treaties, pressure for social reforms exerted by other states, and migration patterns are also important in the alignment of constitutionalism and group rights.

Minority group recognition has often taken the form of group rights. As applied to constitution-making, precommitment theory suggests that the framers of constitutions may behave as individualistic, self-interested rational actors. However, because constitution-making is a group enterprise and not an individual one, constitution-makers may use precommitments to bind themselves and others. Constitutions must be designed to counteract passion, overcome time-inconsistency and to promote efficiency. Constitutional devices such as the separation of powers,

bicameral legislatures and the executive veto are intended to check legislative overreach that may result from individualistic passions.

Similar logic can be applied to minority rights precommitments. Under certain circumstances, constitution-makers may conclude that protection of minorities is required for state efficiency, although it may run counter to individual framers' interests. Thus, during the constitution-making or -amending process, participating majority-group elites may include precommitments that privilege the minority and bind the majority. Reasonable arguments as to the ethical and legal legitimacy of minority group recognition by the state have been made by both proponents and detractors. Proponents argue that such schemes can effectively manage social conflict; they can facilitate democratic consolidation and state capacity by equalizing economic imbalances brought about by historical asymmetries in resource distribution. Detractors contend that affirmative action precommitments merely exacerbate group cleavages by building resentment among the majority and reinforcing the narrative of inferiority among the minority. Consequently, they assert, these preferences actually undermine the national project and ultimately make the state weaker and more fractured.

Practically speaking, the debate over the normativity of affirmative action as a means of social group management seems to be less about whether minority groups should be recognized in certain multi-ethnic state and more about the degree and type of recognition. As the cases discussed *infra* will demonstrate, minority group preferences at national, intermediate or local levels in politics, education or the workplace are common across geography, form of government and legal tradition. These preferences, typically in the form of quotas, minimums, set-asides, are what are popularly understood as affirmative action. However, an examination of constitutions – the origin of all affirmative action laws and regulations – reveals that the universe of group preferences that have traditionally been deemed “affirmative action” fails to adequately represent the range of tools used by constitutional designers to effectuate affirmative action objectives for LERN minorities and women.

Stated succinctly, the current literature on affirmative action deserves a new perspective, one that is comparative in nature, that accounts for the constitutional genesis of affirmative action policies, and that theorizes affirmative action in relationship to constitutionalism, constitution-making and minority rights. The end result will be a clear definition of affirmative action in the constitutional context – *a state mandated or permitted group preference*. Furthermore, four basic types of constitutional precommitments to affirmative action will emerge: classical, tacit, territorial and social. In addition, three sub-types will be discussed; group-specific/non-group-specific, domain-specific/non-domain-specific and mandatory/permissive. These four types and three sub-types often work synergistically to elucidate and effectuate constitutional preferences for LERN minorities and women in a variety of cases.

### III. Goals of the Dissertation

There are three main goals of this dissertation: (1) to attempt a fundamental reconceptualization of what is commonly understood as affirmative action, (2) to develop a typology with which to classify constitutional precommitments to affirmative action and (3) to compare the type and prevalence of constitutional precommitments to affirmative action for racial minorities and women across a variety of issue domains. As previously stated, definitional accuracy and certainty have been elusive in the affirmative action literature. Traditional approaches tend to circumscribe to universe of policies and programs that may qualify as affirmative action by focusing only on certain groups, issue domains or countries. Therefore, a much more basic conceptualization is warranted, one that accepts the notion that affirmative action can apply to *any* group, even majority groups. Still other approaches are flawed because they are more concerned with the means by which the policy or program is implemented (quotas, goals, etc.). In practice, preferential policies can come in a myriad of forms, and are contingent upon the political and legal histories of a particular case.

After affirmative action is reconceptualized and defined, a classificatory scheme will be proposed for constitutional precommitments to affirmative action. To do this, the dissertation will

develop and elucidate a typology based upon the proposed consensus definition. The constitutions of 30 countries will be examined, and their affirmative action provisions identified and coded into the appropriate types and sub-types. There have been previous studies of constitutional precommitments to affirmative action; however, comparative studies have been relatively few, and those that have moved beyond the single-case study compare only a few cases. This project proposes that a large N comparative study of constitutional precommitments to affirmative action study, through the use of constitutional textual analysis, is warranted to better determine how prevalent they are generally, and how prevalent each type is, specifically. A large N study can also help identify potential patterns in how these precommitments come into being, how they operate over time and place, and pinpoint the variables and processes that make implantation and change more or less likely.

Finally, the dissertation will compare constitutional precommitments to affirmative action for LERN minorities and women (SEX). Three foundational questions confronted by constitution-makers provide guidance: (1) what kind(s) of precommitment(s) should we have, (2) to whom should the precommitment(s) apply and (3) in what situation(s) should the precommitment(s) apply? Four issue domains will be examined: political (POL), economic/employment (ECON/EMP), education (EDU) and cultural (CULT). Affirmative action precommitments are evaluated within and across domains for each target group category individually as well as comparatively. Of particular interest is the prevalence of types and sub-types of precommitments within issue domains and the proposal of hypotheses to explain preference prevalence differences across types, sub-types, issue domains and target group categories.

#### IV. Research Design

This dissertation integrates several methodologies. First, the comparative method is used to compare constitutions to identify patterns in the way they memorialize group preferences. Unlike most studies that compare only a few cases, this study chose a large N approach because it will add to

the existing literature, as well as add texture to the role of minorities and women in democratization, constitution-making and nation/state-building processes. This number of cases is also required to fully effectuate the core objective of this project – to achieve a better understanding of how and why states make preferential precommitments to women and minorities.

Second, through the use of constitutional textual interpretation, particular focus will be on the precise phraseology used in the constitutional provisions themselves, how various provisions can be interpreted together and how courts have interpreted those provisions. In identifying patterns in constitutional precommitments to affirmative action, the basic principles of comparative constitutional law will be used as guidance.

#### V. Findings

This study has two sets of findings. The first set relates specifically to the development of a workable typology for constitutional precommitments to affirmative action. Textual study of the constitutions of the cases in the sample, in light of the proposed definition, reveals four basic types of affirmative action precommitments. First, classical constitutional affirmative action precommitments embody what we have come to accept as conventional affirmative action policies; preferential policies designed to benefit groups, usually minorities. They come in the form of reservations, quotas or minimums representation requirements in specified issue domains. Classical precommitments use “universal” language that makes a clear, unambiguous and unequivocal commitment to conferring a mandatory or permissive state-protected preference on a particular group or groups by undertaking extraordinary or exemplary steps, articulated in terms that are widely accepted by the international community as conveying such preference. Second, tacit precommitments also convey a preference, but they do not use terms that are widely accepted; thus, textual and historical context is needed to determine whether a preference can or must be conferred.

Third, territorial precommitments are used to facilitate the devolution of political authority to sub-national governance units. There are three sub-types: grants of *autonomy*, *ethno-development*

schemes fostered by ethno-federal arrangements, and efforts at *conservation* of LERN minorities land and culture. For a territorial arrangement to qualify it must meet three criteria: (1) the territorial arrangement must be provided for in the constitution, (2) territorial boundaries must be largely coextensive with LERN boundaries and (3) the territories inhabited by minority LERN group(s), or the members of the groups thereof, must receive some government mandated or permitted preference that the territories inhabited by the other group(s), or the members thereof, do not receive. Finally, social precommitments support state-authorized preferences by evidencing a clear intent to effectuate social or socialist ideals through a state redistributionary project. This study classifies social precommitments into three sub-types: (1) cases that are *socialist* because they contain provisions that use the term “socialist” in reference to the state; (2) cases that are *social* because, although they do not contain provisions that use the term “socialist,” they do contain provisions that mandate or permit resource redistribution amongst social groups and/or provide for entitlements such as social security, housing assistance or health care; and (3) cases that are constitutionally *asocial* because they contain no provisions that clearly indicate the states responsibility or option to redistribute resources amongst social groups.

The second set of findings is drawn from the study’s comparison of precommitments for LERN minorities and women. When we examine the data three broad conclusions can be drawn. First, liberal individualism remains central to the constitution-making process. However, constitutional acknowledgement of group rights is a rather ubiquitous exception. This conclusion is most obviously reasonable because almost every case has some form of social precommitment. When the prevalence of social precommitments is viewed in light of the fact that almost every case had some LERN-specific or SEX-specific affirmative action provision, liberal individualism in constitution-making has become more of a flexible consideration than a strict directive. In the LERN case, it would seem that in collective civic nationalism and minority rights carry substantial

weight. For women, liberal gendered parochialism seems to be giving ground to more collectivist notions of gender mainstreaming and a modulation of male supremacy.

Second, LERN minorities tend to fare better than women when it comes to preferential constitutional precommitments. This may stem from the fact that LERN minorities have the potential to be more politically disruptive by employing tactics that can destabilize nascent nationalist projects, threatening territorial integrity and degrading trust in government. In some instances, the demands of certain LERN minorities can be met with grants of some degree of autonomy, ethno-development or conservation, making outright inclusion unnecessary. Unlike women, LERN minorities are not homogenous; thus, different solutions may be effective for different groups. In addition, because women are not territorially defined they lack the political salience of indigenous-immigrant or other intra-LERN group social stratification categories. Furthermore, women's issues tend not to destabilize the state and, thus, may be regarded as less serious.

Third, historical evidence suggests that endogenous and exogenous political pressures matter when it comes to LERN minorities' or women's chances of having affirmative action provisions included in constitutions. Endogenous pressures, in the form of grassroots mobilization, domestic political coalition building, litigation, the election of minority and women law-makers, organized and sustained protest, and sometimes outright violence permit subordinated social groups to take advantage of political opportunity structures to have constitutions rewritten or amended. Exogenous forces, such as international conventions, legal borrowing, NGOs, and even economic sanctions or incentives, are also important to realizing institutional legal change for subordinated groups during political transition. When these two forces operate in concert, minority groups stand the best chance of achieving a constitutional precommitment to affirmative action. Exogenous pressures seem to be more significant for women, while endogenous pressures seem more significant for LERN minorities.

## VI. Contribution to the Field

This project makes several contributions to the field of comparative politics. First, it takes a novel approach to affirmative action by redefining it to properly account for all state mandated or permitted group preferences and jettisoning a narrower, ostensibly American-centric, definitions that define it as simply government quotas for minorities and women. Second, I contribute to the comparative constitutional law research program by focusing on constitutions, specifically the manner and frequency with which they use the constitutional text to confer preferences on various groups through the use of affirmative action precommitments. Third, this project elucidates a basic classification system for affirmative action precommitments, one that accounts for historical variation in the development of state institutions and apparatuses across cases, as well as the roles that religion, legal tradition, and the durability of social cleavages may play in the constitution-drafting process itself and the subsequent interpretation of precommitments by adjudicative bodies. Fourth, this study adopts a large N methodological approach, rather than simply compare two or three cases. This approach permits greater cross-country and cross-region comparison. Finally, the study compare how affirmative action precommitments apply to racial/ethnic minorities and women both intra- and inter-case.

## VII. Structure of the Dissertation

This dissertation consists of 9 chapters. This Introduction is intended to provide an overview of the theoretical foundation, methodology, findings and contributions to the various fields of inquiry related to affirmative action and constitutional precommitments. Chapters 2, 3 and 4 provide a review and synthesis of the relevant literatures on comparative constitutional law, constitutionalism, precommitment theory, minority rights, racial projects, affirmative action and ultimately my re-conceptualization of affirmative action. Chapters 5 and 6 apply the new definition of affirmative action to the 30 cases included in the study through the use of constitutional textual analysis and secondary source historical data. This application results in the creation of the analytical framework and classificatory scheme described above. Chapters 7 and 8 apply the classificatory

scheme to evaluate the prevalence of affirmative action precommitments by type and sub-type between women and LERN minorities, respectively and comparatively. Finally, Chapter 9 provides closing observations, identifies theoretical and practical implications of the research, and indicates potential avenues of inquiry for future projects. A Methodology is included as an Appendix. It will describe in detail the research design of the project, including topics such as the comparative constitutional law, historical institutional analysis, case selection, target group definition and selection, precommitment type and sub-type selection, and issue domain definition and selection.

## CHAPTER 2

### LIBERAL CONSTITUTIONALISM, PRECOMMITMENT THEORY AND MINORITY RIGHTS

#### I. The Fundamentals of Constitutionalism

Like many concepts in comparative politics, constitutionalism has no universally-accepted definition. Influenced by the Eastern European democratization, Sajo (1999) defines it as “the restriction of state power in the preservation of public peace” (Sajo, 1999, p. 9). In his view, “[c]onstitutionalism is not merely a legal prescription or prudence elevated to the rank of prescription” (Sajo, 1999, p. 9). For him, “[t]here is no satisfactory definition of constitutionalism but one does not only *feel* when it has been violated, one *can prove it*. What brings about this almost instinctive antipathy toward certain acts of government differs from country to country and from age to age” (Sajo, 1999, p. 12). Ultimately, “[c]onstitutions are written out of fear of an earlier despotic power, though, having been written, they begin a life of their own. From then on, crises will add to the original fear, and answers to the old and new consensus constitute what will be considered constitutional” (Sajo, 1999, p. 13).

Sajo’s fear of the previous regime eventuates in the goal of limited government so as to prevent the reoccurrence of despotism. Rosenfeld (1994) opines that constitutionalism fundamentally requires “imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights” (Rosenfeld, 1994, p. 3). Attempting to reconcile constitutionalism and deliberative democracy, Worley (2009) highlights three essential elements of constitutionalism. First, the *supremacy principle* holds that even the government itself must be subjected to the rule of law, accept institutional constraints and define the scope of government power. Second, the *limited government* principle concerns institutional limits (judicial review, separation of powers, etc.) placed on government intrusion into spaces of individual liberty and impingement upon individual rights, and limits on government must be *entrenched* – the restrictions on state power

cannot be easily changed. Tushnet (2006) identifies several requirements of constitutionalism. He first identifies a commitment to the rule of law, “a generally observed disposition to exercise public power pursuant to publicly known rules, adherence to which actually provides a substantial motivation for acting or refraining from action.” Second, constitutionalism requires a reasonably independent judiciary. Third, and finally, “reasonably regular and reasonably free and open elections, with a reasonably widespread franchise” (Tushnet, 2006, p. 1230).

From a minimalist perspective, Elster (2000) describes constitutionalism as “a general propensity to abide by the constitution and judicial review” (Elster, 2000, p. 99). Constitutions regulate political life, through bills of rights that protect the citizenry from government interference. Constitutions also regulate themselves by providing the rules for constitutional amendment. Constitutional amendment is generally a slow process, requiring a range of qualified majorities, from unanimity, through parliamentary supermajority, a popular referendum or some other standard that is more arduous than that required for the enactment of ordinary legislation. For Elster, the processes that lead to the creation of a constitution represent an elite game; both the upstream or downstream authorities contribute to the creation of the constitutional constraints (Elster, 2000). Berggren & Karlsson (2003) describe constitutionalism as “the doctrine that governmental power and majority rule should be constrained by individual rights and a system of checks and balances, codified in a formal constitution. At the core of this view is the idea that a well-functioning political system needs a clear division of power” (Berggren & Karlsson, 2003, p. 99).

Taking a rational choice approach, Hardin (1999) argues that liberalism, constitutionalism and democracy are mutual advantage theories. Citing Thomas Hobbes, he explains that under the theory of mutual advantage “the best way to secure our personal interest in survival and economic prosperity is to secure the general mutual interest in these things through establishing or maintaining general order” (Hardin, 1999, p. 2). Constitutionalism is a sociological theory used to establish and maintain social order through the acquiescence of the populace. In Hardin’s rational choice analysis

“a constitution does not provide a particular exchange or prisoner’s dilemma interaction. It regulates a long-term pattern of interactions. It establishes conventions in the sociological or strategic sense that make it easier for us to cooperate or coordinate in particular moments” (Hardin, 1999, p. 86). Simply put, constitutionalism erects those institutions necessary for coordination, between individuals and between individuals and the state. Institutions exist to make some actions and results possible and to constrain other actions make others costly. In Hardin’s view, the implementation of constitutionalism is both simple and complex. It is simple because it requires agreement only on large, general matters of national order, with minutiae being the province of legislation. On the other hand, the difficulty in constitutionalism comes in the arrival at an agreement on those large, general matters of national order.

The origins of the more recent efforts at constitutionalism are not singular. Western philosophers widely regarded as the progenitors of constitutional ideals – e.g., Kant, Rousseau, Bentham, Mill – do not enjoy the consultation of the framers of contemporary constitutions. (Henkin, 1992-93). More recent framers tend to consult documents such as the Universal Declaration of Human Rights as general guides, but national idiosyncrasies play a critical role in the constitution-making process. That said, Henkin does identify what he believes to be at least seven demands of modern day constitutionalism. Henkin’s central themes may be summarized as follows: (1) modern constitutionalism is based on popular sovereignty, with government legitimacy and authority grounded in the will of the people through representative government; (2) the constitution must be the supreme law; (3) the government must adhere to a variety of democratic principles: limited government, separation of powers, checks and balances, civilian control of the military and an independent judiciary; (4) the state must respect individual rights, with reasonable limitations; and (6) a constitution should permit self-determination, or the rights of “peoples” to choose their “political affiliation” (Henkin, 1992-93, pp. 535-36).

Lutz (2006) remarks that “[o]ver the past two centuries, we have moved from a situation where almost no country had a written constitution to one where almost every country has one” (Lutz, 2006, p. 4). There has been a diffusion of constitutional principles throughout the world, not only emulating the US and canonical French models, but also Germany and SA. Since WWII, unitary systems, which may work well with homogeneous populations, have gradually given way to federal, confederal or consociational arrangements. Perhaps the most noteworthy trend is the increased recognition of racial, religious and ideological minorities. The type and durability of the cleavages dictates the institutional form required to manage them. Relatedly, as constitutionalism has spread, constitutions have become more rights-conscious, for both individual and group rights. These constitutions produce pressures to help to identify lingering injustices and codify potential solutions. Along with this emerges a possible conflict between a “national culture,” a super-ordinate culture that essentially renders all other national allegiances subsidiary, or what Lutz refers to as a “constitutional culture,” a culture which recognizes the diversity and multitude of nationalities within a state while still asserting sufficient loyalty to the sovereign (Lutz, 2006, p. 14).

Constitutional culture is a product of a whole host of variables, including a state’s social, political and economic histories, legal traditions, mode and manner of transition to a constitutional polity, as well as the type of regime that preceded the transition. In his discussion of the global influence of American constitution, Billias (2009), echoing Sajo, makes the point well.

Any study of constitutional influence must acknowledge at the outset that all constitutions are *autochthonous*; that is, they spring from native soil and are rooted in a country’s indigenous traditions ... Constitutions are, to a greater or lesser degree, hybrid documents, since each new constitution is part of a larger process called *syncretism*, by which the traditions of one country incorporate the indigenous traditions of another country, resulting in a new creation to which both countries have contributed (Billias, 2009, p. 4).

American constitutionalism has been credited with being the blueprint for many of the constitutions enacted around the world. Billias’ basic understanding of constitution, adopted from Fehrenbacher (1989), is “the sum total of legal and political restraints that ... safeguard the exercise of power and

protect certain fundamental rights” (Billias, 2009, p. 7). Billias adds that constitutionalism implies ““a complex of ideas, attitudes and patterns of behavior elaborating the principle that the authority of government derives from and is limited by a body of fundamental laws”” (Billias, 2009, p. 7). In the American experience, these ideas were embodied in six categories of documents: the Declaration of Independence, the first state constitutions, the Articles of Confederation, the US Constitution, *The Federalist* and the Bill of Rights. Each document contributed to the American constitutional model.

In Lutz’s view, “constitutions need to be viewed more as instruments for achieving general fairness and justice than as instruments for efficiently pursuing specific public policies” (Lutz, 2006, p. 11). Lutz asserts that the confluence of culture, power and justice help determine how constitutionalism manifests in any given society. He directs attention to the power element of constitutions. Institutions created by constitutions identify the supreme power, distribute power in a way that leads to effective decision-making and provide a framework for continuing political struggle through elections and litigation rather than violence. Borrowing from Montesquieu’s idea of the “spirit of the laws” and his theoretical discussions of the freedom-coercion dichotomy, Lutz contends that justice is the key ingredient in constitutionalism. By their very nature, written constitutions make the rights and duties of the citizen and state publicly available, making the functions and operations of government known.

Franklin & Baun (1995) contend that what is needed for a constitution to take root is the appropriate *political culture*, a “fertile, organic environment” in which the rule of law can germinate and flourish.<sup>2</sup> (Franklin & Baun, 1995, p. 2). In Schlink’s discussion of the changing relationship

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<sup>2</sup> The authors argue that in the absence of such a pre-existing culture, a viable constitutional culture can come about through: (1) an organic and evolutionary process by which the necessary political institutions emerge as a product of a distinct national identity; (2) exogenous forcible imposition of democratic institutions; or (3) the coalescence of a variety of homogenous ethnic groups that eventuates in the formation of a federal states. This typology seems overly-simplistic, given that there is significant overlap among the three types and that, in practice, the inauguration of democratic societies emerges from the interaction of a number of agents and interests whose positions with regard to constitutionmaking are not always readily discernible. (Franklin & Baun, 1995, p. 3).

between constitutional legal scholarship and constitutional interpretation in German Law, he maintains that the form of constitutional culture that is generated and propagated by a particular constitution depends not only on the memorialization of certain fundamental democratic principles, but also on the administration, interpretation and scholarly analysis of those principles. For him, “[h]ow legislation and administration deal with the constitution essentially depends upon the sort of supervision to which they are subjected by judicial decision making. How this supervising adjudication in turn deals with the constitution, how strictly or laxly it interprets its provisions, and in what spirit it applies them essentially depends upon how legal scholarship deals with the constitution and with judicial decision making.” (Schlink, 1994, p. 197).

As political culture varies, instantiations of constitutionalism vary. Elster (1991) points out that the wave of constitutionalism that began in Eastern Europe in 1989 differed from the previous waves for five reasons: (1) the countries emerged from communist rule, (2) they have pre-communist constitutional traditions, (3) they were transitioning from a central planning to a market-based economy, (4) the countries had intertwined histories and (5) the democratization process proceeded based on demonstration effects. He also points out significant differences, including the federal arrangement of Czechoslovakia and Yugoslavia, and the economic and cultural advancement of Czechoslovakia, Hungary and Poland as compared to the Baltic states. (Elster, 1991, p. 448). In his study, he compares and contrasts the constitutional trajectories of Bulgaria, Hungary, Poland, Czechoslovakia, East Germany, Romania, Albania and Yugoslavia. All cases were ethnically heterogeneous in some way, with varying degrees of geographic distribution of ethnic minorities. Elster identifies three independent causes that contributed to the Eastern European wave of constitutionalism: (1) Gorbechev’s policies of glasnost, perestroika and non-interference; (2) the Round Table talks in Poland; and (3) Ceausescu’s treatment of the Hungarian minority in Romania (Elster, 1991, pp. 453-455).

In his discussion of African constitutionalism, An-Na'im (2006) echoes Sajo's and Lutz's perspective on the influence of culture in determining how a particular society implements "constitutionalism" into its various state institutions. He does so while simultaneously acknowledging that there are in fact necessary standards to which any constitutional society must conform. In the African context, An-Na'im maintains that constitutional culture is inevitably comprised of pre-colonial remnants and European historicity. Thus, if a society is to approximate what he refers to as "African constitutionalism" Africans must "recover some of the moral and philosophical resources of the precolonial past of African societies into a present which has been totally transformed by colonial and post-colonial conditions" (An-Na'im, 2006, p. 32). Additionally, those vestiges of the African past must be integrated into "a theory and practice of constitutional principles that were developed in Western societies, while retaining the new acculturated outcome within recognizable patterns of constitutionalism" (An-Na'im, 2006, p. 32). Clearly, An-Na'im is attempting to create a balance – on the one hand, he challenges the rigidity and particularism of Eurocentric models of state-society relations, while on the other hand he accepts certain elements of those models as universal and integral to the successful accomplishment of the constitutional project.<sup>3</sup>

Especially within Africa, instantiations of political culture have varied greatly. During the colonial period constitutional development in Africa took two forms – the imposition of an alien, European authority that subordinated traditional political structures and the preservation of African culture and social autonomy that later led to mobilization and anti-colonial movements. European influence in Africa's initial constitution-making processes played a key role in their failure precisely

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<sup>3</sup> An-Na'im crystallizes the delicate balance when he argues that

Africans should be able to seek, to retrieve, rejuvenate and develop such conceptions and institutions, regardless of whether or not they can verify or validate such recollections in terms of Eurocentric historiography and epistemology. But equally important is that such retrieval includes a critical examination of the historical experience, instead of blind sentimental assertion of ideas and institutions. (An-Na'im, 2006, p. 33).

because their frameworks were alien. In many instances of African constitutionalism, traditional notions of state sovereignty created tensions between elites who controlled the apparatuses and the distribution of rights and resources and a self-determined civil society that sought greater voice, greater autonomy or even outright secession. An-Na'im suggests that a redefinition of sovereignty based on human rights and human dignity should be pursued. This would be a departure from an insular state-centered approach to one where a country's internal dynamics would be guided by democratic frameworks and covenants put forth by the UN and other international organizations (An-Na'im, 2006, p. 58). Again, An-Na'im calls for balance between conceptions of human dignity derived from liberal standards of individual human rights and "traditional or communitarian conceptions of dignity" (An-Na'im, 2006, pp. 60-61).

Many post-colonial African states followed the path of liberal statecraft which entailed a homogenizing, assimilationist nation-building project that would denigrate ethno-pluralism and elevate an artificially constructed national identity. The proscription of ethnic displays was widespread and any ethno-federal arrangements that were installed to accommodate ethnic groups were abandoned in all but Nigeria (Dersso, 2008, p. 10). Usually state machinery became monopolized by particular groups, to the extreme detriment of others. Constitutions in countries such as Ghana, Tanzania, Algeria, Sudan and the Central African Republic explicitly provided for one-party rule (Dersso, 2008, p. 13). The Kenyan constitution gives the executive enormous power, leaving the judiciary ineffective and untrustworthy, and Kenya's bill of rights inept as it pertains to minority protections (Ongar & Ambani, 2008).

Legal tradition can also play a role in constitutional political culture. An instructive example may be found in Islamic Law. What may be termed the Islamic legal ethic began to take shape during the first few decades after the death of the Prophet Muhammad, spreading throughout the Hejaz and the garrison towns of Arab conquerors. Religious indoctrination was essential to the new leaders of the Islamic state to unite the splintered Arab tribes. Under the caliphate of Umar I, the

Islamic ethic began to take root, through the building of mosques by early caliphs in garrison towns and the deployment of quranic teachers to aid military leaders in Islamic indoctrination. In the view of Hallaq (2005), “[t]he religious activities of the commanders, the Quranic teachers, story-tellers, preachers and *quadis* [Islamic judges] all combines to propagate an Islamic religious ethic and instill it in the hearts and minds of the new Muslims. In all of this, the Quran was again the most fundamental and pervasive element, whose spirit – if not letter – was totally, or near totally controlling” (Hallaq, 2005, p. 55). Quranic law was applied by proto-*quadis* in conjunction with *sunan* (laws for model behavior), Arabian customary law, caliphate decrees and their own discretion. However, true predominance of the Prophetic Sunna law did not begin until the 680s when *quadis* began to reinterpret Prophetic biography separate and apart from the *sunan* of Abu Bakr, Umar and others (Hallaq, 2005, pp. 55-56). The Prophetic law continued to ascend through the second century, with the emergence of legal specialists and the increased entrenchment of the Prophetic authority as superior over other *sunan*, and the beginning of the traditionalist –rationalist conflict (Hallaq, 2005, pp. 77-78). From 740-800 AD, further advances were made in the consolidation of Islamic law: the judge’s office became more centralized, the judicial centralization occurred under the Abbasid caliphate and the *quadis* office became more specialized and litigation, rather than story-telling and policing, became its chief concern.<sup>4</sup>

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<sup>4</sup> The Quran and the *Hadith* are the principal doctrinal sources of Islamic law, or Shari’ah. The methodology of interpretation of these texts is guided by *usul-al-fiqh*, generally referring to methods of legal reasoning such as analogy (*quiyas*), juristic preference (*istihsan*), presumption of continuity (*istishab*) and the rules of deduction. Kamali, 1991, 1. From the *usul-al-fiqh* are derived the *fiqh*, or the law itself. The *Qur’an* is the “the book containing the speech of God revealed to the Prophet Muhammad in Arabic and transmitted to us by continuous testimony, or *tawatur*.” Kamali, 1991, 14. The contents of the *Qur’an* that are legal in nature constitute the *fiqh al-Quran*, effectively the *juris corpus* of the *Qur’an*. There are approximately 350 *ayat* (Qur’anic verses) of legal relevance, some of which were revealed to the Prophet Muhammad in Mecca (Makki) and others in Medina (Madani). The chronology of revelation helps in understanding Qur’anic legislation.<sup>4</sup> Also critical in understanding the nature of Qur’anic legislation is the distinction between *qati* (the definitive) and *zanni* (the speculative). A definitive injunction is one that is “clear and specific; it has only one meaning and admits of no other interpretations” (Kamali, 1991, p. 21).

Conversely, a speculative injunction is open to interpretation and *ijtihad* (the process of rational interpretation). In an instance of *zanni*, the *Qur’an* is looked at as a whole or the text is searched for further

The ethos of reciprocity, as distinguished from a liberal individualist ethos, has direct bearing on how the role of the state is conceptualized. As Tucker (2008) opines, the reach of law into the private realm of society was deep. This reach operated to permit the state to regulate familial relations and, consequently, a woman's freedom over her own body. Simply stated, "[t]he long arm of the law did not stop at the bedroom door, and the woman's physical comforts and sexual experiences within marriage, the legitimacy of her pregnancy, and her special needs as a nursing mother were all well within its purview" (Tucker, 2008, p. 28). Islamic law does countenance the female experience, but does so in a way that makes them subject to male patriarchal priorities" (Tucker, 2008, p. 29). This asymmetrical gender dynamic is not only strictly legal, but is articulated and reproduced through linguistic apparatuses that infuse legal discursive. This discourse of gender inequality had effectively silenced the woman's voice.

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elaboration in a similar or different context. Supplemental sources that would aid in interpretation include the *Sunnah* and statements made by the Companions. These supplemental sources also aid Islamic jurists in specifying the many provisions of the *Qur'an* that are general (*Amm*) in nature, as opposed to those that are specific (*Khas*). Generality has been perceived as one of the virtues of the *Qur'an* because it allows commentators and ulema to "derive a fresh message, a new lesson or a new principle from the Qur'an that was more suitable to the realities of their times and the different phases of development in the life of the community" (Kamali, 1991, p. 32). As with other legal traditions, the goal of interpretation in Islamic law is to determine the intention of the lawmaker.

The Qur'anic conception of justice is not a rigid one. Kamali maintains that "Islam's perspectives on rights and liberties is somewhat different from that of constitutional law and democracy and their underlying Western postulates" (Kamali, 2008, p. 201). He explains further that while Western jurisprudence emphasized rights from an individualist perspective, "the rights and obligations of Islam are inter-related and reciprocal and there is a greater emphasis on obligation that is indicative of the moralist leanings of *Shari'ah*" (Kamali, 2008, p. 202). For example, in the instance of gender, Islamic legal thought and doctrine have assigned men and women distinct social roles. As Tucker (2008) explains "[a]lthough in general the Qur'an deals with women in an egalitarian and non-discriminatory fashion, there are verses that have provided the basis on which to build gender hierarchies (Tucker, 2008, p. 24). From Quranic passages such as chapter 4, verse 34, the man was interpreted as breadwinner with road domestic authority over the dependents and the woman as subservient and obedient.

Such discriminatory practices are not limited to the domestic domain. Historically, men have been permitted to seek several wives, prostitution is criminalized but the male client faces no charges, and the financial compensation for accidental death of a spouse is halved for a woman (Tucker, 2008, p. 26). An ethnographic study conducted by Basu (2008) in the Kolkata Family Court in India highlighted the disadvantages that Muslim Indian women face in seeking legal remedies in divorce and divorce maintenance disputes. As Tucker indicated, the arena of domestic relations has historically been one in which women have suffered material subordination, more than women of Hindu or other religious affiliation.

The examples from Eastern Europe, Africa and Islam are intended to show how the particularities of political culture and the idiosyncrasies of regime type, transition and consolidation, are important variables in determining whether and how liberal constitutional principles are constitutionally memorialized. The role of these cultural particularities is specifically salient as they are manifested within multi-ethnic, deeply-divided societies. In such contexts, the essential basket of constitutionalism's requirements – rule of law, checks and balances, separation of powers, elections, political coordination, etc. – is preserved. However, its “liberal-ness” – the degree to which it emphasizes a state-society relationship predicated upon the rights of the individual rather than the group – may become practically untenable for the embryonic nation-state confronting serious social cleavages. Constitution-makers in such states must not only reconcile the apparent conflict between individual rights and fundamental fairness, but they must also manage the tension between adherence to certain liberal principles and maintain basic societal integrity.

## II. Constitutionalism and Precommitment Theory

If the above-articulated line of reasoning regarding constitutionalism is taken seriously, then one of the central objectives of the constitution-making process should be to craft a document that carefully enshrines the rights and obligations imposed upon the state and its citizens, and by doing so defines the legal relationship between the government and the governed. As discussed above, the conceptualization and practice of constitutionalism may differ from case to case. However, amid the historical and cultural contingencies, common to all is the theory of precommitments – a constitution's principal purpose is to bind the state and its agents. In *Ulysses Unbound*, Elster (2000) provides the seminal examination of constitutional precommitment theory. His discussion is based on rational choice theory – individuals are inherently self-interested and almost invariably exhibit in profit-maximizing behavior. In Elster's view, even rational actors may choose to limit themselves if they believe such limitations are beneficial. Elster identifies two types of constraints. First, there are constraints that benefit the constrained but that are not chosen by the agent for the sake of those

benefits. These constraints may be chosen by the agent for another reason, chosen by some other agent, or not chosen by anyone. Elster terms these *incidental constraints* because the benefits are incidental to the constraints. Second there are those constraints that an agent imposes upon himself for the sake of some expected benefit to himself. These are termed *essential constraints* because the benefits are an expected consequence of the agent's intentional imposition of the constraint (Elster, 2000, p. 4). One reason we may bind ourselves to protect against passion or emotional feelings. Borrowing from Aristotle, Elster contends that decisions based on passion may cause a discrepancy between plans and behavior in at least four ways: (1) by distorting cognition (engender confusion about the consequences of action); (2) by clouding cognition (crowd out relevant alternative considerations); (3) by inducing weakness of will (acting against one's better judgment); and (4) by inducing myopia (passion determines how consequences are weighed) (Elster, 2000, p. 8).

Elster then applies the essential-incidental binary to constitutional precommitments. Unlike constraints in the individual scenario, constitution-makers may bind not only themselves but others. Constitutional precommitments work on two levels. First, the constitution designs the "machinery of government" to counteract passion, overcome time-inconsistency and to promote efficiency. Second, the constitution creates the machinery of amendment, a purposely slow and cumbersome process. For example, the separation of powers is a ubiquitous institutional device that organizes the passage of legislation in two or more stages, mitigating the sometimes rash impulses of politicians (Elster, 2000, p. 117). Similarly, bicameral legislatures and the executive veto are devices that check legislative tyranny. While such precommitments may be indispensable to maintaining institutional efficiency and legislative credibility, Elster acknowledges that adoption may be neither feasible nor desirable in a given polity. He also acknowledges the limitations of extending precommitment theory from individual choice to collective decision-making. He seems to relax his basic rational assumptions – that states are unitary actors with consistent, stable preferences that direct decision-

making – and argues that both individuals and groups can have divided preferences as well (Elster, 2000, p. 168).

While Elster’s conceptual application of precommitment theory to constitutions and constitution-making provides insight into the decision-making processes that determine the structure of government, he devotes little attention to constitutional precommitments to rights. In *Towards Juristocracy*, Hirschl (2004) takes up the issue, arguing that existing theories of constitutionalism fail to account for the nature of constitutional reform that has occurred in the past few decades. He develops the theory of “hegemonic preservation” to explain the occurrence of judicial empowerment; “voluntary, self-imposed judicial empowerment [occurs because] political, economic, and legal power-holders who either initiate or refrain from blocking such reforms estimate that it serves their interests to abide by the limits imposed by increased judicial intervention in the political sphere” (Hirschl, 2004, p. 11). In his view, constitutionalization is a result of the strategic interplay between political elites, economic elites and judicial elites – an interaction that permits the preservation of hegemony by insulating policy preferences from “the vicissitudes of democratic politics,” or majoritarian decision-making (Hirschl, 2004, p. 12). Thus, “the constitutionalization of rights is therefore not a reflection of a genuinely progressive revolution in a polity; rather, it is evidence that the rhetoric of rights and judicial review has been appropriated by threatened elites to bolster their own position in the polity” (Hirschl, 2004 p. 12).

With this theoretical framework, Hirschl uses a qualitative-quantitative comparative case study approach to examine the effects of constitutionalization in four cases: Canada, New Zealand, Israel and SA. For each case he surveys all national high court bills of rights jurisprudence from the date of enactment to 2002. He focuses on four key issues: criminal due process rights, privacy in the contexts of freedom of expression and sexual expression; subsistence social and economic rights; and freedom of association in the context of labor relations. Hirschl finds that in all cases there was a tendency to emphasize Lockean individualism and anti-statism. The high courts protected the

private sphere from interference by the collective (Hirschl, 2004, pp. 13-14.). Hirschl also examines the impact of constitutionalization on economic redistribution to historically marginalized groups in each of the four cases. He finds that there is serious doubt as to whether bills of rights can promote a more egalitarian form of distributive justice. Finally, Hirschl shows how judicial empowerment permits politicians to avoid or delay unwanted political outcomes.

In *Constitutionalism and Secession*, Sunstein (1991) argues that a panoply of “considerations might lead people forming a new government to place basic rights and arrangements beyond the reach of ordinary politics” (Sunstein, 1991, p. 637). Relevant considerations include: (1) the belief that some rights are pre- or extra-political; (2) rights that derive from the principles of democracy itself; (3) an effort to protect a private sphere from majoritarianism; (4) the decision to take certain issues off the ordinary political agenda; (5) provisions designed to solve collective action problems; and (6) strategies to overcome weakness of will on the part of the collectivity (Sunstein, 1991, pp. 637-641). The goal of these strategies is a common one – “reducing the power of highly controversial questions to create factionalism, instability, impulsiveness, chaos, stalemate, collective action problems, myopia, strategic behavior, or hostilities so serious and fundamental as to endanger the governmental process itself” (Sunstein, 1991, p. 633).

Totten (2003) challenges Sunstein’s position that constitutional precommitments can remove issues from the ordinary political agenda. Totten compares gender-based affirmative action in the institutions of the European Union, Germany, Canada and the US. He concludes that in the cases of Germany and the European Union – cases in which there are constitutional precommitments – debate over the issue remained or even grew to the point where the commitment was amended in the case of the EU and became a serious wedge between the parties in the case of Germany. Furthermore, in the US, where there are no overt constitutional precommitments to gender affirmative action, the commitment reflected in its jurisprudence may be sufficient to remove the issue from political debate. Totten’s position on the value of constitutional precommitments to

affirmative action policies should be understood to qualify Sunstein, rather than contradict it. He never goes so far as to maintain that constitutional precommitments are unnecessary tools in deflecting judicial challenges and limiting public date. He simply argues that precommitments are necessary but not sufficient to protecting affirmative action legislation and regulations from judicial challenge. Furthermore, his analysis is applied to a limited number of cases and to only one target group – women. Klarman (1998) distinguishes the two in the following way:

[The agency theory] conceives of legislators as agents and the People, speaking through their constitution, as sovereign, while [precommitment theory] understands both the Constitution and legislation to represent the will of the People, though one takes the form of long-term precommitments and the other the form of short-term preferences that may be inconsistent with those precommitments (Klarman, 1998, p. 152).

Like agency, precommitments suffer from the flaw of indeterminacy, which allows a judiciary to substitute its own decision-making preferences for those intended. Furthermore, precommitments tend to entrench normative values from a preceding generation on all successive generations.

### III. Constitutionalism and Constitution-Making

Whether and how particular constitutional precommitments exist can also be a function of the constitution-making process itself. In their discussion of constitution-making in Africa and Eastern Europe, Franck & Thiruvengadam (2010) identify two basic models of constitution-making processes. Under the “old approach” the process is elite driven; “[t]he government either appointed or attempted to control the election of a constituent assembly, parliamentary committee, technical committee, or select committee of lawyers and politicians to write a new constitution for the country” (Franck & Thiruvengadam, 2010, p. 8). The old approach makes no space for public debate before the drafting process and attempts no consultation with ordinary people. In the 1990s, Africans began to adopt a “new approach,” which emphasized dialogue, debate, consultation and participation. The guiding principles are diversity, inclusivity, transparency, openness, autonomy, accountability and legitimacy (Franck & Thiruvengadam, 2010, p. 8). The new approach has spawned two new strategies for construction and enactment of a new constitution. The first is the

appointment of a constitutional commission, followed by the action of a constituent assembly. This strategy was employed by Uganda and Malawi. An alternative strategy, used in Benin, Niger, Gabon and Togo, establishes a constitutional convention. Unlike in Africa, transitions in Central and Eastern Europe did not incorporate public participation to any significant degree. In cases such as Bulgaria, Hungary and Poland, transition from communism to democracy was negotiated through a series of roundtables, with the Communist Party on one side and the opposition on the other. Albania, Bulgaria and Romania opted for a constituent assembly, usually followed by a referendum process to obtain the approval of the people. Conversely, in Africa, public opinion was sought earlier in the drafting process, but not afterward (Franck & Thiruvengadam, 2010, p. 12).

In Hart's (2010) view, the right to participate in constitution-making is an extension of the right to take part in public life, as articulated in art. 21 of the UN Declaration on Human Rights<sup>5</sup> and art. 25 of the International Covenant on Civil and Political Rights (ICCPR). Art. 5(c) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) echoes the sentiments of both documents. It compels States Parties to eliminate racial discrimination in the area of political rights, "in particular the right to participate in elections – to vote and stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as the conduct of public affairs on any level and to have equal access to public service...." Finally, art. 7 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) compels States Parties to ensure participation of women "in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government." Regional documents with similar language include the 1981 African Charter on

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<sup>5</sup> Art. 21 states,

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. Everyone has the right of equal access to public service in his country. 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Human and Peoples' Rights, the 1998 Asian Human Rights Charter, and the 2001 Inter-American Democratic Charter. In advocating for co-habitational pluralism in Eastern and Central Europe, Vasovic (1992) makes the point succinctly, "democracy entails the participation of people from varying social strata in the decision-making process and the existence of structural conditions that counteract the tendencies toward rapid and sharp social differentiation and the impoverishment of large sections of the population" (Vasovic 1992, p. 95).

However, the right to participate in constitution-making processes is not without its limits. In *Marshall v. Canada* (Communication No. 205/1986 U.N. Doc. CCPR /C/43/D/205/1986 at 40) the UNCHR responded to the a complaint filed by Canada's indigenous Mikmaq tribe alleging that it had been unlawfully denied attendance at a Canadian constitutional conference on aboriginal matters. The Human Rights Committee held that the ICCPR "cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs" (*Marshall* at 5.4). Thus, because the rights of the tribe had not infringed and subjected to unreasonable restrictions, the Committee found no violation of Art. 25 of the ICCPR. Subsequently, in 1996 a UNCHR General Comment did make it clear that "the conduct of public affairs" as envisioned by the ICCPR does include constitution-making. (UNCHR General Comment, 1996, ¶¶ 2, 6). Paragraph 1 of the Comment states that "Article 25 of the [ICCPR] recognizes and protects the right of every citizen to take part in the conduct of public affairs" and that "the [ICCPR] requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects." And under ¶ 6, the choice to change a constitution is in fact a part of the conduct of public affairs.

Hart (2010) identifies the three most common modes of constitutional participation. First, groups may directly elect representatives to a constitutional assembly or convention. Even though the rules of the election process are usually tightly controlled by party elites, voting for representatives certainly ensures a more balanced, accountable outcome than reliance upon some

self-appointed group. In addition to electing representatives to assemblies or conventions, many states hold referenda on the final constitutional texts. As with the election of constitutional representatives, the referendum process is subject to the manipulation of party elites. In Rwanda, the referendum was preceded by a two-year program of education which elicited feedback from citizens. Ultimately, the constitution gained 93% approval. Education campaigns may also include public polling or media initiatives. For example, in SA the constitutional assembly invited public submissions, held public meetings, aired a weekly radio program, advertised on buses and set up a website. In Hart's view, the election, education and referendum components should be implemented in concert as part of a sustained participatory process that truly meet the democratic standard of "taking part" (Hart, 2010, p. 25).

Participatory democratic scholars posit that the foundations democracy require that all affected individuals be permitted a voice in the constitution-making process (Banks, 2008, p. 1048). The "idea that interests are dynamic and that the process of deliberating facilitates interest transformation is a key premise to participatory democracy" (Banks, 2008, p. 1048). These negotiations should ideally occur within an environment of political equality free from coercion. The two norms of inclusion and political equality are integral to designing innovative solutions, particularly in a plural, post-conflict society with moribund political institutions (Banks, 2008, p. 1050). Both elite and popular considerations are important in curing or at the very least mitigating power asymmetries that exist between elites and non-elites, although Banks concedes that "power does not follow automatically from participation" (Banks, 2008, p. 1056).

Banks illustrates her position through the example of the process that led up to the enactment of the 2003 Rwandan constitution and the gender-based affirmative action provisions. Gathii (2008) seems to agree with Banks in that, particularly in third wave democracies of Africa, constitution-making processes are aimed at breaking from past incarnations of government that proved dysfunctional and inimical to democratic consolidation. However, he challenges her position

that participatory constitution-making is more efficacious than alternatives. His comparison of constitution-making in the DRC and Kenya illustrate how broad participation in the drafting process does not ensure passage of the constitution in a state-wide referendum. (Gathii, 2008). Additionally, in the Kenyan case, where there was comparatively more popular participation and authorship, the constitution-making process failed and did not result in institutions that confronted the issue of ethnic cleavages. However, the DRC, with less participation, but with continuing violence, may have experienced “a coming together of the people of eastern DRC in overwhelmingly ratifying the constitution” (Gathii 2008, p. 1137). The author identifies the crisis in the DRC as the principal mechanism that caused the passage of the constitution.

What we can see from the relevant literature is that constitutionalism and precommitment theory have many permutations. Ideal-type constitutionalism involves decidedly liberal principles. However, as its principles began to migrate and become implanted in different societies, liberalism and state-centrism came to be challenged by durable, and sometimes violent, social heterogeneity and a recognition that exogenous political pressures from the state system and international organizations have a profound effect on how constitutionalism manifests itself, both in terms of the aspirations of the peoples in a particular society and how those aspirations are memorialized as rights by parties involved in constitution drafting during constitution-making moments. Participatory constitution-making may be the ideal. However, in practice there is considerable variation in whether all interested parties are granted the right to meaningful participation. Even if all parties do participate meaningfully, there can be no guarantee that all interested parties participate equally.

#### IV. Constitutions and Minority Rights

The sibling subjects of constitutionalism, constitution-making and pre-commitment theory have significant impact on the articulation, administration and enforcement of minority rights. In the few pages he devotes to minority rights in *Ulysses Unbound*, Elster makes some informative

observations. He recognizes the need for constitutional minority rights protections in certain cases where social passions prove deleterious to security and stability of the state.

Standing passions include national, ethnic and religious animosities, strong commitments to equality or hierarchy, and other emotional dispositions that are widely shared and deeply entrenched in the population. Because these passions can induce oppression of minorities and cause severe social conflicts, it would be desirable to have some constitutional protection against them, in the form of entrenched minority rights or power sharing among groups. ... Yet those provisions are also *the least likely to be adopted*, precisely because culture and tradition work against them. In democratic societies, at least, there is no reason to expect the framers to be exempt from the array of prejudices that animate the population at large (Elster, 2000, p. 157).

Elster argues that people do not pre-commit themselves against strong, standing passions. Further, constitutions are usually drafted during times of turbulence and upheaval, which clouds the judgment of constitution-makers (Elster, 2000, p. 161).

Elster's comments are well-taken. However, they are oversimplified and thus limited. Elster assumes that all constitutional framers act under the same set of preferences, regardless of context. However, as we have seen in the episodes of Eastern European, Islamic and African constitution-making such is not the case. Under Elster's scenario, deeply divided societies undergoing authoritarian thaw face an inescapable dilemma during democratic transition as it concerns constitutional pre-commitments to minority rights. On the one hand, they face the passions of the minority groups which seek the group recognition and protection they were not afforded under the previous regime. On the other hand, the passions of the constitution's framers (presumably elite members of the majority) harbor racist, xenophobic or patriarchal passions that are prejudicial to the rights of the minority. This conflict can be resolved in several ways. When constitution-making is an enterprise conducted exclusively by majority elites, minority rights almost certainly will not be of serious concern to the constitution's framers. However, if the drafting process entails: (1) direct participation in the drafting process by elected or appointed representatives of minority groups, (2) indirect participation of minority groups by some form of mass mobilization or protest, (3)

exogenous pressures from other states or international organization or (4) some combination of the three, then minority rights can become an important part of the framers' agenda. Part of the problem with constitutionalism and minority rights stems from the constitution-making process itself.<sup>6</sup> However, the role of racial and ethnic groups – as it relates to participation in the transition itself, pact formation and the potential political and economic redistribution – is less studied.

If we examine the issue of state recognition of minority rights generally, moving from a rational to a more philosophical or normative perspective, many scholars argue that recognition of collective rights is essentially *required* to ensure constitutional protection for minority groups. Will Kymlicka asserts that certain strands of liberal political theory are, in fact, congruent with minority rights (Kymlicka, 1989). He does acknowledge that liberal philosophers such as Rawls and Dworkin have neglected minority rights, and liberal politicians have been “actively hostile” to the issue (Kymlicka, 1989, p. 4). However, he goes on to argue that “cultural membership gives rise to legitimate claims, and that some schemes of minority rights respond to those claims in a way that not only is consistent with the principles of liberal inequality, but is indeed required by them” (Kymlicka,

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<sup>6</sup> In *Inclusion and Democracy*, Iris Marion Young advocates for a widening of democratic inclusion, which is best pursued through the model of deliberative democracy. Because the “[d]emocratic process is primarily a discussion of problems, conflicts, and claims of need or interest” deliberative democracy is “normatively legitimate only if all those affected by it are included in the process of discussion and decision-making (Young, 2002, pp. 22-23). Furthermore, “when coupled with the norms of political equality, inclusion allows for maximum expression of interest, opinions and perspectives relevant to the problems or issues for which a public seeks solutions (Young, 2002, p. 23). Finally, “[p]articipation in an ideal process of deliberative democracy must be equal in the sense that none of them is in a position to coerce or threaten others into accepting certain proposals or outcomes” (Young, 2002, p. 23). But even Young concedes that deliberative democracy cannot deliver justice if it operates within a structure of structural inequality. Young believes that if marginalized groups are given a greater voice in political debate, then the structures can loosen and deliberative democracy can function more effectively. However, this observation may be theoretically optimistic, because in practice the use of systemic avenues for redress of wrongs committed against a minority by the majority have proven to be largely ineffective. This is particularly true with regard to the most voiceless minorities. The institutions that are the progeny of the constitution-making process not only serve as the nascent framework that more often than not entrenches the regime of inegalitarian power relations that that preceded democratic inauguration, but also act as the vehicle that will reproduce the regime of inegalitarian power relations into the future.

1989, p. 4). With the aboriginal groups of North America as his prime example, Kymlicka acknowledges that although far from unique, schemes for the protection of minority cultures are often treated as an exception to liberal theory, in part because liberal theorists mistakenly feel they *must* oppose them. In his view, this rather myopic position on collective rights serves only to harm minority groups in liberal democracies (Kymlicka, 1989, pp. 137-138), groups which often feel threatened by nation-building, and fear that it will create various burdens, or disadvantages for them (Kymlicka, 2001, p. 1). He sums up his position on the dialectic of state building and minority rights as follows

In both scholarly analysis and everyday public debate, minority rights are often described as a form of ‘special status’ or ‘privilege’, and people wonder why all of these pushy and aggressive minorities are demanding concessions and advantages from the state. In reality, however, while minorities do make claims against the state, these must be understood as a response to the claims that the state makes against minorities. People talk about ‘troublesome minorities’, but behind every minority that is causing trouble for the state, we are likely to find a state that is putting pressure on minorities (Kymlicka, 2001, p. 2).

In this sense, the pressing for and the granting of minority rights claims is both a natural and expected part of liberal nation-state building. To underscore his point, he points to the success (peaceful) of what he refers to as the “immigrant multiculturalism” and “multinational federalism” types of minority rights regimes in Western democracies within the framework of liberal constitutions (Kymlicka, 2001, p. 3).

Van Dyke (1977) agrees with Kymlicka, stating the central issue succinctly; “whether ethnic communities that meet certain criteria should be considered units (corporate bodies) with moral rights, and whether legal status and rights should be accorded to them” (Van Dyke, 1977, p. 343).

Van Dyke acknowledges the centrality of the social contract in ordering the state-individual relationship, as propounded by Hobbes and Locke. He also recognizes that groups cannot be accorded moral rights because to do so would threaten the integrity of the state itself. However, Van Dyke argues that historical precedents such as the British conferring rights on its colonies supports his cause. Furthermore, international institutions like the UN have advocated self-determination.

The integration of groups as right- and duty-bearing units is important, not only in intellectual inquiry, but also in more practical ways, such as political representation, the psychology of subordinated minority groups and the implementation of affirmative action programs. Ultimately, Van Dyke makes a sound argument for the compatibility of individual and group rights, although he qualifies his position by asserting that the appropriate criteria with which to determine group rights eligibility remains under-studied.

Rather than attempting to fit a group rights theory into a liberal paradigm, Johnston (1989) directly challenges liberalism. She maintains that although liberal rights theory does recognize “society” as a legitimate rights holder, “[t]here is ... little conceptual space for the rights of groups” (Johnston, 1995, p. 24). She contends that the communitarian approach – a rejection of the independent self as problematically deontological and a privileging of personhood as rooted in community – elevates seemingly a-liberal values such as benevolence, understanding and friendship. Johnston echoes the sentiments of Fiss (1976), opining that groups may have rights if the group has a distinct existence apart from its members and the members are “interdependent” – “the identity and well-being of the members of the group and the identity and well-being of the group are linked” (Johnston, 1995, p. 183). Green (1994) agrees, and cites the example of the rights of North American Aborigines to self-government. In arguing for the rights of internal minorities, he maintains that “in addition to the usual individual rights to personal liberty and associative freedom, there are further special rights to powers and resources needed for the existence of the group” (Green, 1995, p. 260). Finally, Hartney (1995) seems to largely agree with Johnston and proponents of group rights. He emphasizes three key points: (1) that communities are important for the well-being of individuals, (2) that there may be compelling justifications for vesting legal rights in communities and (3) members of communities could have individual moral rights to the protection of their communities (Hartney, 1995, p. 221). He does, however object to the term “collective

rights” because it lends itself to the unintended consequence of being used by a majority against a minority and by a minority against a majority.

The national question is one of the central questions that must be addressed by constitution-makers. For obvious reasons, the question becomes more serious when a given society is a plural one, with deep social cleavages that form the basis of violent conflict. Walzer (1995) argues that “ethnic pluralism is entirely compatible with the existence of a unified republic” (Walzer, 1995, p. 147), although he also posits that the primary function of the state is to do justice to individuals, with group identity being one variable in the equation. He identifies two basic approaches a state can take to ethnic group organization. The state can choose to adopt an “autonomist” strategy, to “encourage or require the groups to organize themselves in corporatist fashion, assigning a political role to the corporations in the state apparatus” (Walzer, 1995, p. 151). This approach would have the effect of national liberation. Alternatively, the state can apply an “integrationist” approach, with uniform standards for all citizens and proportional distribution of political, social and economic resources. In Walzer’s view, this would “repress every sort of cultural specificity, turning ethnic identity into an administrative classification” (Walzer, 1980, p. 152).

While Walzer’s points are well taken, there are at least two other options for a state confronting the challenges of ethnic assertiveness. The state could employ outright genocide, entirely eliminating the “troublesome” minority groups they deem a threat to the nation. Or the state can embrace assimilationism, using non-violent means to achieve ostensibly the same goal as genocide. These four responses to ethnic cleavages – genocide, assimilationism, integrationism and autonomy – form a continuum. On one end, political elites choose to address the problem through programs of violence and homogenization of minority groups to realize to goal of one supreme, unifying national identity. At the other end, constitution-makers embrace sub-national allegiance and accommodate them through territorial arrangements or state- mandated or –permitted group

preferences. Most states fall somewhere in the vast middle, combining policies in a way that suits their particular needs.

Glazer (1995) also highlights how several multi-ethnic states – the US, Canada, Belgium, Malaysia – have indeed deviated from the liberal democratic norm of individual rights when confronting the thorny issue of minority rights. He concedes that he favors an individual rights approach for the US, but does not believe that one course advances democracy and equality while the other necessarily diminishes it. In his view, the choice of approach has no bearing on whether a state can be termed democratic, or whether it is responsive to civil or human rights. A state should focus on the individual “if the state sets before itself the model that group membership is purely private, a shifting matter of personal choice and degree, something that may be weakened and dissolved in time as other identities take over...” (Glazer, 1995, p. 134). Conversely, a group rights approach may be warranted if

the model a society has for itself ... is that it is a confederation of groups, that group membership is central and permanent, and that the divisions among groups are such that it is unrealistic or unjust to envisage these group identities weakening in time to be replaced by a common citizenship (Glazer, 1995, p. 134).

Glazer also argues that “special preferences” could be justified as an alternative when groups are deeply divided and group identities have been reinforced by law or custom for the purposes of discrimination and separation. He borrows his standard for determining whether the preferential approach is justified from the Indian Supreme Court case of *State of Madras v. Dorairajan*, “the social disparity must be so grim and substantial as to serve as a basis for benign discrimination” (Glazer, 1995, p. 137).

In *Can Democracy be Designed*, the authors move from controversies over the philosophical justifications for group rights to the practical concerns over their implementation. They build upon Elster’s point that democratic institutions may be redesigned to

create safeguards against the excessive concentration of power under ‘winner takes all’ electoral democracy; to increase the rights protection and political representation enjoyed by minorities; to bring government closer to the people by decentralization and to increase the

responsiveness of democratic governments to the political demands of poor and socially marginalized groups (Bastian & Luckham 2003, p. 2).

The authors recognize that democracies come into being in specific historical contexts. The fact is that “[d]emocratic institutions and elected governments ... may or may not open spaces for democratic politics; they may or may not be responsive to the political demands of the poor, women and minorities; they may or may not facilitate the management of conflicts” (Bastian & Luckham 2003, pp. 2-3). In their treatment of the Sri Lankan case, which has endured three episodes of constitutional reform, efforts at democratic consolidation have been hampered by a politically partisan constitution-making process, a borrowed Western model of democracy, and a mono-ethnic constitutional design.

Vanhanen (1990) tends to agree, arguing that “[i]n ethnically heterogeneous societies it is very difficult to invent institutional solutions to satisfy the requirements of democratic competition for power and at the same time safeguard the sharing of power among the major ethnic groups at the level of decision-making institutions” (Vanhanen, 1990, p. 149). Vanhanen commends a two-pronged approach to increasing democratization in such societies: (1) changing the social conditions that affect the distribution of power and (2) adapting political institutions to their social environment in a way that allows competing groups to share power (Vanhanen, 1990, p. 165). Vanhanen believes that “in principle” democratic deficiencies that are a result of ethnic conflict can be resolved by “political crafting” or “constitutional engineering” and argues that federalism, proportional representation and parliamentarism are potential solutions. The ideological dimension of policies that foster inegalitarian resource distribution may be especially difficult to overcome. Oftentimes, crises must be created in order for entrenched elite interests to promote reforms that may dislodge the position of the superordinate group. Thus, the calculus is more complicated than when we deal solely with economic reforms because reforms that redistribute wealth may actually be inimical to overall economic growth. Here we are dealing with additional reforms such as access to capital,

access to real property ownership, access to education, access to health care, access to political offices, transformation of legal institutions and acknowledgement of alternative cultural identities.

Bastian & Luckham concede the difficulty in, if not the impossibility of, democratic engineering. For them, “[t]here is a kind of hubris in the idea that constitutional experts, political scientists, donor agencies or even national decision makers can assure democracy or solve conflicts by designing institutions” (Bastian & Luckham, 2003, p. 304). Indeed, institutional design is an apparent oxymoron. “Institutions, in the sense that many political thinkers use the term evolve, grow, become rooted or become ‘institutionalized’ ... and are not designed. And where attempts are made to design them, history, ‘accident and force’ and political manipulation may turn them on their heads and produce perverse and unforeseen outcomes...” (Bastian & Luckham, 2003, p. 304). The authors contend that an historical approach is needed to understand shifting power relations and social transformations (Bastian & Luckham, 2003, p. 306). Also of critical importance is the manner in which decision-makers choose to exploit political opportunities at critical historical junctures. The political and economic forces pressing for reform – and the reforms themselves – may tug in contradictory directions. Even incomplete or politically loaded institutional choices may sometimes create political openings that can be used to expand democratic opportunities or resolve conflicts.

#### V. Constitutions and Women’s Rights

With regard to constitutional pre-commitments for a different minority – women – the analysis is somewhat different. Baines, Barak-Erez & Kahana (2012) describe feminist constitutionalism as “the project of rethinking constitutional law in a manner that addresses and reflects feminist thought and experience.... Feminist constitutionalism demands that we not only revisit classical topics from new perspectives but, more importantly, pose new questions, introduce new topics and take responsibility for changing the focus of constitutional discussion and debate” (Baines et al., 2012, p. 1). Nedelsky concurs, arguing that feminist constitutionalism involves a reimagination of: (1) the scope and practices of institutions that should be held accountable to core

values, (2) the forms of deliberation about those values and their political meaning, and (3) multiple forms of accountability (Nedelsky, 2012, p. 15). Case (2012) contends that “feminist fundamentalism” – an uncompromising commitment to the equality of the sexes – should be an integral part of the feminist constitutionalism program (Case, 2012, p. 48). At its core, feminist constitutionalism challenges the hidden assumptions associated with conventional constitutionalist discourse and injects a variety of additional topics for scholarly consideration: equality jurisprudence, center and periphery constitutional law, rights and institutions, and global and comparative law, and the integration of diversity theories.

For Barak-Erez (2012), feminist constitutionalism hinges upon a feminist constitutional interpretation. She identifies three important types of feminist theories. Under liberal feminism, men and women are granted equal opportunities. This approach requires that gender-neutral texts be read to apply to both men and women. It also requires that distinctions between men and women be given a narrow interpretation. Barak-Erez cites several cases from Israel and South Africa covering issues from service in the military, the taxation of married women and the interpretation of customary law. Ritter (2006) contends that the liberal turn in American constitutional law benefitted women’s rights. She argues that prior to the twentieth century, women’s place in the American political community was relational because they had legal standing only through their husbands, fathers and masters. She asserts further that in the late nineteenth century a shift began to occur; a shift from a citizenship based on domesticity and dependency to one “imperfectly” based on liberal individualism and America’s emergence as a modern constitutional order. For Ritter, US civic membership and gender politics is situated squarely within the framework of constitutional politics. She describes civic membership as referring to the legal and political status of all persons under US political authority. It also refers to the broader political, legal and social meanings attached to one’s place in the polity. Furthermore,

[i]t is conceived of dynamically and historically, as involving everyday political practices and processes in which the state and its members both enact and contest members’ rights, duties,

and civic statuses within different institutional and discursive settings. Civic membership is located in all of the places where the state and the populous intersect: the legal realm, the regulatory and policy realms, and the realm of political representation and popular culture (Ritter, 2006, p. 6).

Constitutional order creates, binds and orders the legal community. They are designed to regulate social order; some constitutions make the nature of the social order clear while others are more ambiguous.

Second, cultural feminism emphasizes an ethic of care, or positive duties toward disempowered people. Finally, radical feminism focuses on the liberation of women from their social subordination and subjection to violence. Kapai (2012) cites the CEDAW and the UN General Assembly's Declaration on the Elimination of Violence against Women (DEVAW) as important international instruments aimed at domestic violence. Rather than choose amongst these interpretive approaches, which at times conflict with one another, Barak-Erez maintains that constitutional interpreters simply ask "the woman question," a method first proposed by Katherine Bartlett (1991). Case asserts that asking "the woman question" can help avoid interpretive choices that disproportionately affect women and instead promote the allocation of burdens in a more just manner (Barak-Erez, 2012, p. 95).

When it comes to women's participation in the constitution-making process itself, Katz (2012) asserts that

women, much like minority groups, have unique interests in the drafting of their nation's constitutions. Women's participation is thus crucial to ensuring that women's rights and priorities are included or at least addressed in a nationwide dialogue. Women's involvement results in substantive textual changes, a broader and more inclusive discussion, and the empowerment of women (Katz, 2006, p. 222).

For example, in Afghanistan, the severe restrictions on women changed dramatically with the defeat of the Taliban in 2001. According to Katz, women were involved in all stages of the new constitution-making process. Of the interim government, the 2002 Emergency Loya Jirga – 220 of the 1,500 delegates were women. Unfortunately, much of the discussions were dominated by

warlords and few women were able to voice their opinions. Likewise, when it came to political involvement, women's voices were muted. Women for Afghan Women, a diverse Afghan NGO, drafted a women's bill of rights which includes 21 essential rights to improve women's status in the education, political and economic spheres. Many of their suggestions were ignored, although they were successful in achieving quotas in the upper and lower houses of parliament (Katz, 2012, pp. 206-207).

Also important to the discussion on gender and constitutionalism is the multicultural dimension. Williams (2012) characterizes the issue of "internal minorities" – e.g., minority women – as an important one faced by liberal democracies with regard to constitutional interpretation and design. For her, "[t]he problem of vulnerable internal minorities arises when a minority religious or cultural group requests an accommodation for its practices from the state and those practices cause significant harm to a group within the minority community" (Williams, 2012, p. 394). Williams contends that multicultural accommodation must support vulnerable internal minorities. In the case of women, this support may take the form of positive action measures and the initiation of internal dialogue. To support her contention, Williams asserts a dialogic view of democracy – one in which the purpose of democratic politics is to form a political community in which people can seek a way forward together. She openly acknowledges the problems associated with imposing a model of dialogic democracy on minorities, as it may be just as intrusive as the imposition of the liberal democratic ideal of individualism. However, dialogic democracy can actually help minority groups' focus more on their core values while simultaneously help the state safeguard its own legitimacy (Williams, 2012, pp. 403-408).

Narain (2012) concurs with Williams; "[a] feminist critique of multiculturalism is critical to bring hidden perspectives into the dialogue between the community and the state, to highlight the gendered dimension of the issue, and to ensure that the community and state include subaltern voices in the dialogue on the accommodation of difference" (Narain, 2012, p. 377). She advocates

for an understanding of multicultural citizenship that allows for the possibility of difference without exclusion and pluralism, and that recognizes constitutional rights as the appropriate arena for addressing women's inequality. She grounds her arguments by focusing on Muslim women's rights, thus highlighting the potential antagonism between multiculturalism and feminism. In her estimation, "[m]inority women are viewed as victims of their culture and gender subordination is located in racialized communities and culture" (Narain, 2012, p. 382). Furthermore,

constructing an either feminism or multiculturalism dichotomy obscures the forces that actually shape culture, denies women agency within patriarchy, and discounts the notion that women have as much of a stake as men do in the continuance of the culture of their group. Moreover, it discounts the level of systemic gender discrimination in the wider society and Muslim women are seen as more subordinated and more oppressed by their cultures (Narain, 2012, p. 382).

Narain illustrates her position by focusing on the plight of Muslim women in India.

Although the Indian Constitution guarantees equality between the sexes, Muslim women's familial relations are governed by religious personal laws as the state's guarantee of equality does not extend into the private sphere. Narain cites the *Shah Bano* case as an example. In that case, a 73-year-old Muslim woman sought spousal support from her husband who had left her. The woman was successful under India's secular law. After her husband was granted a unilateral divorce under Muslim personal law, he appealed the spousal support decision, arguing that under the principles of *iddat* he was only required to pay support for forty days after divorce. The Indian Supreme Court denied his appeal, sparking outrage from religious leaders who accused the Court of interfering with Muslim personal law. The Indian government capitulated and enacted a new law regulating Muslim women's access to spousal support (Narain, 2012, p. 379). Fournier (2012) discusses the nuances of Islamic divorce in additional detail.

## VI. Conclusion

Historically, liberal constitutionalism has provided a firm foundation for nascent democracies endeavoring upon consolidation or for already consolidated democracies seeking to

refine their political institutions. However, as liberal constitutionalism has spread, it has become clear that the application of liberal orthodox principles, specifically the principle of individualism, must be compromised or simply outright discarded if political elites in multi-ethnic states are to succeed in fashioning a constitutional framework that satisfies its various social factions and maintains territorial integrity. To accomplish these goals, constitution-makers may enact constitutional precommitments that adhere to basic democratic principles such as rule of law, separation of powers and due process, but must also bind the state by prescribing rights and privileges for minority groups.

What we have seen is that when constitution-makers adopt constitutional provisions that protect minority rights, they not only bind themselves, but also future generations of legislators and political elites. In addition, they bind certain members of society, most pertinently the majority racial or ethnic group and males. However, rationality alone does not explain the proliferation of constitutional minority rights protections. As discussed previously, philosophical, cultural, or moral considerations also play a role, both with ethnic minorities and women. These pressures not only provide the impetus for minority rights protections, but also minority rights preferences, such as precommitments to affirmative action.

## CHAPTER 3

### TRADITIONAL APPROACHES TO AFFIRMATIVE ACTION

#### I. Introduction

The previous chapter detailed how liberal constitutionalism and precommitment theory could be modified so as not to be incompatible with minority rights protections, both philosophically and practically. One tool used by states to protect minority rights is affirmative action. As with all laws, without the requisite constitutional foundation, affirmative action legislation promulgated by a congress or parliament may be defeated or moderated through judicial challenge by members of a/the superordinate group, thus potentially undermining the intent of the framers. Thus, a focus on those states that have constitutional precommitments to affirmative action policies is appropriate and should provide a unique perspective into how norms of redistribution come into being, become memorialized in state constitutions, and influence judicial institutions in a manner that protects policies of distributive justice for historically disadvantaged minorities.

In this study, affirmative action pertains to actions undertaken by the state or state-affiliated institutions. Although it would seem that identifying affirmative action is a simple exercise, it is not necessarily so. Affirmative actions are given different nomenclature depending upon a number of factors including geography, legal system and country history. However, there are three main manifestations of affirmative action that have made their way into law, policy and scholarship: (1) “affirmative action,” as derived from the American context; (2) “positive action,” as derived from the European context; and (3) “special measures,” as derived from international law. These three concepts will be compared and contrasted to demonstrate the lack of both intra- and inter-term cohesion.

Subsequently, the scholarship on affirmative action will be discussed, including both single-case and comparative studies. The discussion will reveal a proliferation of literature on single cases, but a paucity of truly comparative studies. Ultimately, it will become clear that, although different,

the three affirmative action permutations are sufficiently similar in purpose and application to be amenable to comparative study, and that the scholarly landscape is fertile for a comparative study of affirmative action that focuses on constitutional precommitments.

## II. Race, the State and Affirmative Action

As a preliminary inquiry, it is important to properly characterize the relationship between the state and the creation/reproduction of those politically salient social cleavages that necessitate affirmative action remediation in the first place. As a research program within political science, “comparative racial politics” is in its infancy, and has attempted to explain state-race relations. Although relatively new, it holds much promise; “comparative studies of racial politics provide a singular opportunity to consider some of the analytic and conceptual challenges posed by the recognition that ideologies of race and racism in the twenty-first century connect disparate peoples, regimes, institutions, and national mythologies in peculiar, often startling ways” (Hanchard & Chung 2004, p. 337). Furthermore,

[t]he study of race provides opportunities for cross-national research that can ultimately be linked to some of the classic preoccupations of comparative political science: for example, the interaction between state and civil institutions, between social movements and states, as well as determinants of political stability, flexibility, and democratic rule in a particular nation-state (Hanchard & Chung 2004, p. 337).

In *From Race Relations to Comparative Racial Politics: A Survey of Cross-National Scholarship on Race in the Social Sciences*, Hanchard argues that Katznelson’s (1976) *Black Men, White Cities* was the first work to “compare systematically racial politics in two multiracial societies while going beyond the pluralist and behaviorist approaches to ‘race relations’ that dominated the field from the 1930s to the early 1960s” (Hanchard & Chung, 2004, p. 323). He contends that Katznelson was the first to: (1) analyze structural factors as independent variables that define and limit the parameters of group and individual choice; (2) argue that race and power are intrinsically related; and (3) suggest that different governmental systems could converge with respect to their treatment of a particular minority group (Hanchard & Chung, 2004, p. 324). Ultimately, Hanchard identifies as the four general approaches

to comparative racial politics. (1) the political economy of race; (2) comparative analyses of culture, symbols and ideas; (3) social movements; and (4) state-centered approaches (Hanchard & Chung 2006, p. 344).

In their seminal work, *Race Formation in the United States: From the 1960s to the 1990s* Omi & Winant (1994) lay the conceptual foundation for the state-centered approach by outlining the concept of “race formation.” They argue that the three predominant paradigms for understanding the origin and operation of race as anchor for group classification, hierarchization and conflict – ethnicity, class and nation – are insufficient analytical devices with which racisms can be unpacked and compared. Instead, the authors propose the idea of race formation, a socio-historical process by which racial categories are created, inhabited, transformed and destroyed. This approach posits that race remains fundamental to human interaction and social relationships, and must not be reduced to liberalism, Marxism, nationalism or other categories of stratification.

Subsequent work by Winant would build on and clarify the race formation theory. In *The World is a Ghetto: Race and Democracy since World War II*, Winant (1998) assumes a more global posture, contending that the world has experienced a drastic increase in white supremacy in the last two decades. With intimate links to Gramscian hegemony, he characterizes race formation as a process of historically situated projects in which human bodies and social structures are represented and organized. Racial projects can be neo-conservative, nationalist, liberal, or even operate in everyday life. Within race formation theory, race and racial projects are interpreted social-structurally; race is conceived of as an unstable and de-centered complex of social meanings constantly being transformed by political struggle. Consequently, these interpretations shape our relationship to institutions. Ultimately, any plausible theory of race must: (1) apply to contemporary relationships, (2) apply to an increasingly global context and (3) apply across historical time (Winant, 1998).

He argues further that “racial hierarchy lives on; that it correlates very well with worldwide and national systems of stratification and equality; that it corresponds to glaring disparities in labor

conditions and reflects differential access to democratic and communicative instrumentalities and life chances” (Winant, 1998, p. 2). In comparing the US, Brazil, South Africa and the European Union, Winant identifies a “break” in anti-racist activity since World War II. By “break” Winant implies a shift away from the hegemony of white supremacy and a movement towards human rights. Winant’s position on a global approach to the analysis of racism is appropriate, with one principal failing. Winant’s analysis neglects any mention of nations not traditionally associated with the trans-Atlantic slave trade. Because Brazil, the US, South Africa and Europe all share similar histories, the inclusion of other non-slave-trade related nations would have provided a more persuasive argument. That said, the thrust of Winant’s thesis – that race remains central in the global discourse and that white supremacy remains pervasive – is compelling. Finally, Winant’s construction of race as a dichotomy is also congruent with race’s historical and philosophical underpinnings as presented herein.

While Winant’s concept of race formation and racial projects is first and foremost socio-historical, there are clear allusions to the role of the state and its institutions in the formation and potential transformation of racial regimes. Goldberg (2001) further elucidates the role of the state in creating race. For Goldberg, modernity and the nation-state are premised on notions of homogeneity; and consequently racial exclusion. In this way, the state is a state of power, “the existence and elaboration of which is a necessary condition ... of the possibility of invoking the power(s) of the state” (Goldberg, 2002, p. 8). In assigning the state such a personality, Goldberg directly challenges the purported epiphenomenality of the state. And in the case of race, the state uses its power to shape and discipline spaces in conformity with the homogeneity ideology. In Europe, racial “others” (Blacks) were seen as hybridizing elements; thus they had to be excluded. States rationalize, routinize and naturalize racial hierarchies.

Upon examination, Goldberg’s “racial states” seem to be the direct progeny of what Winant’s racial projects. As intimated earlier, within race formation theory, race and racial projects are interpreted social-structurally; race is conceived of as an unstable and de-centered complex of

social meanings constantly being transformed by political struggle. Particular social meanings become hegemonic, embed themselves in state institutions and become difficult to dis-embed. This means that the racial hierarchies that existed prior to the inauguration of a democratic regime exhibit a durability that resists any attempt to implement egalitarian reforms. The recalcitrance of racial states in the face of democratic reform has a path dependent quality that operates on a structural level, making transitions from autocracy to democracy resistant to political redistribution in plural societies. Stated otherwise, “racial projects” “encompasses literature on the role of the state in constituting and maintaining racial classification, whether to enforce situations of inequality..., or, as seen in the cross-national phenomena of affirmative action debates in nation-states..., utilize the state apparatus to redress situations of racial inequality in civil society and the economy” (Hanchard & Chung, 2004, p. 328). Of central importance here is the marriage between racial inequality and formal institutions, and the manner in which these institutions operate to reinforce inequalities through judicial and legislative pronouncements.

In *The Making of Race and Nation*, Marx (1998) demonstrates the application of the comparative method to the state-centered approach to racial politics. He, like Winant, asserts that far from displacing race as an issue, industrialization, class conflict, nationalism and state consolidation have actually spurred racially defined contention. Stated simply, states made race – official actions enforced racial distinctions through the actions of political and economic elites who ensure stability by building institutions of coercion and coordination. To diminish racial conflicts, the states in his study – the US, South Africa and Brazil – divided loyalties and unified whites. To explain why both the US and South Africa had de jure racial discrimination policies while Brazil did not, Marx eschews explanations that focus on demography, labor differences, Portuguese colonialism or miscegenation. The key to Brazil’s “racial democracy” was its relatively low degree of intra-white conflict, conflict which resulted in the Civil War in the US or Boer War in South Africa. Thus, Brazil had no official

regime of racial exclusion, allowing it to camouflage its legacy of discrimination and avoid implementing an official policy of discrimination.

In agreement with the previous authors, Nobles (2000) contends that the state manipulated race discourse through manipulation of the census, which affects public policies that either vitiate or protect the rights associated with citizenship. Regarding the relationship between race and the state in the US and Brazil, she makes four claims: (1) race is not an objective category, but is a fluid and internally contradictory discourse, partly created and embedded by institutional processes; (2) census bureaus are not politically neutral institutions, and state agencies that use census data as instruments of governance; (3) racial discourses influence the rationale for public policies and their outcomes; and (4) individuals and groups seek to alter the racial discourse in order to advance political and social aims, and have targeted censuses to advance such aims. Similar studies have been undertaken with regard to schemes of taxation (Lieberman, 2003).

From the above discussion, we can see that the relationship between the state and the creation and exacerbation of racial cleavages is an intimate and somewhat co-creative one. If colonialism and other enterprises can be seen as racial projects undertaken in furtherance of race formation, as characterized by Winant and others, affirmative action policies undertaken by the state may be termed “de-racial projects” in furtherance of “race transformation.” To be sure, comparative racial politics has its shortcomings. For example, contributions to its corpus have come disproportionately from historians and sociologists, and much less so from political scientists. One of the first political scientists to study the issue was Louis Hartz in *The Founding of New Societies* (1969), but the study of race as a phenomenon that determines and is determined by state institutions in the subfield of comparative politics generally has been under-discussed. Furthermore, many studies in comparative race focus on some permutation of a black (African)-white (European) binary. However, many peoples in various states have had the same experience and have a struggle that parallels the trajectory of Blacks in the Americas, Europe and Africa. The comparative racial politics

agenda must resist construing race in such a manner and should instead expand to encompass a greater variety of racial projects, including affirmative action measures.

### III. Defining Affirmative Action

Though the practices, policies and programs that constitute affirmative action seem to be readily identifiable by courts, policymakers, and observers, there is no legally or scientifically rigorous consensus definition of the term. Academic writing, agency reports as well as government laws and regulations all seem to adopt some definition encompassing the idea of group dispensations; however, justification and explanations as to why particular definitional verbiage is adopted is difficult to come by. This is true even in the non-American context when affirmative action analogues such as “positive action” and “special measures” are discussed.

#### A. Affirmative Action in the US

Understood historically, the term “affirmative action” is the progeny of American efforts to address the discriminatory effects of Jim Crow segregation against blacks. As Glazer (1975) recounts, through the mid twentieth century “the pattern of American political development has been to ever widen the circle of those eligible for inclusion in the American polity with full access to political rights” (Glazer, 1975, p. 22). This was essentially a policy of assimilationism, as the American pattern of ethnic politics has been to reject the creation of ethnic-based political entities. However, the status of ethnic groups was ambiguous, as typified by the dissonance between the “melting pot” and the “salad bowl.”

The foundation for affirmative action in the US was laid by Pres. Roosevelt and Executive Order 8802, issued in 1941 under pressure from civil rights leader A. Philip Randolph. As the US stood on the precipice of WWII, the order reaffirmed “the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin” and declared that “it is the duty of employers and of labor organizations, in furtherance of said policy and of this Order, to provide for the full and equitable

participation of all workers in defense industries, without discrimination because of race, creed, color, or national origin....”

The expression “affirmative action” originates from Pres. Kennedy’s 1961 Executive Order 10925 which established the President’s Committee on Equal Employment Opportunity and required the federal government and its contractors to take “affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”<sup>1</sup> President Lyndon Johnson extended the program in 1965 with Executive Order 11246 which declared that the US “provide equal opportunity in federal employment for all persons, to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal opportunity through a positive, continuing program in each executive department or agency.”<sup>1</sup> President Richard Nixon followed with his Philadelphia Plan, which required Philadelphia contractors to submit pre-award hiring goals for minorities. The goals were based on the percentage of blacks in the metropolitan Philadelphia labor force. Nixon subsequently issued Revised Order No. Four which required all government contractors holding contracts of \$50,000 or more to file affirmative action programs with the OFCC within four months of contract award. But in spite of their influence on US affirmative action policy, none of these orders actually defined affirmative action.

Comparative constitutional law scholar Michel Rosenfeld defines affirmative action narrowly:

The preferential hiring, promotion, and laying off of minorities or women, to the preferential admission of minorities or women to universities, to the preferential selection of businesses owned by minorities or women to perform government public contracting work for purposes of remedying a wrong or for increasing the proportion of minorities or women in the relevant labor force, entrepreneurial class, or university student population. Moreover, such preferential treatment may be required in order, among other things, to achieve a defined goal or to fill a set quota (Rosenfeld, 1991, p. 47-48).

Rosenfeld derives his definition from Greenawalt (1983) and Fullinwilder (1980). According to Greenawalt, affirmative action “refers to attempts to bring underrepresented groups, usually groups

that have suffered discrimination, into a higher degree of participation in some beneficial program. Some affirmative action programs include preferential treatment, others do not” (Greenawalt, 1983, p. 17). Fullinwider characterizes preferential treatment in the following way; “a black is preferentially hired over a white when the black, because he is black, is chosen over at least one better qualified white, where being black is not a job related qualification” (Fullinwider, 1980, p. 17). Preferences may be achieved by the use of goals or quotas. Sterba (2003) defines affirmative action as “policy of favoring qualified women and minority candidates over qualified men or minority candidates, with the immediate goals of outreach, remedying discrimination, or achieving diversity, and the ultimate goals of attaining a colorblind (racially just) and gender-free (sexually just) society” (Cohen & Sterba, 2003, p. 200). This formulation allows affirmative action policies to achieve a wide variety of immediate goals.

Common definitions of affirmative action suffer from several conceptual deficiencies. As White (2004) notes, “few writing on affirmative action even bother to offer what could pass as a doctrinal legal definition of their subject” (White, 2004, p. 2122). Legal commentators “treat affirmative action as a social phenomenon, without an independent legal character, and around which legal issues arise, even as they talk about affirmative action as though its legal character were well delineated,” while the US Supreme Court itself has an affirmative action jurisprudence “built on a tremendous, unexamined assumption - that affirmative action constitutes negative discrimination” (White, 2125, p. 2127). Indeed, although US Supreme Court has adjudicated numerous cases involving affirmative action, it has never defined the term. Perhaps the most cogent American definition was put forth by the US Commission on Civil Rights in its 1977 Statement on Affirmative Action which defined it as “any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future” (Commission on Civil Rights, 1977, p. 2).

B. Positive Action in Europe

Although the American model of affirmative action and controversy surrounding it has influenced much of the current debate surrounding minority group preferences, preferential policies are neither contemporary nor specific to American politics. Indeed, there has been a long, although not well-documented, history of preferential policies world-wide and a great deal of cross-fertilization of policies. Several governments – Nigeria, Brazil, Israel, Germany, Canada, Uganda, SA, Malaysia, Fiji, the EU, and regions within sovereign states, e.g. Northern Ireland and South Tyrol – have enacted policies that provide preferences to historically disadvantaged racial and ethnic minorities, religious minorities and women. Some scholars refer to these programs as “positive action” programs. Some states have implemented positive action policies because they were inspired by their use in the US. Other states, such as India, have long histories of positive action, or “reservations,” for those of the low or backward castes. However, like its “affirmative action” counterpart in the US, a precise definition of positive action remains elusive.

In a study comparing affirmative action policies in the EU, US, Canada and South Africa, the European Commission defined positive action as “proportionate measures undertaken with the purpose of achieving full and effective equality in practice for members of groups that are socially or economically disadvantaged, or otherwise face the consequences of past or present discrimination or disadvantage” (EC, 2009, p. 24). The report makes an attempt to distinguish between American affirmative action and European positive action, as well as between positive action and positive discrimination in European Court of Justice jurisprudence. In its comparison, the report emphasizes the relative “strength” of affirmative action and positive discrimination (which is illegal in EC law) and the weaker positive action which disallows “unconditional priority” or “unconditional preferential treatment” (EC, 2009, p. 25). However, in a 2007 report for the European Commission, De Vos defines positive action as “a process to introduce a dynamic, result oriented approach that internalizes group dimensions into an equality static and individual formal equality model” (De Vos,

2007, p. 11). De Vos makes sure to mention that one should not simply identify European positive action with affirmative action or special measures because they all stem from their own legal and societal backgrounds (De Vos, 2007, p. 12).

C. Special Measures in International Law

From an international perspective, affirmative action in the form of special measures is firmly entrenched. Broadly speaking, international minority rights “reflect an obvious concern for human dignity” and “guarantee an individual dignity and well-being in keeping with the very notion of human rights” (Gaetano, 2002, p. 49). The first system for the protection of minorities was set up by the League of Nations after WWI. However, there grew a gradual disenchantment with the League’s system, and along with it a belief that there should be no special guarantees for minorities, but only protection of human rights for all. Minority rights language was even omitted from the UN Charter and the Universal Declaration of Human Rights. Post WWI minority rights treaties had all but ceased to exist. In a post-WII atmosphere, the 1948 Resolution 217C (III) reopened the minority rights issue; but, again, progress remained slow. The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) was approved in 1948. In the aftermath of the Holocaust, an event fomented by state-supported racial animus, the convention condemned the commission of certain acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such” (Genocide Convention, 1948, art. 2). The Convention Related to the Status of Refugees (Refugee Convention) has provisions related to racial discrimination.<sup>7</sup>

Approved in 1965, CERD reaffirmed “that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons

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<sup>7</sup> Article 3 of the convention reads, “[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.”

living side by side even within one and the same State” (CERD 1965, Preamble). State parties to the convention “[r]esolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination”<sup>8</sup> (CERD 1965, Preamble). The ICCPR included a provision on minority rights at Art. 27.<sup>9</sup> Finally, the Declaration on the Rights of Minorities is intended as an affirmation of the value in preserving minority group cultural solidarity and provides for state intervention toward that end; “states shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law” (Declaration on the Rights of Minorities, 1992, art. 4(1)).

Unfortunately, while many states acknowledged that discrimination against racial minorities was a global problem in need of confrontation, they were less than forthcoming about the discrimination that existed within their own polities; “not all states have acknowledged that a legal framework outlawing racial discrimination is a necessary, if insufficient, prerequisite to effecting social change in order to promote equality of opportunity” (MacEwen, 1995, p. 2). For example, the members of the EU have more recently developed conspicuously diverse polities, whether the result of the merger of a plurality of ethnic groups during state formation, the historic migration of external groups which subsequently settled in their host states, refugee flows, colonial immigration or guest workers. Yet, “the organs of the [European states] and the ideologies which underpin them are mono-cultural” (MacEwan, 1995, p. 8). Thus, in practice, the UN mantra of “equality in diversity” is often very difficult to achieve.

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<sup>8</sup> As of June 2004, the convention had been ratified by 177 member states.

<sup>9</sup> The section reads “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

In a 2006 report, Global Rights authored a minority rights report for the UN. The report identified four broad areas of concern were recognized: (1) protecting a minority's existence – through protection of physical integrity and prevention of genocide; (2) protecting and promoting cultural and social identity – right of individuals to choose group identity and to reject forced assimilation; (3) ensuring non-discrimination and equality by ending structural or systemic discrimination; and (4) ensuring effective participation of members of minorities in public life (Global Rights 2003, ¶ 73). The political inclusion of minority groups was deemed integral to societal stability and peace. Potential concerns were racial exclusion, discrimination, racism, conflict and genocide. The report made it clear that the effort to include minorities was intended to be a collaborative one, with interagency cooperation envisaged for the promotion of “effective mainstreaming of minority issues across the UN system, recognizing that situations involving minorities often lie at the nexus of efforts to promote human rights, development and security” (Global Rights, 2003, ¶ 73). Stated succinctly, “all States should seek to realize the goal of equality in diversity, in law and in fact” (Global Rights, 2003, ¶ 84).

The UN has not only supported minority group rights, but also minority group preferences similar to affirmative action or positive action. These preferences tend to come in the form of “measures” or “special measures.” In his June 17, 2002, report to the UN Economic and Social Council Sub-Commission on the Promotion and Protection of Human Rights, Special Rapporteur Mr. Marc Bossuyt defined affirmative action as “a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality” (Bossuyt, 2002, ¶ 6). In the international context, “special measures” has its origin in a proposal, ultimately withdrawn, by the Government of India during the drafting of the International Covenant on Economic, Social and Cultural Rights (ICESCR). (Bossuyt, 2002, ¶ 40). The Government of India again raised the issue during the drafting of the International Covenant on Civil and Political Rights (ICCPR); however, the

provision was not included in the final text. Instead, it was included as a general comment (Bossuyt, 2002, ¶ 48).

Thus, although endorsed by the drafting committee, in the cases of both the ICESCR and the ICCPR the inclusion of a special measures provision was scuttled in favor of its reference in a non-binding explanatory comment. However, Bossuyt argues that prohibitions of discrimination and distinction found in the ICESCR and the ICCPR do not prohibit affirmative action and that “there were cases in which the law was justified in making distinctions between individuals or groups” (Bossuyt, 2002, ¶ 52). Other instruments such as CERD, CEDAW, and the Convention on the Rights of Persons with Disabilities (CRPD) include language that may be interpreted as mandating that states implement special measures, for racial groups (CERD, art. 2(2))<sup>10</sup>; (CEDAW, arts. 4(1) and (2))<sup>11</sup>; and (CRPD, art. 5(4))<sup>12</sup>. After a thorough review of the relevant conventions and case law, Bossuyt ultimately concludes that “[t]here is no doubt that a persistent policy in the past of systemic discrimination of certain groups of the population may justify – and in some cases even require – special measures intended to overcome the sequels of a condition of inferiority which still affects members belonging to such groups” (Bossuyt, 2002, ¶ 101).

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<sup>10</sup> The referenced article reads, “States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.”

<sup>11</sup> The referenced articles read “1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved. 2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.”

<sup>12</sup> The referenced article reads “Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.” The previous three clauses in Art. 4 make clear the convention’s distinction between the mere elimination of discrimination (weak rights) and positive action in the form of the special measures permitted by clause 4 (strong rights).

As discussed above and in the previous chapter, the conception and implementation of minority group rights is ubiquitous. Although there is substantial literature on affirmative action, domestic law scholars, international law scholars, and policymakers alike seem to find elusive a clear, accepted definition of affirmative action. However, while definitions vary widely and each instance of preference articulation and implementation is culturally unique, three basic historical models – “affirmative action” in the US, “positive action” in Europe, and “special measures” in international law – can be reasonably interpreted in such a way that comparison across cases can be comfortably and justifiably undertaken. All three concepts embody a common spirit of recognizing the historical injustices perpetrated against minority groups and a need to remedy the consequences of said injustices through state-sponsored programs of preferences. Thus, while specifics such as which groups qualify as “minority groups,” which “minority groups” qualify for preferences, which preferences those minority groups qualify for, and the type and scope of those preferences, may differ, a core emphasis on minority group rights is apparent in each case.

#### IV. Rationales for Affirmative Action

Not only do states differ in their definitions of affirmative action, but they may also differ in the reasons why they enact affirmative action policies. Indeed, rationales for affirmative action are as varied as its definitions. Perhaps the most fundamental justification for affirmative action policies is the achievement of the ideal of equality. Rosenfeld (1991) contends that the manner in which equality is interpreted determines what policies are permissible when it comes to preferential treatment for minorities and women. In the US, two major assumptions underlie how equality is practiced: (1) first order discrimination (discrimination against minorities and women because they are different and inferior) is morally repugnant; and (2) equality must be meted out on an individual basis, not a group basis. Traditional liberal theory, as well as the “equal protection” clause of the Fourteenth Amendment of the US Constitution, embraces this latter assumption that Rosenfeld calls the “postulate of equality” (Rosenfeld, 1991, p. 20). The postulate “posits that individuals are

entitled to equal autonomy and equal respect as subjects of moral choice capable of devising and pursuing their own respective life plans” (Rosenfeld, 1991, p. 22).

Rosenfeld also delineates between equality of opportunity and equality of result. With reference to Rae (1981) and Rescher (1966), Rosenfeld maintains that equality of result means that each member of the designated class receives an equal amount of the good to be distributed. Equality of opportunity, by contrast, means that each member of the class receives the same opportunity as every other member to obtain the good. Rescher argues that when equality of result is not feasible, equality of opportunity is obligatory in the interest of justice. In the case of redress for those who have suffered injury as a result of past rights violations, mere removal of those legal or quasi-legal obstacles may be insufficient to effect restoration of those rights. Distributive justice may be defined narrowly, to encompass only certain economic goods, or broadly, to pertain to the products being distributed as well as the process of distribution in the social, political and economic domains (Rosenfeld, 1991, p. 30-31).

In contrast, compensatory justice generally restores the victim to the position he enjoyed before victimization. Goods are transferred from one party to another (individuals or groups) prior to their involvement in the voluntary or involuntary transaction that initiated the disequilibrium. The ideas of compensatory and distributive justice may coincide or conflict depending on the case. In the former instance, compensation to the victim occurs because some wrongful act has been perpetrated by the adverse party which has left the victim worse off. In the case of distributive justice, there need be no discernible wrongful act that infringed upon the right of another. The goal may be to simply spread a particular pecuniary loss across the members of a group in the interest of justice.<sup>13</sup>

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<sup>13</sup> Rosenfeld examines how his conception of affirmative action squares with four traditional notions of justice: libertarian, contractarian, utilitarian and egalitarian. Libertarians would argue that affirmative action is anathema to “the overall maximization of freedom,” a phrase Rosenfeld borrows from Goldman (1979, p. 39). People have the freedom to enter into contractual arrangements with anyone they wish. In Rosenfeld’s words, “from the libertarian perspective, the postulate of equality finds concrete embodiment in the equality of free association and equality to acquire and transfer property freely” (Rosenfeld, 1991, p. 53). If any equality of

Cohen (2003) argues that racial preferences are morally wrong. In his view, the basic principle of equality entails that “[i]t is wrong, always and everywhere, to give special advantages to any group simply on the basis of physical characteristics that have no relevance to the award given or to the burden imposed. To give or to take on the basis of skin color is manifestly unfair” (Cohen & Sterba, 2003, p. 23). For Cohen, race preferences are not an appropriate remedy under a compensatory theory because the compensation should be for the injury, not the skin color. For example, compensation to blacks today for injuries that occurred during slavery is misguided because the persons who suffered the injuries are no longer alive. Additionally, by providing race preferences, we are only perpetuating and reinforcing the same discriminatory behavior we seek to eradicate. Not only does Sterba view compensatory arguments as illegitimate, but he also takes issue with the more forward-looking purpose of achieving diversity because all too often, “diversity” is narrowly defined as racial/ethnic diversity, and other forms of diversity – e.g. religion, class – are not worthy of preferences.

Cohen also assails race preferences because they are both over-inclusive and under-inclusive. They are over-inclusive because all of those of a certain skin color will benefit even though not all

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opportunity policy were implemented in the names of fairness, justice or social welfare, the individual right to control property would be violated. Contractarian analysis follows a similar logic. Social contract theory, expounded by Hobbes, Locke, Rousseau, Kant, and Rawls, presupposes that free and equal individuals may enter into a social contract for the purpose of generating an institutional framework that provides the optimal equilibrium between a properly functioning state and the individual right to pursue one’s interest. On their faces, libertarian and contractarian approaches seem to counsel against affirmative action. However, some from within these traditions argue that poverty is actually an impediment to the exercise to individual freedom; thus, policies that could lead to greater efficiency in the production of goods and services are permissible because they increase overall freedom. Orthodox libertarians would disagree, citing the supremacy of individual choice and a basic antipathy toward state intervention in the economic marketplace.

Unlike the libertarian and contractarian approaches, utilitarians focus on the common good. Thus, this approach can be compatible with group rights and minority preferences. It also permits preferences to groups even though the members likely to benefit suffered the least discrimination and even though not all of the members suffered discrimination. Unfortunately, the utilitarian approach can also support first-order discrimination against minorities and women. Finally, the egalitarian approach presupposes the moral equality of each person and the ostensible right to equality of result as an integral part of fairness and justice. On its face, this approach seems to favor affirmative action policies.

suffered harm. Thus, some minorities can be admitted to universities or be awarded government contracts undeservedly. Race preferences can also be under-inclusive because some who are deserved of redress will be left out. If just compensation should be apportioned to compensate those most injured the most, and those least injured the least or not at all, then most systems of race preferences fail. Furthermore, the underlying assumption that absent discrimination minority representation in education, politics or the economy would be commensurate with their proportion of the population or should conform to some “goal” or “quota” is merely conjecture. This method unjustifiably imposes burdens on members of the majority, many of whom had no role in imposing harm on the minority. Cohen sees this burden as more than trivial, as most who have lost a university seat or government contract are completely unaware (Cohen and Sterba, 2003). Finally, Cohen argues that affirmative action actually harms the minorities it purports to help by creating widespread resentment, reinforcing stereotypes and humiliating the beneficiaries. The beneficiaries must suffer the burden of perceived inferiority. If they fail, then they are disgraced. If they succeed, they do not know whether their success was because of merit or because of their race.

Like Rosenfeld and Cohen, Nieli (2012) assails affirmative action, particularly in university admissions and employment, as negative and contrary to “the inter-ethnic norm of reciprocity and fairness, which is the very lynch-pin holding together racially and ethnically diverse societies like the United States” (Nieli, 2012, p. 10). He contends that the imperatives of liberal individualism, or what he refers to as “American personalism” operates against defenses of preferential policies based on race. Indeed, such preferences merely serve to foster “the poison of ethnic tribalism” (Nieli, 2012, p. 94).

In his debate with Cohen, and in later work, Sterba (2003, 2009) contends that affirmative action programs are, in fact, defensible. In the case of compensation for past discrimination, Sterba notes that the US Supreme Court has held that “it is permissible to adopt remedial affirmative action in an institution as compensation for identifiable acts of purposeful discrimination committed by that

very institution” (Cohen & Sterba, 2003, p. 206). He cites the examples of AT&T and Texaco reaching settlements for sex and race discrimination, respectively, in their hiring practices. This form of remedy is relatively un-controversial, because it benefits those who were actually injured. Greater controversy arises when those who suffered no injury benefit. Sterba provides the example of *Local 28 of the Sheetmetal Workers Union v. EEOC*, 478 US 421 (1986). In that case, the Court upheld a compensatory affirmative action program that required the union to increase its minority membership to 29 percent. The goal was based on the percentage of minorities in the New York City labor pool.<sup>14</sup> Although those admitted would have suffered no discrimination, the standards created an equal opportunity for prospective minority workers and could correct for harm done by other companies such as AT&T and Texaco.

Sterba proposes a standard of proof for remedial affirmative action that could permit compensation for widespread discriminatory practices. Sterba suggests several requirements. First, if past discrimination is proven, affirmative action is permissible even if the institution implicated in the affirmative action did not discriminate. Second, given the history of racial discrimination, US law should not view all racial classifications as suspect and the standard of proof needed to prove discrimination – for women or minorities – should not be unreasonably high. However, not all members of the group may benefit. Only candidates who have qualifications that, when combined with an educational enhancement program, will allow them to be qualified in a reasonable amount of time may be admitted to affirmative action programs (Cohen & Sterba 2003, pp. 233-234).

Sterba takes affirmative action opponents like Cohen and to task. In response to arguments that slavery does not justify affirmative action, Sterba argues that it was precisely slavery and racial segregation that laid the foundation for present day disparities in education, health care, housing and

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<sup>14</sup> Sterba argues that statistical disparities are important because they show prima facie evidence of discrimination in U.S. employment discrimination lawsuits. He believes that this use of statistical disparities to establish prima facie discrimination should be expanded to other areas of society (Cohen & Sterba, 2003, p. 210).

employment. He argues further that there is no true distinction between what opponents view as acceptable efforts at eliminating racial and sexual discrimination, and “problematic” efforts which seek proportionate outcomes. In his words, “when we engage the first form of affirmative action, we are led, naturally and justifiably, to engage in the second form of affirmative action...” (Cohen & Sterba, 2003, p. 254). Sterba also contends that the group rights criticized by detractors of affirmative action can, in fact, be consonant with moral entitlement. Affirmative action can also be an appropriate remedy even if only the most qualified members of the target group benefit. The most qualified members did not necessarily suffer less discrimination; they may have simply resisted it better. And even if they did suffer less, affirmative action can nevertheless be a suitable remedy for their degree of discrimination. Those non-minorities who feel slighted because a minority has benefitted from a scholarship or promotion are unjustified. What they are actually objecting to is the leveling of the playing field. Athletic preferences in scholarships and veterans’ preferences in hiring and promotion have existed for decades. Finally, alternative programs such as Kahlenberg’s (1995) class-based approach, and the lottery approach proposed by Guinier & Sturm (2001) have had some success but remain problematic because of their limited scope.

Other proponents of affirmative action argue that programs can be justified because the policies target groups which have suffered historical wrongs. Lapenson (2009) argues that this was the primary argument raised by some of the architects of the Philadelphia Plan: Secretary of Labor George Schultz and Assistant Secretary of Wage and Labor Standards Arthur Fletcher and Assistant Attorney General for Civil Rights Jerris Leonard. Buttressing this rationale is that the state itself played a pivotal role in creating and reproducing the social inequalities – whether race/ethnicity or gender based – which require affirmative action measures to ameliorate them. In his study of the US and nine Latin Americans cases, Gargarella (2010) traces how the ideals of egalitarianism would eventually give way to the coercion of particular religious groups, would discourage civic participation and reduce popular controls to a minimum expression (Gargarella, 2010, p. 2). He

arrives at his conclusions by analyzing constitutions and related documents. Therefore, it is argued, as the principal “bad actor” the state must put its own house in order, or at the very least permit, the implementation of preferences for disadvantaged groups through legislation or constitutional precommitment.

Goldman (1979) takes a moderate approach. He argues that “reverse discrimination” is permissible, but should be limited in scope. It is permitted “to compensate specific past violations of ... rights or denials of equal opportunity” and can be justified if it “create[s] equal opportunity in the future for the chronically deprived” (Goldman, 1979, p. 6). However, reverse discrimination should not be permitted “when directed indiscriminately at groups defined only by race or sex, in order to merely increase their percentage representation in various social positions” or the programs “encourage or directly mandate such group-oriented policies” (Goldman, 1979, p. 6). Goldman’s chief concern is the preservation of the privilege of merit and competence in awarding positions, specifically with regard to employment and education. For him, the basic principle of merit-based hiring aligns quite well with ideas of justice, egalitarianism and public welfare and is a distributive rule that is superior to others.

The merit principle becomes qualified in the case of compensation for victims of injustice, but Goldman rejects compensation for women and blacks under a group rights theory. He claims that because it cannot be proven that each member of the entire group was harmed, reverse discrimination should not be directed toward an entire minority group. For Goldman, only direct violations can be compensated.

groups that are defined only according to some shared characteristic, that have no official representative bodies, whose members have no formal interaction, and whose individual members may suffer harms from injustices that do not necessarily affect others, compensation can be owed only to the individual members who have been harmed and not the groups as a whole (Goldman, 1979, p. 88).

## V. Case Studies in Affirmative Action

Once we proceed beyond the philosophical and normative discourse surrounding affirmative action, we can see that most studies are single-case studies, with far fewer adopting a comparative approach. Nonetheless, these studies do underscore the uniqueness of the racial formations in which positive action programs are implemented and provide fertile ground for generalization. Some appear in edited volumes (Jenkins & Moses, 2014; Gomes & Premdas, 2013; Brown et. al., 2012; Kennedy –Dubordieu, 2006). Perhaps the most studied cases are the US and India.<sup>15</sup> Glazer’s *Affirmative Discrimination: Ethnic Inequality and Public Policy* is a seminal text. There are also studies that examine affirmative action in Brazil (Cicalo, 2012), India (Despande & Zacharias, 2013; Patnaik, 2005) and SA. Fewer studies have been performed on cases such as Malaysia (Wyzan, 1990). Some studies have focused on affirmative action for transnational groups. For example, Turgeon (1990) studied affirmative action for gypsies in Eastern Europe. Like many ethnic and racial minorities, Gypsies (Roma) suffered severe discrimination.<sup>16</sup> The Nazi regime attempted to exterminate Gypsies during WWII is perhaps the most noteworthy example, but discrimination in employment, education and politics continues to this day post-totalitarian in Eastern Europe and Russia.<sup>17</sup>

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<sup>15</sup> Hasan (2009).

<sup>16</sup> Racism against Roma occurred because of linguistic and religious differences, because they were nomadic and because of their social structure. These characteristics, derived from their origins in the Punjab region, set their culture apart from the Europeans. However, skin color was also an important dimension of racial othering. As Duna (2011) indicates, “[w]hen Gypsies first appeared, Christianity had shaped the doctrine of war between light and dark and personified the white angels against the black devils. To the church the Gypsy culture was non-acceptable and their dark skin exemplified evil and inferiority.”<sup>16</sup> This pattern mirrors the theo-politics inherent in the early relations between Europeans and Africans. In both cases, religion was employed to instigate and invigorate race antagonisms. For Africans abducted into the American chattel slavery system “[t]he heathen condition of negroes seemed to be of considerable importance to English settlers in America – more so than to English voyagers upon the coasts of Africa – and that heathenism was associated in some settlers’ minds with the condition of slavery.”

<sup>17</sup> To illustrate identity convergence between marginalized racial/ethnic groups, some Roma, a group synonymous with Gypsies, refer to themselves as “Black” (chernyi) although their ethnic origins are not African. As Lemon (1995) explains,

[i]n Russia, a "black" is, among other meanings, a person whom many North Americans probably would describe as "ethnic looking" people with "olive" skin and dark eyes and hair. However, in Russia as in many other places, “race” also is linked to categories that can be connected via tropes of

This project does not seek to diminish the importance of single case studies. They can be useful for descriptive or idiographic purposes, by articulating the particularities of affirmative action in Nigeria's federal character principle, Malaysia's New Economic Policy or affirmative action in Brazil. There are several edited volumes (e.g., Kennedy-Dubordieu, 2006) that are loosely comparative, at best. The problem is that whether contained in an edited volume or as a stand-alone paper, single case studies suffer from the same limitations – they are limited in their contribution to established theory and their ability to promote new, alternative theories to explain social and political phenomena.

Comparative studies of affirmative action are far fewer. Tushnet (2003-04) argues that comparativists must proceed with caution when comparing affirmative action regimes because substantive constitutional doctrine is sometimes closely tied to particular institutional arrangements, such as the nature of the relationship between the legislature and the courts. As an example, he cites the “creamy layer” doctrine in Indian affirmative action jurisprudence – as discussed earlier – and maintains that its application to the American context might be limited because the term operates

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generation or "blood" and thus mobilized in political arguments, as in this recent issue of one of the many nationalist newspapers in the capital: “The highest goal of the government must be to preserve that racial nucleus which alone can create culture, beauty and all the highest values.

Furthermore,

[y]ounger Roma display a fascination with the music and dress of American "Blacks" on MTV that rivals their fascination with Russians. Those of wealthier, merchant Lovari families, especially, trace their identification with American Blacks not in terms of defeat or secondclassness, as did the Keldelari metalworker, but in terms of an “attitude” that they say they can detect in expressions and movements of American musicians that renders them “like us.” They also equate blackness with America (as in, “the statue of liberty isn't that where Michael Jackson dances in the video?”) and see America as “better than Russia.” Thus they reverse the valence of blackness and shift their own place in racial hierarchies: Roma, if more like American blacks, and thus more like Americans, must be better than Russians.

What these quotes show is that racialized minority groups outside of the African Diaspora can and do adopt the name “Black,” and they do so for a variety of reasons. In the case of the Roma in Russia, to be Black is both derogatory and emancipatory, albeit in a manner somewhat different from Black Americans. We also see how the intra-ace class differences help to determine how racial signifiers are selected and interpreted.

within a doctrinal framework specific to India. In addition, Indian courts have justified affirmative action on the grounds of compensatory justice, distributive justice and the relative status of groups rather than individuals. US courts recognize none of these; it recognizes only the interest of diversity as a legitimate justification for race preferences. Ultimately, Tushnet's is a much broader argument against judicial borrowing. In his view, "constitutional systems are *systems* so that even if one has a good grasp on the way another constitutional system deals with a particular problem, one might not fully understand the way in which that solution fits together with other aspects of the constitutional system (Tushnet, 2004, p. 663). Thus, "it is not entirely clear that looking elsewhere is actually a productive way of coming up with new approaches to existing problems" (Tushnet, 2004, p. 663).

More rigorous examples tend to explore the cross-country variation in policies with a general focus on four major issues: (1) identification of their intended beneficiaries, (2) the form of the programs involved (quota/non-quota), (3) the level of legal norms from which they derive (constitutional, legislative, administrative); and (4) their domain of implementation (Sabbagh, 2004, p. 2). Both qualitative and quantitative approaches have been employed. These studies engage such issues as: how states demarcate various groups according to their race, caste or religion, the precise form of affirmative action programs, whether such programs apply to the public or private sectors; whether the policies are implemented at the administrative, legislative or constitutional levels; and whether such programs produce a net benefit for the targeted beneficiary group.

Studies comparing race/ethnicity-based affirmative action include: Zhou & Hill (2010) (comparing China and the US); Daniel (2007) (comparing the US and Brazil); Hassan & Nussbaum (2012) (comparing the US, South Africa and India); de Vries & Pettigrew: (1994) (comparing the US and the Netherlands); Wiesskopf (2004) and Bhagat (2007) (comparing the US and India); Nesiah (2004) (comparing the US, India, and Malaysia); Guillebeau (1999) (comparing SA, Brazil and the US); Sabbagh (2004) (comparing the US, India, Malaysia and SA); Boston & Nair-Reichert (2003) (comparing the US, India and Brazil); and Sowell (2004) (comparing India, Malaysia, Sri Lanka,

Nigeria and the US). Less rigorous examples include Bhagwat (2009) and Sowell (2004) which, although thought provoking and insightful, lack methodological rigor of true comparative work.

Affirmative action for women has received less attention. Some pertinent single case and comparative studies include: Seidman (1999) (comparing Germany, the US, and the EC); Lihamba et al. (2006) (examining affirmative action for women at the University of Dar es Salam, Tanzania); Bereni (2006) (affirmative action for women in political representation); Stock (2006) (comparing affirmative action policies in Germany for women and the disabled); Totten (2003), discussed above, examined the role of constitutional precommitments to gender affirmative action in the European Union, Germany, Canada and the US. Other relevant works include Bacchi (1996) (comparing the US, Canada, Australia, Sweden, the Netherlands and Norway); Ozkanli & White (2008) (comparing female professors in Australia and Turkey).

The scholarship on constitutional precommitments to affirmative action is even thinner than the number of truly comparative studies. An exemplar of the approach is provided by Cottrell & Ghai (2007), who examined precommitments to affirmative action based on ethnicity in the context of Fiji. They argue that in the Fijian context affirmative action programs have been “faulty and ineffective” because of corruption and ineptitude. Perhaps more fundamentally, the authors argue that a constitutional focus on ethnicity seems at odds with notions of markets and individualism; “[a]ffirmative action for identity and affirmative action for equality in Fiji are tugging largely in opposite directions” (Cottrell & Ghai, 2007, p. 249). The authors recommend inclusion of a fuller range of social, economic and political rights, with priority given to the most deprived. While the authors make no pronouncements with regard to the propriety of constitutional precommitments generally, their skepticism with regard to the effectiveness of the Fijian precommitments and their acknowledgement that “[w]hen affirmative action is statutory or administrative (without objectives stated in the Constitution), there is considerable discretion in structuring these schemes, and different rationales and approaches can be adopted” (Cottrell & Ghai, 2007, p. 228).

From a comparative perspective, and building from the work of Seidman (1999), Totten (2003) studied affirmative action and gender in the EU, Germany, Canada and the US. Although he articulates no formal methodology, Totten's approach to evaluating the effectiveness of constitutional precommitments to gender affirmative action is to determine whether the precommitment successfully removed debate over the issue from the national political agenda. He borrows this test from Sunstein (1991). Essentially, his is a basic correlational study; his independent variable is "the existence of a constitutional precommitment to affirmative action" and his dependent variable is "the elimination of public debate over the issue at which the precommitment is targeted." Totten's evidence is almost exclusively qualitative; he examines jurisprudence from each case to find whether judicial decisions were met with increased political debate, or whether political debate proliferated in the absence of any such decisions. For him, the persistence of political debate is the appropriate standard because it can lead to political divisiveness, disruption, destabilization and, by implication, de-democratization. His ultimate findings are inconclusive: Germany and the EU were the clearest cases of the failure of precommitments to remove debate over gender affirmative action from the political agenda while the Canadian case was less clear.

It seems that Totten's emphasis on the correlation between the precommitments and the elimination of political debate misses the point. In a newly democratizing state, contention over the issue of resource redistribution to marginalized groups will not be eliminated simply because precommitment language was agreed upon or acceded to at the outset. In fact, one might reasonably hypothesize that in the short term, contentiousness might increase because of the socioeconomic reconfigurations redistribution can cause. Then, after some increase in public debate, contention over the issue could decrease, as the policies become more familiar and embedded in the social fabric of the new democracy. This hypothesized trajectory seems much more plausible than the rigid test adhered to by Totten. His formulation even elides the durability of ideological animus directed toward the beneficiary groups by the groups which perceive themselves as "losers," a durability that

could quite easily survive a constitutional precommitment. Thus, Totten's application of Sunstein's standard for determining the effectiveness of constitutional precommitments to the issue area of affirmative action is misplaced and is not a reasonable metric for measuring effectiveness.

In addition to its conceptual deficiencies, the case selection in Totten's study limits the generalizability of its results. Perhaps most obviously, he studies only gender; thus, whether a study of affirmative action programs targeted at other cleavages (race, ethnicity, religion) would produce similar results is unclear. Similarly, if we accept his standard for determining effectiveness (which I argue we should not) we do not know whether certain cleavages are more prone to deeper political debate because of societal norms, the prevalence of discriminatory institutions, etc. All of his cases are western, with long established democratic institutions. Again, this limits the generalizability of results to other regions of the world such as Latin America and Africa. To compound matters, Totten does not explain his case selection, which makes basic methodological assessment difficult. Finally, Totten's study seizes upon none of those concerns with which political scientists of the comparative politics subfield would be familiar: process tracing, the uncovering of causal mechanisms, the explanation of divergent or convergent developmental trajectories, etc. It should be noted that Totten's formal training was as a jurist and not a political scientist.

## VI. Conclusion

The current affirmative action literature suffers from several shortcomings. Perhaps the most prominent is the lack of definitional certainty and a reconciliation of the international, European and American varieties of group preference. Next, there is very little comparative work being done in the field of affirmative action. To be sure, much research has been conducted on single cases around the world. However, very few studies have compared cases in a rigorous, systematic manner and even fewer have attempted to engage in any true large n analysis. Finally, a minimal amount of studies have examined the role constitutional precommitments, either singularly

or comparatively, play in the conferring group preferences. For the affirmative action program to move forward, these three core deficiencies must be addressed.

## CHAPTER 4

### Reconceptualizing Constitutional Group Preferences: Toward A Modern Approach to Comparative Affirmative Action

#### I. Introduction

Chapters 2 and 3 have revealed some important lacunae in the research regarding precommitment theory, racial projects and affirmative action, as separate fields of inquiry and as they intersect. These three bodies of scholarship converge on the issue of the relationship between minority rights and the state, a convergence significantly informed by the research programs of constitutionalism and comparative constitutional law. Each has robust normative and methodological debates; however, the debates have yet to be applied to affirmative action in any meaningful way. This project attempts to bridge this gap by making four crucial conceptual contributions to the literature on affirmative action: (1) the application of a large N approach to comparing cases of group preferences; (2) a focus on constitutional precommitments, constitution-making and constitutional interpretation; (3) the proposal of a working definition of “affirmative action” that can be used for comparative purposes; and (4) the creation of a novel analytical framework that can be used to classify precommitments to affirmative action.

#### II. A Large N Comparative Approach

The vast majority of affirmative action studies have either been single case studies or small N comparisons. These studies do play a foundational role in the comparative constitutionalism research program by directing attention to specific causal mechanisms, identifying important variables in the evolution of constitution-making or the evolution of constitutionalism, and elucidating socio-historical processes that make certain political outcomes more or less likely to occur. However, as Law (2005) and Yeh & Chang (2008) argue, economic and cultural globalization have made inter-state dialogue over common legal issues almost a necessity. Not only is such cross-cultural legal communication judicially efficient because legal borrowing can allow one state to find

solutions to constitutional dilemmas without having to start from scratch, but it may also aid in the mutual global evolution of a certain body of law so that stable, predictable international norms can be developed. These sentiments must not only be reflected in our courts, but also in our academic research.

As previously mentioned, and further explicated in the Methodology, there are detractors of such as Tushnet (2003-04), and while his concerns must be acknowledged; however, they should not impede scholarly progress toward what Hirschl identified as the third and fourth types of comparative constitutional law inquiry – concept thickening through multiple description and movement beyond thick description and concept formation to theory-building and causal inference (Hirschl, 2005, pp. 129-132). This study seeks to accomplish these goals through a large N comparative constitutional study of 30 cases and their constitutions. A study of this size is certain to add to the existing literature on comparative constitutional law and comparative constitutionalism, as well as add texture to the role of minorities and women in democratization, constitution-making and nation/state-building processes. This number of cases is also required to justify the core objective of this project – to achieve a better understanding of how and why states make preferential precommitments to women and minorities.

### III. Toward a working definition of affirmative action

Before any serious analysis of affirmative action precommitments can bear any fruit, a serious concern must be addressed; there is currently no consensus definition of affirmative action. As the brief review of the literature has demonstrated, conventional approaches tend to circumscribe the universe of policies and programs that may qualify as affirmative action. Some definitions focus on the group(s) that are the proposed beneficiaries of the program or policy (blacks, women, etc.). Such an approach is lacking because any group can be the beneficiary of affirmative action, not just minorities and women. Many states have preferential policies that target veterans, persons with disabilities, the poor, single mothers and any number of other social groups. These sorts of policies

are not usually referred to as affirmative action because the political discourse around “affirmative action” as such has developed so as to limit its application largely to policies that target racial/ethnic minorities and women, particularly in the American context. A much more basic conceptualization – and one that challenges the current epistemology that has left the term rigid – accepts the notion that affirmative action can apply to *any* group, even majority groups. Still other approaches are flawed because they are more concerned with the means by which the policy or program is implemented (quotas, goals, etc.). In practice, preferential policies can come in a myriad of forms, and are contingent upon the political and legal histories of a particular case. This definitional ambiguity makes comparative study difficult, if not impossible.

To resolve this ambiguity, this study seeks to formulate a unified, minimalist working definition of affirmative action that incorporates both international and domestic law standards toward the end of broad applicability across countries and issue domains and analytical simplicity that can assist in generating generalizable theories. The definitions of Rosenfeld, Fullinwider and Greenawalt are helpful but are too group- and issue domain-specific, and are implicitly American-centric. Similarly, the definition proposed by Special Rapporteur Bossuyt is flawed. His definition asserts that affirmative action policies should be a “coherent packet of measures.” However, in practice these measures are rarely coherent, either as to potential groups of beneficiaries of the types of measures mandated or permitted. Furthermore, coherence is temporal; selection of policy which may at one time have been coherent may subsequently become incoherent, as regimes change, demographics change, laws change and constitutions themselves change. Nor should affirmative action measures be required to be temporary. Some states may decide that certain groups are so materially disadvantaged that preferences need be conferred *ad infinitum*, or at least for an indeterminate period of time. Finally, the requirement that the measure be designed to achieve “effective equality” is problematic. Effective equality is tantamount to what Rosenfeld refers to as equality of result, and measures aimed at its achievement surely qualify as affirmative action.

However, efforts aimed at equality of opportunity, where no equal result is guaranteed but is only made more likely, may also constitute a group preference. An obvious example is the distinction between party list quotas for women and seat reservations. In the latter case, reserved seat laws guarantee that women will have minimum legislative representation and, thus, clearly qualify as an affirmative action measure. In the former case, minimum representation is not guaranteed, but the increased likelihood that party list quotas provide nevertheless constitutes a group preference.

This project asserts that in defining affirmative action, the focus should be only secondarily on specific groups, time constraints, whether equality is substantive or of opportunity, or the rationale for implemented the measures. Instead, the definition should be based primarily on three basic propositions: (1) that the core relationship is that which exists between the state and social groups – multi-ethnic states regularly use preferential policies as a tool to manage the demands of various ethno-political factions in an effort to stave off ethnic conflict and ameliorate power asymmetries that cause inequality; (2) that the state – through its executive, legislative and judicial apparatuses – plays a pivotal role in conferring, managing and directing the distribution of the privilege, the type of privilege, the degree of privilege and the target groups that may benefit; and (3) that the preferential policies in question do in fact intend to, or can be legally construed to, confer a privilege on a target group of beneficiaries such that the target group receives a privilege that other groups either do not receive in the same proportion or do not receive at all. In accordance with these fundamental propositions, affirmative action shall be defined succinctly as *a state mandated or permitted group preference*.

#### IV. An Analytical Framework for Affirmative Action Precommitments

This project uses an examination of the various constitutional precommitments to affirmative action for racial minorities and women to do what previous literatures on comparative constitutionalism, minority rights and affirmative action have yet to do – propose a typology of

constitutional precommitments to affirmative action. The precommitment types are set forth in summary form below and are explained at length in subsequent chapters.

A. Classical and Tacit Precommitments

Taking into account the minimalist definition, four basic types of constitutional precommitments can be discerned: *classical*, *tacit*, *territorial* and *social*. Classical constitutional affirmative action precommitments generally embody what we have come to accept as conventional affirmative action policies and those routinely described by affirmative action scholars: preferential policies designed to benefit groups, usually minorities and women. Classical precommitments often come in the form of reservations, quotas or minimum representation requirements in education, employment or legislatures. These provisions may either mandate or permit state action in furtherance of their goals. Classical precommitments may include terminology such as: “affirmative measures,” “special measures,” “measures,” “specific measures,” “special provision,” “positive measures,” “reservations” or “quotas.” India, Pakistan, and Bangladesh, discussed at length later, all have constitutions with classical precommitments that use the terms “reserved” or “reservation.” Similarly, the Ethiopian constitution, also discussed later, contains a classical precommitment, using instead the phrase “special attention” when referring to preferences for women.

Tacit precommitments also convey a preference, but they do not use terms that are widely accepted and textual interpretation is needed. Whereas classical precommitments make the framers’ intent to confer a preference patent, the language of a tacit precommitment must be interpreted in light of the history of the provision(s) in a particular case. Classical precommitments are generally the strongest of the three types because their meanings tend to be more stable over time and they can better withstand judicial scrutiny when legal challenges are mounted against them. Four common examples of tacit language are: “promote,” “protect,” “real and effective,” and “safeguard.” The Colombian constitution uses the term “real and effective” when referring to the enforcement of equality for “groups which are discriminated against or marginalized” (Colom. Const. art. 13)

Article 9(2) of the Spanish constitution also uses the term “real and effective,” in addition to the terms “facilitate” and “promote.”

B. Territorial Precommitments

Territorial precommitments are perhaps a bit more controversial than their classical and tacit counterparts. These precommitments convey group preferences through constitutionally designed territorial arrangements. These provisions occur in constitutions enacted amidst a variety of socio-political contexts and cleavages, legal traditions, and economic systems. For a territorial arrangement to qualify it must meet three criteria: (1) the territorial arrangement must be provided for in the constitution or special status, (2) territorial boundaries must be largely coextensive with LERN boundaries and (3) the territories inhabited by minority LERN group(s), or the members of the groups thereof, must receive some government mandated or permitted preference that the territories inhabited by the other group(s), or the members thereof, do not receive.

Some territorial precommitments take the form of ethno-federal arrangements in which the territorial boundaries of political subunits are more or less coextensive with ethnic boundaries. Under this scenario, minority-inhabited areas are granted by the central government an autonomous status, thus conferring substantial control over their own political and economic institutions. In other cases, there is no grant of autonomy, but in an effort to address asymmetrical economic circumstances among majority and minority LERN groups, the state may implement ethno-developments policies targeting impoverished minority sub-national units. Oftentimes ethno-development schemes involve economic incentives, subsidies or outright quotas to spur agricultural or industrial development, as well as enhanced financing to increase access to health care, education, housing and public employment. Schemes aimed at cultural and land conservation are also used.

Many territorial affirmative action precommitments take the form of ethno-federal arrangements. Although widely discussed in the political science and economic theory, there is no consensus definition of federalism. According to Hueglin & Fenna (2006) “[i]n a federal system of

government, sovereignty is shared and powers divided between two or more levels of government each of which enjoys a direct relationship with the people” (Hueglin & Fenna, 2006, p. 32). The ultimate goal is a balance between the federal and regional units. Filippov, Ordeshook & Shvetsova (2004) categorizes a state as federal if “its governmental structure can be characterized by multiple layers ... such that at each level the chief policy makers – governors, presidents, prime ministers, legislatures, parliaments, judges – are elected directly by the people they ostensibly serve ... or appointed by public officials thus directly elected at that level” (Filippov et al., 2004, p. 9). Federal arrangements generally have two interrelated justifications, economic and political. For an economic perspective, federal arrangements may be preferred because “[g]overnment (i.e., coercive) action may be required to resolve those market failures associated with informational asymmetries, externalities, and wholly decentralized decision making over public goods” (Filippov et al., 2004, p. 1).

Furthermore,

[b]ecause technology, taste and our understanding of things are never static, the decentralization and political competition that federalism allows offers the possibility of designing a state that can, in principle at least, move back and forth between acting in a centralized versus a decentralized way, and that makes such adjustments over time and across issues according to fixed democratic rules, especially safeguarding individual rights (Filippov et al., 2004, p. 2).

Thus, economically speaking, federalism in its ideal form facilitates the allocation of responsibilities across the state guided by the principle of rationality, the avoidance of transaction costs and the management of externalities.

Conversely, political justifications for federal arrangements are much more varied and do not always conform to the principle of rationality. Hueglin & Fenna (2006) identify three normative propositions that support a federal system. First, decisions are best made at the local level because local elites have the best knowledge to do so. This arrangement also enhances citizens’ voice because holding local decision-makers accountable is easier than holding accountable those who reside far away. Second, local governments can administer services in a manner consistent with the culture of

the particular locality, all the while participating in the national whole. Thus, these “subcentral communities” can better protect their distinct interests. Third, the dispersal of power among several levels of government decreases the likelihood of tyranny from any one level. This constitutionalist argument applies to both parliamentary and presidential regimes; in parliamentary systems federalism can act as a counterbalance to the power amassed by a fusion of legislative and executive branches, while in a presidential system the vertical stratification of federalism can complement the horizontal separation of powers that three branches of government can provide (Hueglin & Fenna, 2006, pp. 40-41).

Perhaps the most pertinent binary here is what Hueglin & Fenna characterize as *cultural federalism* vs. *territorial federalism*. In the former case, the geographic boundaries that demarcate subnational units coincide with those that separate cultural groups (Switzerland). In the latter case, geographic boundaries are cross-cutting and the composition of subnational units is heterogenous. Cultural federalism may be a result of the persistence of what Amoretti (2004) refers to as territorial cleavages. In his view, “[a] territorial cleavage exists when a self-conscious minority is concentrated in a specific area of a state’s territory. ... What matters is that the minority and the majority perceive themselves as collectively different and therefore deserving of some kind of different treatment” (Amoretti, 2004, p. 2). Oftentimes, these cleavages lead to “ethnic” conflict. The realization and scale of any conflict is difficult to predict as it is contingent upon a number of variables. However, the result of such conflict is well known: mass inter-group violence, diminished state capacity and legitimacy, crumbling political institutions, the demise of the rule of law, unfettered refugee flows, a dilapidated economic infrastructure and perhaps the failure of the state itself. Given this potential scenario, plural societies with deeply embedded territorial cleavages can enact measures of accommodation. These measures can include minimizing violence and extra- and counter-institutional mobilization, minimizing alienation and hostility toward the state, and encouraging respect for minority civil and political rights (Amoretti, 2004, p. 2).

What Hueglin & Fenna refer to as cultural federalism can also be referred to as *ethnofederalism*. Hale (2004) defines the ethnofederal state as a federal state in which at least one constituent territorial governance unit is intentionally associated with a specific ethnic category. Borrowing from Riker's (1964) seminal work, he opines that ethnofederal states must meet two criteria. First, the state must be federal. This means that: (1) there must be two levels of government that rule the same land and people, (2) each area has at least one domain of action in which it is autonomous and (3) there is some guarantee of the autonomy of each government within its own sphere. Second, there must be a minimal level of democracy, which entails "direct regional elections and in Freedom House rates these countries as either 'free' or 'partially free'" (Hale, 2004, p. 168). Under these criteria states like Uganda and China would be disqualified. In this study, ethnofederalism does not require democracy. Here, the key principle in ethnofederalism decentralization of national administrative authority which is devolved to subnational governance units.

Federalism is the conceptual precursor to consociationalism. Lijphart characterizes federal theory as a "special type" of consociational theory, one which implements segmental autonomy, which permits some social groups to have some decision-making authority independent of a central government (Lijphart, 1977). Both federal and unitary states can use territorial demarcations as a tool for assigning preferences to certain groups. In a unitary state, Lijphart uses the term consociationalism to describe an institutionalized power-sharing arrangement implanted in divided societies for the express purpose of managing social group conflict. In its ideal form, a consociational arrangement has four characteristics: (1) governance by a grand coalition of political leaders of all significant segments of society; (2) a mutual veto or "concurrent majority" rule; (3) proportionality as the principle of political representation; and (4) a high degree of autonomy for each segment (Lijphart, 1977, p. 25). In practice, these arrangements are far from ideal.

The normativity of consociational arrangements are not without controversy. As O'Leary notes, the crux of the detractors' argument is that consociation "reinforces the presumed sources of

conflict. It freezes and institutionally privileges (undesirable) identities at the expense of more 'emancipated' or more 'progressive' identities, such as class or gender" (O'Leary, 2005, p. 5). Furthermore, they argue that proportional representation will only lead to the irreversible formation of sectarian parties, replacing the politics of interests with the politics of identity. They also argue that these arrangements are inherently undemocratic. (O'Leary, 2005, p. 6). Feminists, liberals and socialists are common purveyors of this line of argument.

Roeder & Rothchild (2005) argue that power-sharing hinders peace and democracy in post-conflict societies. They identify seven potential problems. First, they limit democracy by creating a small elite cartel among ethnic groups. Democracy requires competition among elites, not conspiracy. Second, power-sharing institutions can actually undermine power-sharing agreements by giving ethnic groups the ability to challenge the agreement for fear of defection by other parties. Third, the issue of inter-ethnic resource allocation monopolizes the political agenda. Fourth, there is a "second-generation problem"; even though the initial parties to the agreement may be committed to its implementation, subsequent generations of ethnic elites may not be as committed.<sup>18</sup> Fifth, because power-sharing involves increasing representation of minority ethnic groups, government becomes inefficient. Sixth, power-sharing institutions tend to be rigid and unable to adapt to changing circumstances. Finally, power-sharing agreements are difficult to enforce. Legitimate sanctions may become conflated with predation, and the absence of an external guarantor prevent defection (Rothchild & Roeder, 2005).

Cohen (1997) found that federal arrangements encourage discontented ethnic groups to engage in protest more frequently, but with less severity. His explanation is a simple one; unlike in unitary states, in federal arrangements "[t]he dispersions of centers of power de-intensifies ethnopolitical convergence on the central government and, therefore, takes pressure off it.

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<sup>18</sup> Hartzell & Hoddie (2003) argue that multi-faceted power-sharing arrangements tend to make power-sharing institutions more durable. Institutions must be multidimensional, focusing not only on the security dimension, but the military, territorial and economic dimensions as well.

Federalism dilutes the intensity of ethnic demands by redirecting them to many centers instead of one” (Cohen, 1997, p. 624). In applying the ethnic security dilemma analytical framework, Saideman, Lanoue & Campenni (2002) found that federalism may increase protest, but reduces the level of ethnic violence because minority groups have more local influence and those groups may have less fear that their way of life will be threatened by a national majority. In remarking upon the interaction of their federalism and minority population concentration variables on the likelihood of ethnic conflict, the authors hypothesize that “[f]ederal systems, for example, may be more effective in reducing unrest in areas where minority groups inhabit specific regions of a country (thus allowing for federal boundaries to correspond with ethnic populations) (Saideman et al. 2002, 121). Lake & Rothchild (1996) argue that “the establishment of regional autonomy and federalism are important confidence-building measures that, by promoting the rights and positions of minority groups, mitigate the strategic dilemmas that produce [ethnic] violence” (Lake & Rothchild, 1996, p. 42).<sup>19</sup>

Of course, the federal design is not a panacea. Quantitative analysis performed by Brancati (2006) suggests that while federal arrangements may mitigate the likelihood or severity of ethnic conflict and/or secession, they may also contribute to the formation of regional parties, thus increasing the probability of both. In addition, the actions of one subnational governance unit may have a deleterious effect on another. Burgess (2006), in a reappraisal and expansion of Riker’s (1964) conception of a federal state as a grand bargain among politicians, sets forth an analytical framework of “circumstantial causation” that privileges two broad independent variables, “perceived common interests”<sup>20</sup> and “internal threats” (Burgess, 2006, p. 99). These variables, the relative salience of

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<sup>19</sup> The authors cite as successes Bosnia, Sri Lanka, Cyprus and Sudan, among others. However, they also acknowledge that regional autonomy and federalism can have unintended consequences, as in the cases of South Africa, Ethiopia and Russia.

<sup>20</sup> In assessing comparative studies by Wheare (1946), Deutsch (1957), Riker (1964), Birch (1966) and Watts (1966) Burgess identifies the following “common interests”: shared political values, expectations of strong political ties and associated benefits, a multiplicity of ranges of communications and transactions, the desire for political independence, prior political association, strategic (territorial) considerations, geographic proximity, common cultural-ideological factors, political leadership and a broadening of the political elite, similarity of social and political institutions, the appeal of federal models and the combination of historical processes that were founded upon prior political commitments. He also lists the following four “threat” factors: a sense of

which is context dependent, enter into constitution-makers' calculus when determining whether a federal system is appropriate and how a federal system should be configured. Hueglin & Fenna (2006) identify four binaries, the combination of which will help determine the pattern of intergovernmental relations: cultural diversity vs. territorial division of powers, presidential vs. parliamentary, senate vs. council and legislative vs. administrative subnational authority (Hueglin & Fenna, 2006, p. 57).

Thus, as a tool of state-building, federal arrangements can be used as leverage against minority groups which resist incorporation into any truly national unit. As Burgess maintains “[f]ederations were conscious rational attempts or experiments designed to create and foster a sense of belonging to what ... was an artificial political community ... with an overarching political authority that encompassed, institutionalized, accommodated and gave official recognition to those identities that were politically salient” (Burgess, 2006, p. 104). Here, Burgess, like Amoretti, highlights the nexus between the federal and national projects, the erection of a system of political devolution and geographic demarcation that could allay, eliminate, co-opt or peripheralize competing minority nationalisms that threatened to disrupt a state's territorial and/or ideological integrity. The federal project accepts a heterogeneous, multinational state by recognizing at least the disruptive potential of a distinctive or contrary culture, and at most acknowledging the value of diversity as a contribution rather than a hindrance to a national culture. In sum, “[f]ederations emerge ... because of the imperative to structure and institutionalize difference and diversity” (Burgess, 2006, p. 156). The central difference between traditional federalism and consociational or ethno--federal arrangements is that traditional federalism presupposes an equal distribution of power among subnational units. Under a power-sharing, arrangement, some units may have more power than others. In some cases, divided states opt for a grant of autonomy to some units. According to Ghai

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military insecurity, a sense of economic insecurity, a sense of cultural insecurity and a perceived threat to the stability of the existing political order.

(2000) there is no developed or reliable theory of autonomy (Ghai, 2000, p. 4). In her study of 9 Latin American cases, Van Cott (2001) concludes that indigenous demands for autonomy succeed when their claims are integrated into larger regime bargains and when opportunity structures favor the making of such claims.

In practice, preferences for territories inhabited by discrete “ethnic” group can take several forms, perhaps best described as falling along a spectrum of preference. On one end, there can be reasonably conservative arrangements in which the central government retains all or the preponderance of administrative decision-making authority but confers preferred status on peoples from national sub-units. These measures may be principally economic in nature, using principles of redistribution to justify providing increased investment to those subunits which are inhabited by minority groups and which are underdeveloped. In addition, preferred employment in the public sector may be implemented for disadvantaged groups. On the other end, the structure of territorial arrangements in plural societies, particularly those in which ethnic cleavages have been the cause of inter-group violence and institutional disruption, delegations of partial sovereignty or autonomy may be undertaken, to the degree required to quell continued violence and prevent outright secession. Many states designate autonomous regions for this purpose, with the degree of autonomy granted on a case-by-case basis. Indeed, the variation in the type and degree of preferential arrangements is made apparent through not only inter-case analysis, but through intra-case analysis.

As indicated above, this study adopts the basic definition of the ethno-federal state, with some qualification. The requirement that the state be “democratic” must be relaxed because it has no bearing on whether the state confers preference. In addition, the goal of managing ethnic conflict necessarily entails conferring a preference on those minority groups which benefit from the devolution of political power, either to states or to communities. Thus, in some cases, ethno-federal arrangements are vehicles for implementing affirmative action. Of course, not all federal arrangements are ethno-federal, or have segmental cleavages that coincide with territorial cleavages.

To determine whether a constitutionalized federal arrangement is or is not, whether by its very language or by application, ethno-federal in nature requires attention paid to plain constitutional language as well as to historical facts which when aggregated suggest so. This study posits that the connection between territorial arrangements and affirmative action lies in the redistributive policies that the national government uses to not only prevent conflict but to resolve political and economic power asymmetries and effectuate more egalitarian outcomes among territorially demarcated subnational groups.

C. Social precommitments

In addition to the classical, tacit and territorial types, constitutional affirmative action precommitments can also come in the form of social precommitments, an umbrella term used here to encompass constitutional provisions that evidence a clear intent to incorporate socialist, communist or social democratic ideals. Although Marx and Engels first distinguished between communism, a working-class revolutionary movement, and socialism, a middle-class reformist movement, socialism has now become a general term for state-initiated economic reform to reapportion wealth, principally among classes. This project argues that “social” precommitments can just as easily be used to justify affirmative action legislation that benefits LERN minority groups and women because of (1) the elevated normative value that “social” states grant to wealth redistribution along class cleavages and (2) the significant coincidence of class lines and LERN and gender lines in many states.

Often set in contradistinction to more liberal socio-economic arrangements, “social” arrangements carve out a much more prominent role for the state in society and economy. As Lindemann (1983) acknowledges, “no platonic authority exists that can provide us with a ‘real’ definition of socialism” (Lindeman, 1983, p. xi). Furthermore,

It would be satisfying to conjure up some concise and air-tight definition of [socialism] ... [b]ut attempts to provide such definitions have always failed, for the simple reason that language, and particularly the language of political persuasions, evolves in ways that defy easy

description.... We must thus reconcile ourselves to the uncomfortable truth that often people who call themselves socialists so define their beliefs as to exclude others who also claim to be socialists (Lindemann, 1983, p. xi).

Indeed, not only is the particular arrangement of socialist state institutions important, but the history which spawned these institutions is important as well. Thus, the manner in which “social” precommitments manifest themselves in any particular society is historically contingent. As Wright (1986, p. 1) maintains “[t]he history of socialism is the history of socialisms.” That said, there are characteristics that can be said to be inherent in the concept itself, despite its multifarious manifestations. Socialism emphasizes cooperation, social justice and community over the needs of the individual. It also presupposes the innate gregariousness of human beings and the optimal development of humanity through cooperation rather than competition.

Socialism is often discussed in juxtaposition to liberalism; however, the two do share some very fundamental goals amidst their very different approaches to realizing them. Both ideologies encourage liberty and a means of achieving social progress. Liberalism seeks liberty through individual competition, private property ownership and free elected representatives. Conversely, socialism objects to individualism and finds the valorization of capitalist private property ownership often to be destructive. Both liberalism and socialism espouse equality; liberalism favors equality of opportunity while socialism elevates social equality or equality of outcomes.

In contrast to capitalism, socialism attributes the hegemony of the capitalist economic system, and the manner in which social institutions and the state apparatus have developed, to the self-interested machinations of the capitalist bourgeoisie as it turns most of society into proletarians. The term “socialism” owes its origin to socialist thinkers in Great Britain, Ireland and France in the early 19<sup>th</sup> century. In the view of Marx & Engles (1948), the bourgeoisie appropriated the means of production by transforming it from individual to social and from agricultural to industrial, facilitated by the transformed division of labor that the factory brought. Although the means of production

had been socialized, the appropriation of commodities produced was concentrated in the hands of the capitalists.

According to Engels (1892), this contradiction between social production and capitalist appropriation will end in a violent explosion of rebellion by the productive forces, eventuating in the state taking control of production. However, because the state itself is a bourgeois construct, further steps are required. The means of production must revert to the control of the proletariat, which will then turn the means of production into state property. As Engels summarizes,

[t]he proletariat seizes the public power, and by means of this transforms the socialized means of production, slipping from the hands of the bourgeoisie, into public property. ... The development of production makes the existence of different classes of society thenceforth an anachronism. ... To accomplish this act of universal emancipation is the historical mission of the modern proletariat (Engels, 1892, pp. 86-87).

In essence, the state, no longer a manager of government administration and social relations, becomes superfluous and dies out (Engels, 1892, p. 86).

The Marxism described above represents an ideal type of socialism. Other theorists regarded socialism as indispensable in fostering a more egalitarian distribution of capital appropriation, but challenged some of the fundamental assumptions of Marxist socialism. As elucidated by Kautsky (1892) the general trajectory of economic development – specifically production for sale and the unforeseen growth of the capitalist system itself – actually *requires* state intervention. Simply put, “the economic development forces the state, partly in self-defense, partly for the sake of better fulfilling its functions, partly also for the purpose of increasing its revenues, to take into its own hands more and more functions or industries (Kautsky, 1892, p. 100). Luxemburg (2006) argued that a proletariat revolution is not necessary for the proletariat to gain political power, but that democratic institutions alone might suffice. Indeed,

[democracy] is necessary to the working class because it creates the political forms (autonomous administration, electoral rights, etc.) which will serve the proletariat as fulcrums in its task of transforming bourgeois society. Democracy is indispensable to the working class because only through the exercise of its democratic rights, in the struggle for

democracy, can the proletariat become aware of its class interests and its historic task (Luxemburg, 2006, p. 63).

These and similar revisions of Marxism can be seen as a moderated, more pragmatic placement of the role of the state in any socialist program. Ideas such as these ultimately paved the way for what politicians and political thinkers refer to as social democracy.

From a more liberal perspective, Meyer & Hinchman (2007) trace the roots of social democracy to the individual rights refrain of classical liberalism and the gap between what they term “formal validity” and “efficacy in the real world.” Formal validity “implies that one should take legal steps to ensure individual freedom by establishing a legal sphere of privacy shielded from the intervention of third parties” (Meyer & Hinchman, 2007, p. 10). Conversely, efficacy in the real world places emphasis on actual impact. Under traditional liberal theory, integral to individual freedom is the right to own property, protected by negative liberties (as opposed to positive ones) the concept of negative liberties assumes that the interference of third parties, including the state.

The writings of classical liberal theorist John Locke do lend some support to the notion that liberalism and individual rights can be compatible with the common good. To him, the natural state of man “is a state of perfect freedom to order their actions and dispose of their possessions and persons as they see fit, within the bounds if the law of nature, without asking leave, or depending upon the will of any other man” (Locke, 1681, p. 262). However, liberty is not synonymous with abject license, as there are ethics of equality, charity, justice, and fairness at work. As Locke maintains,

[a]nd, being furnished with like faculties, sharing all in one community of Nature, there cannot be supposed any such subordination among us that may authorise us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for ours. Every one as he is bound to preserve himself, and not to quit his station wilfully, so by the like reason, when his own preservation comes not in competition, ought he as much as he can to preserve the rest of mankind .... (Locke, 1681, p. 264).

Furthermore, Locke rejects the idea that justice and equity should be assessed by each individual in the light of his own interest. He states that “[t]his unjust view has always been rejected by the wiser amongst mankind, those who retained some sense of common humanity, some concern for the welfare of society” (Locke, 1664, p. 178). Locke not only seems to suggest the compatibility of the liberal/self-interested and the social/common, but also indicates that, at times, the former dictates the necessity of the latter. He maintains that men will relinquish the power, liberty, and equality they held in the state of nature to a government only “as the good of the society shall require,” and “only with an intention in every one the better to preserve himself, his liberty and property,” with the “peace, safety, and public good of the people” as the ultimate end (Locke, 1690, p. 68). Thus, it would seem that for Locke individual rights and social rights are perhaps in some practical instances antagonistic, but are not at all mutually exclusive.

British philosopher Tawney (1965) challenges the notion that equality is inimical to liberty. He observes that “while inequality of power is a condition of liberty, since it is the condition of any effective action, it is also a menace to it, for power which is sufficient to use is sufficient to abuse” (Tawney, 1965, p. 286). He notes that just as there are limits to individual liberty in the political sphere, it is incumbent upon industrial society to extend such limits to the economic sphere. He states his position on the matter plainly: “when liberty is construed, realistically, or implying, that the economically weak will not be at the mercy of the economically strong ... a large measure of equality, so far from being inimical to equality, is essential to it” (Tawney, 1965, p. 290). Tawney’s position not only underscores the compatibility between liberty and equality realized through “social” interventions, but it also intimates the potential harmony between “social” interventions and democratic institutions. This is a belief that social democrats such as Laurat (1940) and Durbin (1940) espouse, construing democracy as an organizational principle that inherently demands economic equality and social justice.

Critical to distinguishing between liberal democracies and more social states is how the state perceives its role in meting out fairness and equality through its management of positive and negative rights. The companion notions of positive legal rights and social citizenship gained currency in the aftermath of WWII and the enactment of the Universal Declaration of Human Rights. As this study shows, many states incorporated these rights into their respective constitutions as fundamental rights, the contravention or curtailment of which requires state intervention. Under this arrangement, the state may compensate groups affected by the negative consequences of risks it helped to create (Meyer & Hinchman, 2007).

As the above discussion shows, “social” states tend to embrace norms of fairness, equality and redistribution in obligating themselves to provide for workers or the poor. However, group remediation need not stop with the proletariat or the poor. Constitutional social precommitments may also be used to justify preferences, or affirmative action, for other groups such as racial minorities given that in many instances, there is significant overlap between the two groups. By their very nature, social precommitments are the affirmative action precommitments with the broadest application. In theory at least, they can support legislation that assigns preferences to all target groups across all issue domains. I argue here that while social precommitments strictly construed concern principally economic redistribution along class lines, it can have a meaningful preferential impact on redistribution to primarily LERN groups, but also to women. Again, in many societies there is substantial coincidence between class and minority group lines. The precise arrangement of these cleavage overlappings is necessarily country specific. However, in instances where such coincidence can be observed, “social” precommitments, even absent a precommitment targeting a LERN group or women specifically, should provide legal justification sufficient to support affirmative action legislation or policies.

It is of course argued that “[n]ationalism and Marxism are philosophically incompatible” because for a Marxist class interests would supersede national interests (Walker, 1984, p. 5). For the

nationalist, the opposite would be true. As Walker interprets Marx and Engels, the nation as such was a superstructural phenomenon that came into existence after the demise of feudalism and with the rise of capitalism. “Nationalism was mainly a device of the bourgeoisie for identifying their class interests as the interests of the entire society,” (Walker, 1984, p. 7), and was used to “dampen the class consciousness of the proletariat by obscuring the conflicting class interests within each nation, and by encouraging rivalry among the proletariat of various nations (Walker, 1984, p. 7). However, as Walker points out, “Marxists not only learned to accommodate themselves to an expediential coexistence with a world filled with nationalisms, but they also developed a strategy to manipulate nationalism into the service of Marxism” (Walker, 1984, p. 6). Furthermore, “the unmistakable growing impact of nationalism upon world politics that took place during the lifetime of Marx and Engels demanded a greater appreciation of the power of nationalism” (Walker, 1984, p. 11). Walker also contends that respect to nationalism is congruent with Marx’s dialectical view of progress, where the ends is more important than the means (Walker, 1984, p. 14).

Ultimately, the reaction of classical Marxists to the real-world influence of nationalist movements mirrors that of classical liberals. Although philosophically neither is compatible with serious political appreciation of national identities, practical considerations force a re-thinking of ideological allegiances to how societies are to be organized. Thus, more “pliable” iterations of Marxism, such as those embodied in social democracies, and even constitutionally communist cases such as China, recognize group rights of national minorities. As the analysis in Chapter 8 will show, most cases in the sample have both social and affirmative action precommitments of some sort.

## V. Conclusion

Chapters 2, 3 and 4 were intended to accomplish four goals. First, they reviewed the relevant literature on constitutions, constitutionalism, and precommitment theory to show how states and the political elites that govern them use constitutions and the institutions that are created by them to manage and distribute resources to various segments of the national population. Second,

they explained that, as a result of a myriad of endogenous and exogenous political pressures, affirmative action is one of the tools many states use to manage and distribute resources to various segments of the population in a preferential manner. Third, they demonstrated how the existing literature of affirmative action is inadequate, primarily because of its conceptual and definitional uncertainty, its single-case emphasis and its American- and/or Euro-centric focus. Finally, they proposed to resolve these inadequacies with a large N, thirty-case comparative study that focuses on the constitutions themselves, a simple, consensus definition of affirmative action that can be broadly applied to a variety of contexts, and a working typology of affirmative action precommitments that proceeds beyond just conventional forms (classical, tacit) to encompass those that are more unconventional (territorial, social).

## CHAPTER 5:

### CONVENTIONAL PRECOMMITMENTS TO AFFIRMATIVE ACTION

#### I. Introduction

From a review of the constitutions of the 30 cases in the sample, a basic framework can be derived by which we can characterize affirmative action precommitments. For the purposes of simplicity and parsimony, this project will focus on four major types that can be used to organize affirmative action precommitments: *classical*, *tacit*, *territorial* and *social*. Subsequent chapters will examine other dichotomized sub-types: *group-specific vs. non-group-specific*, *domain specific vs. non-domain specific* and *permissive vs. mandatory*. The four types and the three sub-types were selected because they address the three key foundational questions that constitution-makers must confront after agreeing that some form of affirmative action precommitment is indeed warranted: (1) what kind(s) of precommitment(s) should we have, (2) to whom should the precommitment(s) apply and (3) in what situation(s) should the precommitment(s) apply? This study addresses two target group categories: LERN minorities (an acronym for linguistic, ethnic, racial and national) and women. The prevalence of the various types of affirmative action precommitments within and between LERN minorities and women will be the subjects of the next chapter.

Classical constitutional affirmative action precommitments embody what we have come to accept as conventional affirmative action policies; preferential policies designed to benefit groups, usually minorities. Classical precommitments often come in the form of reservations, quotas or minimums representation requirements in specified issue domains. These provisions may either mandate or permit state action in furtherance of their goals. Classical precommitments use “universal” language that makes a clear, unambiguous and unequivocal commitment to conferring a mandatory or permissive state-protected preference on a particular group or groups by undertaking extraordinary or exemplary steps, articulated in terms that are widely accepted by the international community as conveying such preference. Tacit precommitments also convey a preference, but they

do not use terms that are widely accepted; thus, textual and historical context is needed to determine whether a preference can or must be conferred. Stated otherwise, whereas classical precommitments make the framers' intent to confer a preference patent, the language of a tacit precommitment must be interpreted in light of the history of the provision(s) in a particular case.

Second, multi-national states use a variety of territorial precommitments to facilitate the devolution of political and administrative authority to sub-national governance units. There are three sub-types: grants of *autonomy*, *ethno-development* schemes fostered by ethno-federal arrangements, and efforts at *conservation* of LERN minorities land and culture. However, not all territorial arrangements qualify as affirmative action precommitments. For a territorial arrangement to qualify it must meet three criteria: (1) the territorial arrangement must be provided for in the constitution, (2) territorial boundaries must be largely coextensive with LERN boundaries and (3) the territories inhabited by minority LERN group(s), or the members of the groups thereof, must receive some government mandated or permitted preference that the territories inhabited by the other group(s), or the members thereof, do not receive. Territorial precommitments only apply to the LERN category.

Finally, social precommitments may operate in a manner sufficient to support state-authorized preferences for target groups. These constitutional provisions must evidence a clear intent to effectuate social or socialist ideals through a state redistributionary project. Social precommitments can qualify as affirmative action because in almost all societies there is significant overlap between class cleavages on the one hand, and LERN and SEX cleavages on the other. As will be discussed, this study classifies social precommitments into three types: (1) cases that are *socialist* because they contain provisions that use the term "socialist" in reference to the state; (2) cases that are *social* because, although they do not contain provisions that use the term "socialist," they do contain provisions that mandate or permit resource redistribution amongst social groups and/or provide for entitlements such as social security, housing assistance or health care; and (3) cases that

are constitutionally *asocial* because they contain no provisions that clearly indicate the states responsibility or option to redistribute resources amongst social groups.

The framework presented here should in no way be interpreted as definitive. The actual outcomes of the affirmative action precommitments (whether they “work” or not) is not the focus of this project. Any discussion of outcomes in this project is used only to: (1) provide social, political and/or historical context for how the constitution-making process itself came about; (2) explain the rationale behind the inclusion of affirmative action precommitments and the inclusion and exclusion of certain target groups; (3) highlight events that may have occurred subsequent to initial constitutional ratification that may have led to the creation of a legal or regulatory framework in furtherance of precommitment goals, or (4) highlight events that may have led to the modification of precommitment interpretation or a constitutional amendment that expanded or restricted precommitment application. It is also important to understand how different types of precommitments can work together. For example, how might a territorial precommitment and a social precommitment work together? We will see that in some instances provisions can reinforce one another to effectuate the intent of constitution-makers or to permit minority group plaintiffs to make good faith legal arguments that they are entitled to preferential treatment from the state or state-run institutions. There may also be conceptual and practical overlap among the types. This precommitment synergy may also change over time. Legally speaking, precommitment synergy may manifest in an *in pari materia* reading of constitutional provisions to properly understand the affirmative action precommitment landscape.

## II. Equality Precommitments

Prior to discussing the preferential provisions that appear in constitutions, an examination of provisions that grant equality is warranted. Equality precommitments are provisions that memorialize a state’s commitment to enforcement of equality among individuals and groups, and may or may not be domain specific. Some constitutions adopt a minimalist posture with regard to

equality, typified by the US Constitution’s “equal protection” clause, with no additional supporting equality provisions. Other provisions mirror two of the affirmative action precommitment sub-types – group specific vs. non-group specific and domain specific vs. non-domain specific. Some are phrased as anti-discrimination provisions and still other provisions specifically prohibit state prescribed preferences. Many constitutions incorporate an “equal protection” clause and support it with some additional provisions, including affirmative action precommitments. Whether an equality provision indicates a commitment to equality of opportunity or equality in practice, or substantive equality, is difficult to determine without historical and legal context. It is important to highlight that any equality precommitment has the potential to become an affirmative action precommitment because, over time, courts’ interpretations of constitutional “equality” language can change. When equality provisions are present and can be read *in pari materia* with classical, tacit, territorial or social precommitments then the intent is to mandate or permit a preference is made clearer. When there is no other language suggestive of preferential treatment, reference to alternative legal sources such as legislation and case law is required to determine accurately the particular meaning of equality.

Mexico provides a basic example of equality language. Mexico is the only case in the sample with no discernible “equal protection” provision. However, Mexico does have equality provisions for the EDU and ECON/EMP domains and for the women and LERN target groups. Art. 3(I)(c) maintains that the Mexican education system

shall contribute to better human relationships, not only with the elements which it contributes toward strengthening and at the same time inculcating, together with respect for the dignity of the person and the integrity of the family, the conviction of the general interest of society, but also by the care which it devotes to the ideals of brotherhood and *equality of rights* of all men, avoiding privileges of race, creed, class, sex, or persons.

Art. 123(A)(VII) provides that “[e]qual wages shall be paid for equal work, regardless of sex or nationality.” With resemblance to the “equal protection” clause, Art. 24 of the Ukraine Constitution states that “[c]itizens have equal constitutional rights and freedoms and are equal before the law.” However, an equality provision in Art. 21 adds that “[a]ll people are free and equal in their dignity”

and a SEX provision in Art. 51 ensures that “each of the spouses has equal rights and duties in the marriage and family.”

Other states have adopted “equal protection” provisions but have added additional bolstering equality provisions. Indonesia and the Russian Federation are two examples. In Indonesia “[a] citizens shall be equal before the law and the government and shall be required to respect the law and the government, with no exceptions” (Ind. Const. art. 27(1)). Furthermore, “[e]very person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law” Ind. Const. Art. 28(d)(1)). There are provisions that buttress the state’s obligation to enforce equality and art. 28(I)(2) (“Every person shall have the right to be free from discriminative treatment based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment”). The Russian constitution is similar: under art. 6(2), “Every citizen of the Russian Federation shall have all the rights and liberties on its territory and bear equal duties, stipulated by the Constitution of the Russian Federation”; art. 8(2); “Private, state, municipal and other forms of ownership shall be recognized and shall enjoy equal protection in the Russian Federation”; art. 13(4); “Public associations shall be equal before the law”; art. 19(1), “All people shall be equal before the law and in the court of law”; and art. 123(3) “Judicial proceedings shall be held on the basis of controversy and equality of the parties.” While each provision is worded differently indicating a separate emphasis, all constitute fairly general equality provisions that highlight a commitment to equality.

Many constitutions couch equality in terms of anti- or non-discrimination. These provisions span virtually all issue domains and target groups. In China, “[d]iscrimination against and oppression of any nationality are prohibited...” (China Const art. 4). Likewise, in Brazil “the law shall punish any discrimination attacking fundamental rights and liberties (Brazil Const. art. 5(XLI)). The Pakistan Constitution has non-discrimination equality provisions for SEX and POL, “[t]here shall be no discrimination on the basis of sex alone” and [n]o citizen otherwise qualified for appointment in

the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth” (Pak. Const. arts. 25(2), 27(1)). A final example can be found in Nigeria, “[a]ccordingly, national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited” (Nig. Const. art. 15(2)).

As we saw in the case of Mexico, some equality provisions refer to a particular group, or are group-specific. For example, art. 14 of Japan’s constitution states that “[a]ll of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.” Under the Turkish constitution “[a]ll individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations” (Turk. Const. art. 10). In addition to its more general equality provision in art. 3(9), Iran’s constitution holds that “[a]ll people of Iran, whatever the ethnic group or tribe to which they belong, enjoy equal rights; color, race, language, and the like, do not bestow any privilege” (Iran Const. art. 19). The Russian Constitution goes perhaps the furthest in the number of groups mentioned; “[t]he state shall guarantee the equality of rights and liberties regardless of sex, race, nationality, language, origin, property or employment status, residence, attitude to religion, convictions, membership of public associations or any other circumstance” (Russ. Const. art. 19(2)).

Some, like art. 2(14) of the Constitution of the Philippines, mention *only* women as meriting equal protection of the laws; “[t]he State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men.” Others discuss women’s equality and applicable domain(s). For example, art. 48 of the Chinese Constitution states that “[w]omen in the People’s Republic of China enjoy equal rights with men in all spheres of life, political, economic, cultural and social, and family life,” with specific mention of equal pay for equal work. Other provisions relate to domestic relations. Art. 64 of the Vietnamese Constitution states

that “[m]arriage shall conform to the principles of free consent, progressive union, monogamy and equality between husband and wife.” Article 41 of the Turkish Constitution is similar; “[t]he family is the foundation of the Turkish society and based on the equality between the spouses.” A final example can be found in Art. 36(1) of the South Korean Constitution; “[m]arriage and family life are entered into and sustained on the basis of individual dignity and equality of the sexes, and the State must do everything in its power to achieve that goal.”

Perhaps the most interesting subset of cases is those that have both equality provisions and classical affirmative action precommitments. In the case of Ethiopia, Art. 25 of its constitution guarantees equal protection and “[i]n this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status.” However, Ethiopia permits the state implementation of “affirmative measures” and provision of “special attention” to remedy the “[h]istorical legacy of inequality and discrimination suffered by women” (Eth. Const. art. 35). Although seemingly prohibited by the Art. 25 proclamation of non-discrimination on the basis of sex, art. 35 memorializes what will be later referred to as a classical SEX affirmative action precommitment, giving clear preferences to women in the POL, ECON/EMP and EDU domains. Furthermore, art. 54 establishes “special representation for minority Nationalities and Peoples” in the House of Peoples’ Representatives. Again, this statement qualifies as a classical precommitment and, although it lies in apparent contravention of Art. 25’s non-discrimination mandate, it is an explicit exception.

In Nigeria we find a similar situation. Art. 15(2) maintains that “national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited.” Article 42 under the constitution’s “Fundamental Rights” chapter makes Nigeria’s commitment to equality even clearer;

- (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

Like Ethiopia's constitution, Nigeria does carve out an exception for its "federal character" preference scheme.

The task of interpreting equality provisions is made more difficult when there is little other constitutional evidence that minority preferences can be conferred. The best example here is the US which will be treated here at some length. Generally speaking, the US constitution is a minimalist one, with significant influence from a liberal individualistic ideology and consequently no classical or tacit affirmative action precommitments. Section 1 of the Fourteenth Amendment to the US Constitution states, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ... without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." On its face, this provision is general in its applicability, with no mention of any specific group or domain. Nor does it describe how the provision is to be implemented; that task is left to legislation, regulation and judicial decision. But does the equal protection clause embody strict liberal equal opportunity, thus prohibiting affirmative action, or does it permit some public or private activity aimed at substantive equality? Reference to the relevant socio-historical context and judicial precedence clearly shows that the Fourteenth Amendment permits affirmative action and is a particular precommitment.

In fact, the US has a long history of affirmative action, most notably for whites. Rubio (2001) argues that preferences for whites began as early the early 18<sup>th</sup> century in the legal distinctions between the rights of white indentured servants and black slaves. For example, in 1691 the Virginia

General Assembly prohibited the setting free of black slaves. Later blacks lost the right to vote and to engage in sexual relations with whites. By contrast, “Christian white servants” in Virginia could gain freedom through the payment of “freedom dues” and they could not be beaten by their masters without an order from the justice of the peace (Rubio, 2001, p. 5). In Rubio’s view, “white privilege is implicated in black subordination. No matter how poor you were, being white meant *not* being a slave” (Rubio, 2001, p. 9). This racial order became memorialized legally by the Supreme Court in *Dred Scott*, 60 US 393 (1857).<sup>21</sup> Justice Taney had made clear that under the US Constitution, blacks were not citizens of the US and thus had no rights under it. Under Pres. Andrew Jackson, racial

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<sup>21</sup> The facts and procedural history of the case can be a bit confusing. Dred Scott was born a slave in Virginia around 1799. In 1834, Dr. Emerson bought Scott in Missouri and moved him to Illinois, a free state. In 1836, Emerson and Scott moved to Fort Snelling in Minnesota. Under the 1820 Missouri Compromise, an agreement between pro- and anti-slavery factions that regulated slavery in the western territories, slavery was not permitted in Fort Snelling. In 1838, Emerson and the Scott family moved back to Missouri. When Emerson died, Scott became the property of his wife. Scott then requested that he be set free and she refused. Scott filed suit in a Missouri state court alleging false imprisonment and battery. After having his claim denied on a procedural issue, his lawyers successfully argued for a retrial.

By the time the case went to trial, Ms. Emerson had moved to Massachusetts and her brother Sanford took over her financial affairs. Scott received a favorable ruling in the Missouri lower court. The jury found that Scott and his family should be free under the Missouri doctrine “once free, always free.” Sanford appealed to the Missouri Supreme Court and won. Scott did not appeal to the Supreme Court because he thought he would lose. By 1853, Sanford was the legal owner of the Scotts and he had moved to New York. The case was then refiled in the Federal District Court for the District of Missouri under the diversity jurisdiction of Article III, Section 2. The judge rejected Sanford’s argument that Scott was not a citizen, instructing the jury that Scott was subject only to the laws of Missouri. The jury found for Sanford. Scott then appealed to the Supreme Court.

The primary legal issue for the Court was relatively simple: Can a negro, whose ancestors were imported into this country, and sold as slaves become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities guaranteed by that instrument to the citizens? The decision was a resounding “no.” The Court reasoned that the citizenship a state confers within its own limits is legally different from the citizenship that the Union confers. Thus, citizenship of a state is not equivalent to being a citizen of the United States. The key inquiry is to determine who was a citizen of the United States at the time the Constitution was adopted. Upon examining the legislation, history and the language in the Declaration of Independence, as well as the Constitution, the Court concluded that slaves were not intended to be included as citizens. As a result, blacks had no rights that the white man was bound to respect, and he could be freely bought and sold like merchandise. It was acknowledged that public sentiment regarding slavery may have changed since the adoption of the two documents; however, the Court maintained that a change in public opinion cannot change the meaning we give the Constitution from when it was framed and adopted.

hierarchy had become further cemented in what Rubio refers to as the “democratization of white inclusion” (Rubio, 2001, p. 24). “Jacksonian democracy” included an extension of the franchise to non-propertied white males. This, along with access to American Indian land the creation of the “white job” helped to solidify whiteness in opposition to blackness and other ethnic identities.

During Reconstruction<sup>22</sup>, the Thirteenth<sup>23</sup>, Fourteenth<sup>24</sup> and Fifteenth<sup>25</sup> Amendments raised the idea of equality in political discourse. Many who had reluctantly relented on the Thirteenth Amendment’s abolition of slavery and involuntary servitude argued that the “equal protection” clause of the Fourteenth Amendment was not to be included because it amounted to special protection for blacks and abrogated states’ rights (Rubio, 2001, p. 43). The succeeding civil rights bills caused an even greater stir because they attempted to codify the idea of social equality found in the Reconstruction amendments. Black congressional representative John Roy Lynch (R-Mississippi) accused opponents of social equality of being white supremacists. The first black senator, Hiram Revels (R-Mississippi) attempted to reassure whites that black uplift would not injure whites. Nevertheless, many white politicians protested vigorously, even as the 1875 Civil Rights Act was passed and the Freedman’s Bureau was erected. During Reconstruction, blacks made gains in

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<sup>22</sup> In *From Slavery to Freedom*, John Hope Franklin examines the political dynamic between blacks and whites during Radical Reconstruction. He opines that the Republican Party played a critical role, but was moved to adopt the cause of Blacks only because of political expediency. For example, the Freedmen's Bureau, not only supervised educational activities relating to refugees and freedmen, which included issuing rations, clothing and medicine, but it was also used by missionaries and teachers from the North to civilize the Black “barbarians” in the South. Republicans also used the Union League to recruited blacks into the Republican Party, to help protect the fruits of the Northern victory. By the fall of 1867, there were chapters of the League all over the South. This helped to deliver the Black vote to the Republican Party.

<sup>23</sup> The Thirteenth Amendment reads “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

<sup>24</sup> Section One of the Fourteenth Amendment is pertinent here. It reads, “[a]ll All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

<sup>25</sup> The Fifteenth Amendment reads, “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”

electoral politics, employment and educational achievement through what ostensibly amounted to state preferences. These benefits, however, were severely curtailed by the Compromise of 1877, and were mitigated by the pre-existing Black Codes, laws which the states used to regulate a myriad of civil and legal rights, from marriage to the right to hold and sell property, to the ability of black agricultural laborers to work. As the Black Codes of the 18<sup>th</sup> and 19<sup>th</sup> centuries became the Jim Crow of the 20<sup>th</sup> century, preferences for blacks dissipated.<sup>26</sup> The controversy then re-emerged with the executive orders issued by Presidents Kennedy and Johnson.

What has today become known as affirmative action finds its origins in the post-Civil Rights era of greater black empowerment. Several important disputes over whether and how race-based affirmative action was to be applied under the Equal Protection Clause have been litigated in federal courts in the post-Civil Rights era. Most scholars agree that the benchmark cases regarding affirmative action in education are *Regents of the University of California v. Bakke*,<sup>27</sup> 438 U.S. 265 (1978)

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<sup>26</sup> The history of the US. with regard to inequality between the races and between the sexes is well documented according to Katznelson (2005) argues that affirmative action actually existed in the US post-New Deal South to the benefit of whites. Whites used three mechanisms to safeguard the status quo racial power asymmetry in the South. First, they sought to leave blacks out of any legislation by inscribing race into the law, particularly where it concerned occupations in which blacks were over-represented like farming and maid service. These jobs constituted over 75% of blacks employed in the South and were excluded from legislation that created modern unions, minimum wage laws, laws that dictated work hours and Social Security. Second, whites insisted that the administration of the laws be placed under the control of local officials, who were racist. Third, and finally, they prevented Congress from attaching anti-discrimination provisions to the social welfare legislation. As a result, “at the very moment when a wide array of public policies was providing most white Americans with valuable tools to advance their social welfare – insure their old age, get good jobs, acquire economic security, build assets and gain middle class status – most black Americans were left behind or left out” (Katznelson, 2005, p. 23).

<sup>27</sup> A brief review of the facts in *Bakke* is warranted. In the early 1970s, the medical school of the University of California at Davis admitted 100 students each year. The university used two admissions programs: a regular admissions program and a special admissions program. The purpose of the special admissions program was to increase the number of minority and "disadvantaged" students in the class. Applicants who were members of a minority group or who believed that they were disadvantaged could apply for the special admissions program. In the regular admissions program, applicants had to have a grade point average of at least 2.5 on a scale of 4.0 or they were automatically rejected. In the special admissions program, however, applicants did not have to have a grade point average of 2.5. Under the school's quota system, sixteen of the 100 spaces in the medical program were reserved only for the disadvantaged students. From 1971 to 1974 the special program admitted 21 black students, 30 Mexican Americans, and 12 Asians, for a total of 63 minority students.\* The regular

and the two Michigan cases, *Gratz v. Bollinger*, 538 US 244 (2003) and *Grutter v. Bollinger*. 539 U.S. 306 (2003). In *Bakke*, the Court held that the university's affirmative action scheme violated the Equal Protection Clause because it was not narrowly tailored and did not provide for individualized assessments for all available slots. Later, in *Gratz*, petitioners Gratz and Hamacher filed a class action alleging a violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 after both were denied admission as undergraduates to the University of Michigan. Although the Law School Admissions Council considered Gratz to be well qualified and Hamacher to be within the qualified range, both were denied admission. They alleged that the "points system" used by the university to help underrepresented racial or ethnic minority group members gain admission was unconstitutional. The Court held that the university's affirmative action program was not narrowly tailored to achieve respondents' asserted interest in diversity, the policy violates the Equal Protection Clause.

The Court's decision in *Grutter* was different.<sup>28</sup> The Court ultimately held that the law school program admissions program was sufficiently narrowly tailored because it did not insulate each

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program admitted 1 black student, 6 Mexican Americans, and 37 Asians, for a total of 44 minority students. No disadvantaged white candidates were admitted through the special program.

Allan Bakke was a white male. He applied to and was rejected from the regular admissions program in 1973 and 1974. Minority applicants with lower scores than Bakke's were admitted under the special program. After his second rejection, Bakke filed a lawsuit in the Superior Court of Yolo County, California. He wanted the Court to force the university to admit him to the medical school because the special admissions program *violated* the Fourteenth Amendment and his denial of admission constituted unlawful race discrimination. In accordance with precedent the Supreme Court first held that the proper standard of review was strict scrutiny because the Equal Protection Clause applies to all persons regardless of race. The strict scrutiny standard, first articulated in *U.S. v. Carolene Products*, 304 U.S. 144 (1938), and applied in *Korematsu v. U.S.*, 323 U.S. 214 (1944) is the most stringent of the three standards courts use to determine if state action that contravenes a constitutional right is legal. Under this standard in a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary to the accomplishment of its purpose or the safeguarding of its interest.

<sup>28</sup> That case involved the University of Michigan School of Law, which sought to achieve student body diversity through compliance with *Bakke*. Focusing on students' academic ability coupled with a flexible assessment of their talents, experiences, and potential, the policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, an essay describing how the applicant will contribute to Law School life and diversity, and the applicant's undergraduate grade point average (GPA) and Law School Admissions Test (LSAT) score.

category of applicants with certain desired qualifications from competition with all other applicants. Rather, it considered race or ethnicity only as a “plus” in a particular applicant’s file and was flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each individual applicant. Attaining a diverse student body is at the heart of the Law School’s proper institutional mission, and its good faith is presumed absent a showing to the contrary. Enrolling a “critical mass” of minority students simply to assure some specified percentage of a particular group merely because of its race or ethnic origin would be patently unconstitutional.

This brief historical and legal review of American affirmative action and constitutional pronouncements of equality, as well as the examination of equality provisions in other cases, was intended to show the diversity in constitutional language and the potential difficulties in interpretation and application. By themselves, equality provisions do not settle the debate over whether a constitution mandates or permits affirmative action. However, it does invite its possibility, and, at the very least, equality provisions, whether in Indonesia, Russia or the US, guarantees a minimum of equality of opportunity.

### III. Classical Precommitments

Classical affirmative action precommitments extend beyond equality of opportunity into substantive equality, or preferences. Classical precommitments are the most familiar type of precommitment. They are termed “classical” because they take the form of what most scholars, politicians and members of the general public envision affirmative action policies to be. These precommitments involve such policies as civil service quotas, admissions quotas in public institutions higher education or minimum reserved seats in legislatures. Classical precommitments apply to both

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Additionally, officials must look beyond grades and scores to so-called “soft variables,” such as recommenders’ enthusiasm, the quality of the undergraduate institution and the applicant’s essay, and the areas and difficulty of undergraduate course selection. The policy does not define diversity solely in terms of racial and ethnic status and does not restrict the types of diversity contributions eligible for “substantial weight,” but it does reaffirm the Law School’s commitment to diversity with special reference to the inclusion of African-American, Hispanic, and Native-American students.

LERN minorities and women. Conversely, tacit provisions utilize less accepted language that requires reference to historical and legal context to determine whether a preference was intended or whether a group can qualify for preferential treatment, whether intended by constitution-makers or not. Classical precommitments have interpretations that tend to be more stable over time and exhibit greater robustness in the face of legal challenges. Conversely, tacit terms can be more ambiguous, and thus more malleable in terms of judicial construction.

Classical affirmative action precommitments come in a variety of forms - there is no one singular phrase or term required to indicate that a preference is intended. However, the provisions have one commonality – the precommitment language makes a clear, unambiguous and unequivocal commitment to amelioration the status of a particular group or any group it deems necessary by undertaking extraordinary or exemplary steps. The language used to craft these precommitments does not readily lend itself to multiple interpretations. The plan language of the provisions requires the conclusion that a preference is constitutionally mandated or permitted and does not constitute illegal discrimination. Although there is no one specific phrase or term required to indicate that a preference is intended, certain phrases are almost certainly indicative of the intention to create a preference for particular target groups. In the case of classical precommitments, not only is the text clear as to whether an affirmative action precommitment is intended, the text is also generally clear as to whether a precommitment is mandated or permitted by the state.

In this study, classical precommitments are those which adopt the specific language or terminology readily identifiable as a clear indication of the intent to bestow a preference upon a target group. Such terminology includes, but is not limited to: “affirmative measures,” “special measures,” “measures,” “specific measures,” “special provision,” “positive measures,” “reservations,” or “quotas.” These terms, or variants thereof, indicate adherence to the ideal of equality of outcomes with regard to the group(s) identified as eligible by the constitution drafters.

India, Pakistan, and Bangladesh all have constitutions with classical affirmative action precommitments that use the term “reservation,” “reserved” or some other variant. This is not surprising because their development as independent states derived from a singular historical trajectory, and all share a long-standing commitment to affirmative action. The only difference among the three cases is that Pakistan and Bangladesh have religious precommitments while India does not. Indeed, Pakistan and Bangladesh have classical precommitments for religious minorities (non-Muslims). In the case of Pakistan, these religious preferences include reservations for seats in national parliament and provincial assembly elections.<sup>29</sup> For Bangladesh, the precommitment to religious minorities is far more narrow, referring only to public service hiring.<sup>30</sup> Both states are majority Muslim.<sup>31</sup> In neither case are the specific religious minority groups listed. Indonesia and Ethiopia, take different linguistic approaches.

In the case of Indonesia, its constitution has arguably the broadest classical precommitment in the sample: “[e]very person shall have the right to receive facilitation and special treatment to have the same opportunity and benefit in order to achieve equality and fairness.” (Indon. Const. Art. 28(H)(2)). Its breadth makes it facially applicable to any target group or domain. In addition, the provision’s language intimates a duty on the part of the state to provide such special treatment, making it mandatory. The language “facilitation and special treatment” here indicates a right to

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<sup>29</sup> The following provisions of the Pakistan Constitution are instructive: art. 51(1), 1(a) (“There shall be three hundred and forty-two seats of the members in the National Assembly, including seats reserved for women and non-Muslims”); art. 51(4)(c) (“the constituency for all seats reserved for non-Muslims shall be the whole country”); art. 51(4)(e) (“members to the seats reserved for non-Muslims shall be elected in accordance with law through proportional representation system...”); art. 106(1) (“Each Provincial Assembly shall consist of general seats and seats reserved for women and non-Muslims as specified herein below”); art. 106(3)(b) (“each Province shall be a single constituency for all seats reserved for women and non-Muslims allocated to the respective Provinces under clause (1)”); and art. 106(c)(3) (“the members to fill seats reserved for women and non-Muslims allocated to a Province under clause (1) shall be elected in accordance with law through proportional representation system”).

<sup>30</sup> Bangladesh Const. art. 29(3)(2) (“Nothing in this article shall prevent the State from giving effect to any law which makes provision for reserving appointments relating to any religious or denominational institution to persons of that religion or denomination...”).

<sup>31</sup> Under art. 2(a) of the Bangladesh Constitution “[t]he state religion of the Republic is Islam, but other religions may be practiced in peace and harmony in the Republic.” Under art. 2 of the Pakistan Constitution “Islam shall be the state religion of Pakistan.”

positive action, for both the achievement of the “same opportunity” and “benefit” or outcome. Affirmative action legislation enacted by the Indonesian legislature mandates a 30% quota for seats (Art. 65(1), Law No. 12 (2003)), a 30% quota for new political party membership (Art. 2, Law No. 12 (2003) and a 30% quota for new party leadership at the national, town and provincial levels ((Art. 20, Law No. 12 (2003). (Katjasungkana, 2008, p. 489).<sup>32</sup>

Ethiopia also has classical precommitments for both women and LERN minorities. However, unlike Indonesia, it has separate provisions, distinct classical language and domain specificity for each target group. Its precommitment for women under art. 35(3) is quite expansive, “[t]he historical legacy of inequality and discrimination suffered by women in Ethiopia taken into account, women, in order to remedy this legacy, are entitled to affirmative measures. The purpose of such measures shall be to provide special attention to women so as to enable them to compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions.” First, the provision uses classical language twice, “affirmative measures” and “special attention,” leaving little doubt as to the framers’ intent. Second, the domain application of affirmative action measures is broad. The language mentions specifically the political, social and economic domains, and the framers took exceptional care to pre-empt any potential judicial controversy as to the provision’s applicability to the private sphere.

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<sup>32</sup> However, as Stockmann (2008) points out that the Indonesian constitution contains no provision pronouncing the equality of men and women, in apparent contravention of its commitments under CEDAW and the state’s own 1998 Human Rights Action Plan (Stockmann, 2008, pp. 59-60). That said, the Indonesia Constitution has several broad equality provisions that implicitly safeguard equality between the sexes. Under Art. 27(1), “All citizens have equal status before the law and in government and shall abide by the law and the government without any exception.” Additional protections can be found in the constitution’s chapter on human rights, arts. 28A-28J, enacted in the second amendment to the constitution. Some representative provisions include: art. 28(d)(1) (“Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law”); art. 28(3)(d) (“Every citizen shall have the right to obtain equal opportunities in government”); art. 28(I)(2) (“Every person shall have the right to be free from discriminative treatment based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment”).

By contrast, Ethiopia's provisions under the LERN category are a bit more restricted. Under art. 89(4) "[g]overnment shall provide special assistance to Nations, Nationalities, and Peoples least advantaged in economic and social development." This provision seems broad and its application undoubtedly mandatory; however, it is not as broad as the classical precommitment for women for two reasons. First, it lacks the historical explication and the emphasis on redress associated with the SEX precommitment. Second, art. 89, under which Ethiopia's broad LERN precommitment falls, is dedicated to "Economic Objectives." Articles 90 and 91, which enumerate Ethiopia's "Social Objectives" and "Cultural Objectives," respectively, make no mention of special assistance. That said, further provisions reinforce art. 89(4) by adding a political dimension. Article 54 establishes "special representation for minority Nationalities and Peoples" in the Council of Peoples' Representatives in the form of quotas; "minority Nationalities and Peoples shall have at least 20 seats." Its companion, art. 61(2), establishes a one-seat quota for the Council of the Federation, the other chamber of the Ethiopian Parliament.

A selection of classical preferences for women may help to illustrate the point further. As previously indicated, art. 35(3) of the Ethiopian Constitution makes it clear that the framers intended to bestow a preference upon women. In addition, other provisions that provide for "special representation" for minorities in congress, with quotas, demonstrate that the framers of the Ethiopian Constitution embraced the idea of equality of outcome for disadvantaged groups. To conclude otherwise would betray the plain meaning, framers' intent and the overall structure of the document. Similarly, the current Ukrainian Constitution employs language memorializing preferences for women, permitting "special measures for the protection of health and work of women" (Ukr. Const. art. 24). However, Ukraine's constitution is currently undergoing revision and the "special measures" language for women may be removed. According to the Venice Commission, such a removal "is in conformity with new approaches to gender equality abstaining from granting women special privileges, especially if these are based on a traditional conception of the different

roles of men and women.” (Venice Commission Opinion 534, 2009, ¶ 21). This new approach may be at odds with Ukrainian realities. Zhurzhenko (2001) argues that Ukraine’s transition from socialism to a free market economy was deleterious to women because it corresponds with the patriarchal gender ideology construction of women and perpetuates the notion of a natural division of labor between the sexes. In the Ukraine, the “transition to democracy” project resulted in the demise of the “working mother” gender contract, under which the state protected the health and work of women. Economic reforms led to a decrease in funding for these programs. What’s more, using data compiled by the Ukrainian Longitudinal Monitoring Survey (ULMS) Ganguli & Terrell (2005) found that the disparity in wages between men and women from communism to post-transition has persisted. Currently, women do earn less than men in both the formal and informal sectors. Pignatti (2010) attributes the formal market discrepancy to wage discrimination, and the informal discrepancy to more personal variables.

Finally, the Argentine Constitution also memorializes a precommitment to affirmative action for women. The 1994 reforms state clearly that “[a]ctual equality of opportunities for men and women to elective and political party positions shall be guaranteed by means of positive actions in the regulation of political parties and in the electoral system” (Arg. Const. § 37).<sup>33</sup> This precommitment is buttressed by article 75(23); the state is tasked with legislating “positive measures guaranteeing true equal opportunities and treatment, the full benefit and exercise of the rights recognized by this Constitution and by the international treaties on human rights in force, particularly referring to ... women ....” International treaties, including CEDAW, are incorporated into the constitution under art. 75(22), (23). Under these provisions, Argentine Law No. 24012 has been

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<sup>33</sup> Section 2 of the Temporary Provisions ensures that the measures implemented under art. 37 do not result in any diminution of rights; “[p]ositive actions referred to in the last paragraph of § 37 shall not comprise less guarantees than those in force at the time this Constitution was approved, and their duration shall be determined by law.”

promulgated to establish a minimum 30% quota for women candidates on election lists submitted by parties.<sup>34</sup>

In sum, Ethiopia, Ukraine, Argentina and the other cases illustrate how constitutions use can employ a variety of classical affirmative action terms to confer preferences upon groups.<sup>35</sup> Constitution-drafters' use of certain widely-accepted terms almost always indicate the intent to memorialize an affirmative action precommitment. That these precommitments are aimed at achieving substantive equality is patent and can be ascertained by adjudicators because they are recognized legal terms of art found in international covenants and constitutions around the world.

#### IV. Tacit Precommitments

It has been argued here that classical precommitments evidence an intent to confer a preference or can be used by aspirant target group to assert its legal right to a preference because they employ widely accepted language that post-WWII constitution-makers and jurists largely agree upon. Thus, a simple plain meaning approach to textual interpretation is sufficient. Like classical

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<sup>34</sup> The relevant provision reads “The lists submitted shall contain at least thirty percent women candidates for the elected offices and in proportions such that there is a possibility of being elected. A list that does not meet these requirements will not be made official.” Women’s advocacy organizations played a critical role in the passage of the Quota Law, which preceded the 1994 reforms. However, according to Lubertino (2003) the reforms buttressed the efficacy and enforceability of the Quota Law as it “serve[d] as a protective umbrella and have defeated the usual traditional male argument regarding the ‘unconstitutionality of positive action’ as a violation of the right to equality before the law” (Lubertino, 2003, p. 5). Indeed, it was the quotas, which had existed in Argentina since 1991, that provided that 100 of the 300 members of the constitution assembly be women, which, in turn, permitted the positive action language contained in Arts. 37 and 75 and the transitory provisions. Furthermore, subsequent to the 1994 reforms, the city of Buenos Aires passed a constitution with positive action provisions broader than those found in the national constitution.

<sup>35</sup> The ROK and Germany use the term “promote” to indicate an affirmative action precommitment. In the ROK Constitution, “the State shall endeavor to promote the welfare and rights of women” (ROK Const. art. 34(3)). Article 34(3) works in conjunction with the express precommitment in 32(4); “[s]pecial protection shall be afforded to working women, and they shall not be subjected to unjust discrimination in terms of employment, wages and working conditions.” The gender preference has been made practical in the 2004 reforms to the Political Part Law installed 50% gender quotas for party lists in the Kuk Hoe (National Assembly). The same can be said of the German Constitution’s Art. 3(2); “Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.” Among EU member states, Germany has taken the lead on positive action for women.

precommitments, tacit precommitments also evidence intent to confer a state-mandated or state-permitted preference upon a particular group or groups. However, these provisions contain no commonly recognized language. Instead, they employ phrasology that is either unambiguous as to intent despite not being classical, or language which, upon scrutiny of historical context, case-specific legal precedent and other constitutional provisions, reveals itself to be preferential. In the absence of legal precedent or the actual implementation of affirmative action legislation without legal challenge, identifying tacit affirmative action precommitments may require some degree of subjectivity. The core task is to distinguish between a facial intent to carve out a legally enforceable preference from an effort to merely implement equality or anti-discrimination policies *without* preferring a group.

A review of the 30 cases in the sample reveals several tacit terms. Four are the most common: “promote,” “protect,” “real and effective” and “safeguard.” For example, art. 13 of the Colombian Constitution begins with an equality provision but then proceeds further: “[t]he state will *promote* the conditions necessary in order that equality may be *real and effective* will adopt measures in favor of groups which are discriminated against or marginalized” (emphasis added). The tacit terms “protect” and “real and effective” are used in conjunction with the classical term “measures” to indicate a state obligation to prefer certain minority groups. The extent and type of preferences authorized by the Columbian Constitution is discussed in some detail in the next chapter. Similarly, art. 13(1) of the Philippine Constitution states,

The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good. To this end, the State shall regulate the acquisition, ownership, use, and disposition of property and its increments.

This example combines tacit terminology, classical terminology (“priority”) and a social precommitment which authorizes wealth redistribution. Art. 13(14) also uses tacit term “protect,” as well as “realize their full potential” in the context of a women-specific precommitment. In both the Columbian and Filipino cases, the terminology used, and the preferences implemented, indicate a

desire for the state to implement programs and policies that do more than simply prohibit discrimination. Rather, the intent is to facilitate equality of outcomes through group preferences.

Constitutional provisions from Colombia and Ukraine illustrate how the particular term “promote” can be interpreted as an affirmative action precommitment. Article 11 of the Ukrainian Constitution uses tacit language but is not classified as a tacit precommitment. It states that “[t]he State promotes the consolidation and development of the Ukrainian nation, of its historical consciousness, traditions and culture, and also the development of the ethnic, cultural, linguistic and religious identity of all indigenous peoples and national minorities of Ukraine.” Although the term “promote” is used, it is used to refer not only in reference to the indigenous peoples and national minorities mentioned in the latter part of the provision, but also to the nation as a whole. Moreover, the constitution does use the classical term, “special measures” when referring to the protection of health and work of women in art. 24. This use of “special measures” for women but the term “promote” for LERN groups would seem to indicate that art. 11 is not intended to be applied in the same preferential manner as art. 24.

The Colombian Constitution provides another example. In Colombia,

[t]he state has the obligation to promote and foster the equal access of all Colombians to their culture by means of permanent education and scientific, technical, artistic, and professional instruction at all stages in the process of creating the national identity. Culture in its diverse manifestations is the basis of nationality. The state recognizes the equality and dignity of all those who live together in the country. The state will promote research, science, development, and the diffusion of the nation's cultural values (Col. Const. art. 70).

Here, “promote” is used twice. In the first instance, the state “promotes” access for *all* Colombians for the purpose of fostering a national identity. The use of the term “all” means that no preference is accorded to any specific group or groups. Later in the provision, and just as we saw in art. 11 of the Ukrainian Constitution, there is an attempt to balance the social homogenization that accompanies any process of nationalization with an overture recognizing the value of cultural or ethnic particularism. The second instance again uses “promote” to refer to the development of the nation

*as a whole*. If we compare these two provisions with Columbia's art. 13 we can see a clear distinction between "promote" used in a merely anti-discriminatory way and "promote" used as a tacit affirmative action precommitment. Article 13 reads, in its entirety,

[a]ll individuals are born free and equal before the law and are entitled to equal protection and treatment by the authorities, and to enjoy the same rights, freedoms, and opportunities without discrimination on the basis of gender, race, national or family origin, language, religion, political opinion, or philosophy. The state will promote the conditions necessary in order that equality may be real and effective will adopt measures in favor of groups which are discriminated against or marginalized. The state will especially protect those individuals who on account of their economic, physical, or mental condition are in obviously vulnerable circumstances and will sanction any abuse or ill-treatment perpetrated against them.

The first sentence is undoubtedly an equality precommitment. It is reasonably expansive in scope; it mentions several variations of "equality" ("equal before the law," "equal protection" and "without discrimination") while also identifying specific social categories. The second sentence, however, is undoubtedly an affirmative action precommitment. As in art. 70, the term "promote" is used. But the subject or beneficiary of the "promotion" is not the "nation" writ large, or all groups. Instead, "promote" is accompanied by "measures" and "real and effective." Furthermore, the use of "promote" is associated with a particular group or groups to be named later, identified in the constitution as "groups which are discriminated against or marginalized." Thus, unlike the case of LERN groups in Ukraine, LERN groups in Colombia, as well as women the poor and persons with disabilities can receive preferential treatment through what is arguably mandatory (art. 13 uses the term "will" rather than "may" or "can") particular affirmative action precommitment. Furthermore, we know that Colombia permits LERN preferences because art. 176 of its constitution provides for POL-specific preferences in the form of electoral quotas.

The Spanish case is also instructive with regard to the interpretation of tacit terms. Article 9(2) of the Spanish Constitution states that public authorities must "*promote* conditions ensuring that freedom and equality of individuals and of the groups to which they belong are *real and effective*, to remove the obstacles preventing or hindering their full enjoyment, and to *facilitate* the participation of

all citizens in political, economic, cultural and social life” (emphasis added). No classical terms are used, but the phrase “real and effective” seems to be an allusion to substantive equality or equality of outcomes. However, under the equality provision found in art. 14, “Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.” Additionally, and reminiscent of the duality found in the Ukraine case, the Spanish Constitution does use classical language when referring to persons with disabilities; “[t]he public authorities shall carry out a policy of preventive care, treatment, rehabilitation and integration of the physically, sensorially and mentally handicapped by giving them the specialized care they require, and affording them *special protection* for the enjoyment of the rights granted by this Part to all citizens” (Spain. Const. § 49) (emphasis added). There is also a classical provision at § 3(3). All three provisions were included in the original 1978 constitution, not added later through amendment.

When viewed in its entirety, § 9(2) is a tacit precommitment (later classified as non-group-specific, non-domain-specific). A 1992 CEDAW report outlines the affirmative action policies that have been implemented under art. 9(2). They include: Act No. 10/1994 which funds measures to promote recruitment and hiring in under-represented professions, employment and unemployment protection; Royal Decree 631/1993 authorizing the National Vocational Training and Employment Plan, to enact measures preferring unemployed persons with particular difficulties in entering or re-entering the labor market, especially women; the Second Plan of Action for Equal Opportunities for Women (1993-1995) announcing scholarships and internships for women, and encouraging affirmative action in business through various initiatives; and an Order of 25 May 1995 regulating State funding for activities promoting and developing affirmative action in universities as a way of encouraging the principle of equal opportunity for women (Spain CEDAW Report, 1996, art. I.1). There are also 40 percent party list electoral quotas for women in the Congress of Deputies and the Senate. A 2009 UN Economic and Social Council Report summarizes that affirmative action for

women is “mainstreamed into all the development policies of the Spanish Government, in addition to being a sectoral priority, in view of the need to respond to inequalities through the development of temporary affirmative action measures until gender equality is achieved” (Spain ESC Report, 2009, p. 8).<sup>36</sup> The Spanish case shows that real and effective and promote, even in the absence of a classical term, can be sufficient to constitute an affirmative action precommitment.

Terms such as “safeguard” and “protect” can also be tacit terms. Article 36 of the Pakistani Constitution maintains that “[t]he State shall safeguard the legitimate rights and interests of minorities, including their due representation in the Federal and Provincial services.” Again, we have no classical language and, thus, no clear textual indication as to whether “safeguard” intends to confer a group preference. The phrase “due representation” could be read to imply representation commensurate with relative population, some sort of proportional representation scheme. Such a scheme could be classified as affirmative action because minorities would be preferred in national and sub-national civil service hiring. However, art. 37(a) complicates the matter: “[t]he State shall promote, with special care, the educational and economic interests of the backward classes or areas....”<sup>37</sup> Here, we have the pairing of a classical and a tacit term, preceded by mandatory language, used to indicate a preference for backward classes or areas. Both arts. 36 and 37(a) first appeared in the 1973 Constitution, and as far back as its 1962 constitution Pakistan has shown its ability to distinguish textually between equality of opportunity and substantive equality.<sup>38</sup> Further discussion of the three subcontinent cases – India, Pakistan and Bangladesh – will highlight how shifting definitions of what it means to be a member of a “minority” group or “backward class”

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<sup>36</sup> Article 13 also uses the implied precommitment phrase “real and effective,” but it uses the express term “measures” as well.

<sup>37</sup> Waseem (1997) identifies four aspects of affirmative action in Pakistan. First, there is ethnic preference. Second, positive action laws in Pakistan are usually based on geographic region. Third, the policies are defined along sectoral lines. Finally, the implementation of policies is in part determined by the mobilization of a particular ethnic group.

<sup>38</sup> Chapter I, Art. 6(2)(2)(1), (2(a) of the 1962 constitution read, “[all citizens should be equal before the law, be entitled to equal protection of the law and be treated alike in all respects. This principle may be departed from where in the interest of equality itself it is necessary to compensate for existing inequalities, whether natural, social, economic or of any other kind....”

impacts judicial interpretation of who qualifies for state preferences and under what circumstances. All in all, it seems as if we have a situation similar to that found in Spain – classical language used for one provision, but tacit language used for another.

Even still, we know that “safeguard” as written into art. 36 does permit minority preferences because Pakistan has in fact implemented minority quotas for civil service appointments. In Pakistan, the state is the largest employer. In the years after independence, economic inequality among the regions began to grow as a result of uneven developmental activity in the educational, industrial and agricultural sectors, and increased inter-provincial flow of resources. Quotas were introduced to address this inequality. The first was introduced in 1948. Under the system East Bengal was to receive 40% of the civil service positions, 23% for Punjab, 2% for Karachi, 15% for all other provinces and 20% to be based on merit. This system failed to achieve its purpose of uplifting those from minority groups because migrants were benefiting from the preferences more than the locals. The quotas were extended under the 1956 and 1962 constitutions, for 15 and 10 years respectively. Then Pres. Yahya extended the quotas to the urban and rural sectors of Sindh province; under-represented rural Sindhis were given 60% representation in the federal and provincial services and over-represented, Urdu-speaking migrant urban Sindhis were given 40%. Under the 1973 Constitution the quotas were again extended and changed to embrace a greater number of Sindh settlers, reduce met-based seats from 20% to 10% and reschedule the share of constituent parts of post-Bangladesh Pakistan (Waseem, 1997).

“Protect” is another term that requires contextual interpretation. For example, art. 48 of the Chinese Constitution states that “women in the People’s Republic of China enjoy equal rights with men in all spheres of life, political, economic, cultural and social, and family life. The state *protects* the rights and interests of women, applies the principle of equal pay for equal work for men and women alike and trains and selects cadres from among women” (emphasis added). Further, under Art. 49(1) “[m]arriage, the family, and mother and child are *protected* by the state” (emphasis added). If we

interpret “protect” as synonymous with “safeguard” then it might be reasonable to conclude that these two provisions at least permit preferences for women. The plain language suggests that mothers receive state protection and fathers do not, but the existence of an affirmative action precommitment for women is questionable for at least three reasons. First, when read by itself, the language does not readily permit distinction between a preference and an equality/anti-discrimination. Second, when read together with the other sub-articles of art. 49, it seems that the overarching intent is not to protect women, but to protect the family unit. Finally, the article that immediately precedes art. 49 entitled “Gender Equality” does maintain that “the state protects the rights and interests of women,” but it does so by employing overt equality language. Thus, when arts. 48 and 49 are considered *in pari materia* the Chinese Constitution seems to have no women-specific precommitment.<sup>39</sup>

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<sup>39</sup> Chinese women have made significant strides toward equality since the ascendance of the Communist Party, but none of the laws enacted have been preferential. In 1950, marriage and family laws were changed to give men and women equal status in the home, equality in choice of occupation, and equality in possession of family property and inheritance rights (Hong, 1976, 546). However, more recently, Bulger (2000) argues that even despite constitutional protections, employment discrimination against women in China persists. Bulger recounts the story of Sun Lili who became pregnant without receiving permission from her employer’s family planning office. She had become pregnant and aborted twice before because she and her husband did not believe they would get employer approval. This time the couple decided to go through with the pregnancy, a decision which Sun’s work unit found inconvenient. The work unit demanded that Sun terminate her pregnancy. Sun refused and was eventually dismissed. All of Sun’s legal challenges to the decision failed.

In Bulger’s view, Sun’s story epitomizes the failures of the non-discrimination promises made to women in the Chinese Constitution, the Labor Law, the Law for the Protection of Women’s Rights and Interests. Many employers continue to prefer men to women to avoid maternity leave, Chinese women are under-represented in higher paying jobs, and women are often the last hired and first fired. In the EDU domain, the Chinese government has provided no incentives to ensure that boys and girls receive equal educational opportunities. Women’s advocacy organizations like the Coalition on Women’s Employment Rights (CWER) and the All-China Women’s Federation (ACWF) have protested against policies that steer women toward jobs as temporary domestic helpers, “periodic employment” proposals that would require women to stop working for several years after marriage or the birth of a child and earlier retirement ages for women than for men (Bulger, 2000).

As an aside, art. 16(1)(d) of Nigeria’s Constitution also contains an provision that uses “protect” and is not an affirmative action precommitment. “The State shall...without prejudice to the right of any person to participate in areas of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.” Nigeria does have a vicarious territorial precommitment, but this article accords no preference to any groups. Rather, it protects “every citizen.”

However, we know that art. 48 does in fact require affirmative action for women. As Guo & Yongnian (2008) point out, affirmative action for women began in 1949 with the establishment of the People's Republic of China. Preferential measures resulted in an increase in the proportion of women in the National People's Congress and the Chinese People's Political Consultants Conference. These achievements grew into the 1980s but then declined in the 1980s. There was a resurgence in the 1990s following the Fourth World Congress on Women in Beijing. Quotas for hiring were implemented and were effective. According to Guo & Zheng, there were 10 million female governmental officials across the country in 1991, approximately 31.2% of the total. The total rose to 12.4 million in 1994, or 32.5%; 13.8 million in 1997, or 34.4%; 14.9 million in 2000, or 36.2%; and 15.026 million in 2005, accounting for 38.9%. Women also made gains in senior official positions. In 1994, there was one woman vice premier in the State Council, 16 female ministers and deputy ministers, more than 300 female mayors and deputy majors; and 21,012 women judges. The share of women among NPC representatives also expanded. There were 626 women representatives at the Eighth NPC in 1993, accounting for 21% of the total, and 19 female Standing Committee members, making up 12.3%, 2 percentage points higher than the previous committee. The numbers increased in 1998 (Guo & Yongnian 2008, pp. 5-7).

If we examine the use of "protect" in an apparent Chinese LERN-specific affirmative action provision and compare the findings with those for women, we arrive at a similar result. Article 4 of the Chinese Constitution reads, in pertinent part,

[t]he state *protects* the lawful rights and interests of the minority nationalities and upholds and develops the relationship of equality, unity and mutual assistance among all of China's nationalities. Discrimination against and oppression of any nationality are prohibited; any acts that undermine the unity of the nationalities or instigate their secession are prohibited. The state helps the areas inhabited by minority nationalities speed up their economic and cultural development in accordance with the peculiarities and needs of the different minority nationalities (emphasis added).

Here, "protect" seems indicative of a tacit affirmative action precommitment because it is accompanied by a territorial precommitment, a subject which will be discussed in the next chapter.

Here, the territorial precommitment permits the state to prefer minority LERN groups through the use of territorial boundaries as a proxy. Additionally, there is provision for state “help” for areas inhabited by those minorities, and an expediting of development predicated upon the particular needs to those minority groups.

China’s art. 4 tacit LERN-specific precommitment has not only territorial elements, but also social aspects. Article 122, which reads, in pertinent part,

[t]he state gives financial, material and technical assistance to the minority nationalities to accelerate their economic and cultural development. The state helps the national autonomous areas train large numbers of cadres at different levels and specialized personnel and skilled workers of different professions and trades from among the nationality or nationalities in those areas.

Of the 56 state-designated ethnic groups the Han ethnic group comprises about 92% of the Chinese population. Redistributive justice has been the principle goal of China’s preferential policies in an effort to achieve equality-in-fact, an outcome simple equality of opportunity cannot produce (Sautman, 1998, pp. 87-88). Preferential policies in China affect marriage (minorities are permitted to marry at a younger age), family planning (under the 1992 family planning law urban Han are permitted to have one child while minority groups are permitted to have two) and education (special funds for minority education, a points-based preference system for admission to universities within and outside of minority areas) and in official positions. In the private sector, the 1993 Regulations on Work with the Urban National Minorities urges municipalities to encourage enterprises to recruit minorities, sometimes achieved through hiring quotas. With regard to representation in legislative organs, there are minority quotas for the National People’s Congress (NPC) as well for urban resident committees and local people’s congresses outside of the autonomies. While these broad preferences for Chinese minority nationalities have engendered some resentment among the Han, ethnic tensions over the policies have been relatively muted (Sautman, 1998).

The tacit precommitment terms discussed here show how determining whether an affirmative action precommitments were intended can be a rather involved task. To reiterate, textual,

historical and legislative context are crucial in identifying tacit precommitments. As with classical and equality provisions, interpretation of tacit provisions can change over time. Thus, a group preference that at one time is adjudged to be a violation of the equal protection principle can later be deemed constitutional as norms of what constitutes justice and fairness change, or as internal and external pressures dictate change. Indeed, the meaning of particular terms or phrases is not fixed, but subject to the political and cultural shifts among peoples and states. This means that categorization of specific particular terms as affirmative action precommitments must be a fluid, ongoing enterprise rather than a rigid and definite one. Certainly, interpretations of classical language are likely to be more stable over time as compared to tacit terms. However, just because a constitution mandates or permits “special measures” for women or LERN minorities does not mean that *any* preferential measure is constitutional. In the case of classical precommitments, the type of measure, along with the mode and method of effectuation, are subject to judicial interpretation which can change over time. In the case of tacit provisions, not only might the type of preferential policy be controversial, but whether preferences are authorized at all *may* be contested.

## CHAPTER 6

### UNCONVENTIONAL PRECOMMITMENTS TO AFFIRMATIVE ACTION

#### I. Territorial Precommitments

While classical and tacit precommitments may be the easiest to identify and parse, not all affirmative action precommitments employ readily identifiable language. Territorial affirmative action precommitments, which apply only to the LERN category, are less obvious. These provisions occur in constitutions enacted amidst a variety of socio-political contexts and cleavages, legal traditions, and economic systems. Like tacit precommitments, territorial precommitment identification requires an examination that proceeds beyond a plain language method of interpretation and toward an analysis of impact. As mentioned earlier, for a territorial provision to qualify as an affirmative action precommitment, three criteria must be met: (1) the territorial arrangement must be provided for in the constitution, (2) territorial boundaries must be largely coextensive with LERN boundaries and (3) the territories inhabited by minority LERN group(s), or the members of the groups thereof, must receive some government mandated or permitted preference that the territories inhabited by other group(s), or the members thereof, do not receive. Territorial affirmative action precommitments come in a variety of forms in which a constitution uses territorial divisions to convey various degrees of political, economic and cultural autonomy on LERN minority groups. This study identifies three types of territorial affirmative action provisions: autonomy, ethno-development schemes and conservation. There is some overlap among the three types.

Regardless of type, all require some form of ethno-federal arrangements in which the territorial boundaries of political subunits are more or less coextensive with ethnic boundaries. Under territorial autonomy precommitments, minority-inhabited areas are granted by the central government an autonomous or semi-autonomous status, thus conferring substantial control over their own political and economic institutions. Degrees of autonomy may vary among different

subunits of the same country. In the case of ethno-development precommitments, there is no outright grant of autonomy, but in an effort to address asymmetrical economic circumstances among majority and minority LERN groups, the state may implement policies targeting impoverished majority-minority sub-national units. Oftentimes ethno-development schemes involve economic incentives, subsidies or outright quotas to spur agricultural or industrial development, as well as enhanced financing to increase access to health care, education, housing and public employment. The principal difference between the autonomy and the ethno-development precommitments is that in the former case the central government takes on a passive role, allowing the LERN-minority sub-national unit to exercise authority in certain domains, while in the latter case the central government takes on an active role by redistributing economic resources to the under-developed LERN-minority subunit. In addition, conservation precommitments are usually embodied in provisions that allude to autonomy or economic redistribution, but use language that focuses more on conservation of indigenous culture, customs and resources.

A. Autonomy Precommitments

The precise constitutional language used to express territorial precommitments varies. In the case of autonomy precommitments, some provisions explicitly provide for autonomy. Other precommitments are more difficult to identify. Perhaps the most difficult cases to code are those in which, in practice, a multi-LERN state exhibits some scheme of authoritative devolution to a LERN minority political subunit, but constitutional language is threadbare or ambiguous as to whether certain of those sub-national units may or must receive preferential treatment. The cases of the US and Spain are instructive. As it pertains to territorial divisions, the US Constitution makes it clear that a federal system is contemplated and “States” shall be the principal political subunit. Although never defined, there is no indication that any one State can or must receive any preferential treatment. Moreover, there is ample evidence that the relationship between the central government and the states, as well as between the states themselves, is to be governed by the principle of equality.

Article IV(1) guarantees that each State give full faith and credit to the public acts records and judicial proceedings of other States. Under art. IV(2), “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” Only in art. IV(3) does the constitution mention a political subunit other than a state; “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.” However, the phrase “Territory or other Property” receives no elaboration.

Even if the Territoriality Clause seems textually ambiguous as to the creation of an ethno-federal arrangement that grants certain subunits varying degrees of autonomy in political decision-making, we know that such an arrangement does indeed exist. For example, aside from states, the US is comprised of several islands that are not “States,” such as American Samoa, the Virgin Islands, Puerto Rico and Native American tribal lands. For the purposes of this study, the inquiry is not so much upon what constitutional authority does the US rely to justify acquiring and holding territory, exercising sovereignty and dominion over them and incorporating them as non-“State” political subunits. This authority is well recognized (Leibowitz, 1979). Rather, the pertinent question is upon what constitutional authority does the US rely to justify treating the residents of such territories in a distinct, arguably preferential (or perhaps discriminatory), manner relative to the residents of “States”?

In the case of Puerto Rico, the so-called Insular Cases provide guidance. Specifically, the Court in *De Lima v. Bidwell*, 182 U.S. 1 (1901), made it clear that territory acquired by the US is within its “constitutional boundaries.” As an acquisition stemming from the Spanish-American War, the commander-in-chief has the authority to make decisions regarding the territory. After the end of military operations and the re-establishment of civil rule, the Congress has the power to legislate over the acquired territory within the limitations and prohibitions set by the Constitution. The Court

found that the Treaty of Paris that ceded Puerto Rico to the US was valid and that US authority over the island is plenary. The Court notes that the usual course of action would be admission to statehood; however, in this instance it was left to Congress. Legally, Puerto Rico became “a commonwealth” through its 1952 constitution. However, whether this designation has curtailed in any way the plenary congressional authority granted under the Territory Clause is a matter of dispute

Indeed, Puerto Rico and other American non-state subnational political units possess a status distinct from that of the states. According to Laughlin (1979), when Congress legislates for the territories it need not concern itself with conformity to the interstate commerce clause, enumerated powers or war powers provisions because the territorial clause “effectively deprives territories of the analogous sovereignty reserved to the states by the Tenth Amendment” (Laughlin, 1979, p. 340). However, the denial of analogous status does not necessarily mean the territories have lesser status. In some situation, the territories’ non-state status accords them more decision-making authority than states. For example, American Samoa, ceded to the US by articles signed in 1900 and 1904, has legal institutions that combine western law with traditional Samoan law. Its basic constitutional structure mirrors that of most American states, with executive, legislative and judicial branches. But under art 1, § 3 of the Samoan Constitution,

[i]t shall be the policy of the Government of American Samoa to protect persons of Samoan ancestry against alienation of their lands and the destruction of the Samoan way of life and language, contrary to their best interests. Such legislation as may be necessary may be enacted to protect the lands, customs, culture and traditional Samoan family organization of persons of Samoan ancestry, and to encourage business enterprises by such persons.

In accordance with this policy, American Samoa has enacted land alienation restrictions that prohibit the alienation of land to any person of less than fifty percent native Samoan ancestry. On its face, such a provision would seem to be a clear violation of the Equal Protection Clause because it discriminates based on race. However, in *Craddick v. Territorial Registrar*, AP No. 10-79 (1980), the High Court of American Samoa held that although it involved a suspect classification (race) the statute met the Fourteenth Amendment “strict scrutiny” because there was a compelling state

interest in preserving the lands of Samoa and the Samoan culture. The Samoan example shows that the American Constitution, arguably the most minimal and liberal in the sample, permits not only affirmative action for LERN minorities in the classical sense, but also through territorial arrangements that allow for autonomy in rule-making and economic distribution.

Conversely, Guam has been advocating for years for greater self-determination and authority over its political affairs. Under Organic Act legislation, Guam is designated an “unincorporated territory” and although its residents are US citizens, Guam is not a legal part of the US. Rather, it is “appurtenant to the United States and belongs to the United States” (Ruffatto, 1993, p. 385). In 1980, the Guam legislature established the Guam Commission on Self-Determination (CSD) and a 1992 referendum showed that three-quarters of residents favored commonwealth status and one quarter favoring statehood. Negotiations between the CSD and the US have made little progress with the US refusing to compromise on key reforms: (1) Chamorro (Guam’s indigenous group) rights to self-determination; (2) a 200-mile Exclusive Economic Zone; (3) mutual consent for the applicability of federal laws over the island; (4) US power of eminent domain in Guam; and (5) Guam’s participation in international organizations (Ruffatto, 1993, p. 388). Meanwhile, Micronesia, acquired by the US in 1945, was able to negotiate self-determination through a Compact of Free Association. US policy over Micronesia was initially dominated by concerns over military security. However, the overwhelming predominance of the military concern led the US to neglect economic development on the island. This neglect did not go unnoticed in the international community. In response, investments were made into the island and the US Secretary of the Interior established the Congress of Micronesia. Subsequently, negotiations over Micronesian sovereignty began to accelerate. After the Third Round of negotiations in 1971, Micronesia adopted its own constitution. In 1978, the constitution was ratified by the four islands that would later become the Federated States of Micronesia: Yap, Pohnpei, Truk and Kosrae. Palau and the Marshall Islands rejected the constitution and were later granted their own sovereignty (Ruffatto, 1993).

The cases of Puerto Rico, American Samoa and Guam show that the US Constitution's Territoriality Clause operates as a territoriality/autonomy precommitment insofar as it permits the state to engage in treatment of the LERN minority groups that reside there in a manner that is preferential to those who reside in "states." The examples also illustrate a hierarchy of sorts among the non-State entities (e.g., unincorporated vs. incorporated and unorganized v. organized). In the American case, the permissive nature of the precommitment and the broad congressional authority over the various types of units means that not only are preferential policies permitted, but also policies that discriminate negatively against the groups in question. For example, residents of American Samoa may have some rule-making authority over the transfer of ancestral lands; however, unlike the residents of Puerto Rico, the Virgin Islands and the Northern Mariana Islands, residents of American Samoa are legally considered "nationals," not citizens. (Faleomavaega, 1994, p. 115). While legal citizens, residents of American Samoa cannot vote in Presidential elections and have no representation in either chamber of the legislature. Further, Puerto Rican individuals and corporations are exempt from federal taxation laws, but they receive a disproportionately low share of federal funding for social programs such as Aid to Families with Dependent Children and Medicaid. This disparate treatment was upheld in *Harris v. Rosario*, 446 U.S. 651 (1980). Leibowitz (1978) aptly summarizes the dilemma.

The territorial government and its citizens have been subjected to broad federal action without political representation, equal treatment, and full economic participation. Even the territorial constitutions approved by Congress, which extended basic civil rights to territorial citizens do not establish an area beyond the reach of federal authority and are subject to congressional override. No criteria restrict the potential exercise of congressional authority to intrude upon local territorial matters. Neither judicial precedent nor legislative and executive action has established that the territories must be treated equally with the states or even with each other. Indeed, the operative principle appears to be that each territory will be treated individually, but the guidelines upon which this individual treatment rests have never been formulated (Leibowitz, 1978, p. 452).

His statement has application beyond the American context. Indeed, even in the case of group preferences in the form territorial autonomy, political sovereignty and cultural self-determination,

without outright independence LERN subunits operate in a socio-political limbo that is always changeable. In the cases just discussed, the devolution of power from the center is unilaterally revocable by the center, unlike the grant of authority in a federation. However, the mode and manner of revoking or amending the grant of authority has little impact on the categorization of both types of arrangements as territorial. Ultimately, any evaluation of whether actual preferential treatment exists for any LERN subunit is necessarily a case-specific, domain-specific and even an issue-specific endeavor.

The Spanish case also uses imprecise language when it comes to naming specific territories to be preferred. However, it differs greatly in the amount of attention paid to how its system is to be organized, how self-determination through a process of autonomy can be achieved and the powers granted to self-governing units. Article 2 attempts to strike a balance between the national and multi-national imperatives; “[t]he Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all.” In its Part on “Territorial Organization of the State” the document maintains “The State is organized territorially into municipalities, provinces and the Selfgoverning Communities that may be constituted. All these bodies shall enjoy selfgovernment for the management of their respective interests” (Spain Const. art. 137). Furthermore, art. 138 provides for “a fair and adequate economic balance between the different areas of the Spanish territory” to effectuate the principle of national solidarity articulated in art. 2. In striking the economic balance, “special consideration,” is given to island territories. Territories have the right to form Self-governing Communities. These include “provinces with common historic, cultural and economic characteristics, insular territories and provinces with a historic regional status may accede to self-government and form Self-governing Communities (Comunidades Autónomas) in conformity with the provisions contained in this Part and in the respective Statutes” (Spain Const. art. 143(1)). Territories that do not meet the above

criteria may also seek self-governing status through a Statute of Autonomy, but through a process mediated by the Cortes Generales rather than through the referendum.

Section 148 enumerates the extensive powers granted to Self-governing Communities. They include organization of its institutions of government, transportation systems within the territory, economic development within the territory and protection of culture, language and customs. Sections 156 and 157 elaborate on the “financial autonomy” of the territories. – taxes and other revenue-raising policies must be implemented in coordination with the state treasury and must conform to the principle of Spanish solidarity. Section 149 enumerates the competencies of the state, which are much broader. Key areas include regulation of basic conditions guaranteeing equality, international relations and defense, and monetary and judicial systems. Under § 150(2) some of the state powers may be delegated to the Self-governing Territories. For example, seven of the 17 autonomous regions have taken over the provision of healthcare from the state. However, complete power has not been transferred from the Instituto Nacional de la Salud, and the provision of services varies greatly among the regions (Reverte-Cejudo & Sanchez-Bayle, 1999). The Spanish Constitution outlines the procedure for drafting the Statutes of Autonomy (Spain Const. §§ 151, 152) and how the relationship between the state and the territories is to be managed (§§ 154, 155). Finally, §§ 158(1) and (2) makes a clear reference to LERN territorial preference; “[a]n allocation may be made in the State Budget to the Self-governing Communities in proportion to the amount of State services and activities for which they have assumed responsibility and to guarantee a minimum level of basic public services throughout Spanish territory.” More to the point, “[w]ith the aim of redressing inter-territorial economic imbalances and implementing the principle of solidarity, a compensation fund shall be set up for investment expenditure, the resources of which shall be distributed by the Cortes Generales among the Selfgoverning Communities and provinces, as the case may be.”

For Spain, the eighteenth and nineteenth centuries were a time of authoritarianism and centralism. Later, various decentralization projects attempted, such as Catalonia's *Mancomunidad* autonomy movement during the Second Republic (1931-36) and the grant of the Basque autonomy statute in 1936, but true progress came only after democratic transition in 1978. As described above, the autonomy provisions of 1978 constitution offer the possibility of autonomy but the territories' constitutions remain secondary to the Constitution. Disputes over the division of powers between the central and autonomous governments are adjudicated by the Constitutional Court (Aja, 2001). Discrepancies between powers sought and powers sought have historically generated centrifugal tendencies, often culminating in armed conflict, in communities such as the Basque region and Catalonia. Franco's obsession with anti-communism and anti-separatism in the pursuit of national unity denied these culturally unique communities' pursuit of self-determination and rejection of assimilationism. Ethnic differences, however, remained palpable. Euskadi Ta Askatasuna (ETA) took up arms in its battle for Basque autonomy while other groups sought greater autonomy through more peaceful means.

Guibernau (1995) argues that § 2 was the most controversial provision of the 1978 constitution because it "exemplifies the tension between the unity of Spain and the social pressure to recognise historic nations such as Catalonia, Galicia and the Basque Country..." (Guibernau, 1995, p. 245).<sup>40</sup> These three territories were granted immediate autonomy under the constitution as "historic nationalities" while others had to wait for five years. In the end, however, all territories that are granted self-governing status, regardless of process, receive the same rights of self-determination. Residents of Catalan and the Basque Country, which represent distinct LERN minority groups within Spain, disapprove this uniformity and instead favor "asymmetrical decentralization" of authority in a manner that permits them enhanced autonomy. The Basque region does have greater

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<sup>40</sup> Conversi (2000) argues that "the objective of a homogenous Spain has competed with a pluralist vision of Spanishness since the beginning of the nineteenth century and both are part of the centuries-long political practice in which centralising attempts clashed with regional resistance" (Conversi, 2000, p. 122).

authority over taxation than most other regions, which means that residents do not pay income, corporate, wealth or inheritance taxes to the central government. The Basque government does pay a *cupo*, or compensatory tax, to the central government as remuneration for services rendered. Included in this compensation is a contribution to the Inter-territorial solidarity fund, a fund designed to help poor regions grow, in accordance with obligations set forth under § 158(2). With the exception of Navarra, the other regions are legally classified as “common” regimes, with limited taxation powers and a consequent reliance on wealth transfers from the central government. Among the common regimes, there were initial asymmetries in the devolution of fiscal authority, however, reforms made in 1993, 2001 and 2001 has largely removed them (Garcia-Mila & McGuire, 2007). Garcia-Mila & McGuire argue that this territorial scheme has benefitted Spain by easing some of the political tensions among nationalists in the Basque, Catalonia and Galicia.

The Territoriality Clause in the US Constitution embodies a minimal, rather vague permissive affirmative action territorial precommitment. The Spanish constitution was ambiguous as to the precise territories to be granted autonomy, but was detailed as to the process of achieving self-government. In other cases, however, preferential territorial precommitment provisions are even more remarkable because they explicitly name the preferred territories. The cases of Russia and Pakistan illustrate the point. Under the 1993 Russian Federation Constitution. Article 3(1) acknowledges the Russian Federation as a multinational one. Under Art. 5(1) “[t]he Russian Federation shall consist of republics, territories, regions, federal cities, an autonomous region and autonomous areas, which shall be equal subjects of the Russian Federation.” Further, art. 5(2) maintains that “[t]he republic (state) shall have its own constitution and legislation. A territory, region, federal city, autonomous region and autonomous area shall have its own charter and legislation.” Article 5(3) describes the balance of power between the state and its “constituent entities” (republics, krais, oblasts, autonomous oblasts and autonomous okrugs), while also incorporating an equality precommitment and a reference to the “self-determination of peoples in

the Russian Federation” as a basis of its federal structure. Then, art. 5(4) states the constitution’s position on the relationship between the constituent entities and between the constituent entities and the state more plainly; “[a]ll constituent entities of the Russian Federation shall be equal with one another in relation with federal State government bodies.” Such a statement seems to be intrinsically at odds with the hierarchy of sub-national units mentioned in Art. 5(1) and listed in art. 65, as well as with basic principles of self-determination.

By way of background, Medushevsky (2006) posits that Russia has undergone three major constitutional cycles since the early twentieth century. These phases are structurally similar. The first was the 1905-1907 constitutional revolution, the transition from absolutism to monarchical constitutionalism, and then to the sham constitutionalism embodied in the April 1906 Russian Fundamental Law and its subsequent iterations. The second cycle manifested in the toppling of the monarchy and the establishment of a republican regime under a dictatorship and nominal constitutionalism. This cycle had three stages: (1) deconstitutionalization through transition from monarchy to republic and repeal of old legislation (1917); (2) constitutionalization in the form of a democratic constitution enacted by the Constituent Assembly in 1918; and (3) reconstitutionalization and an outright rejection of the constitution and liberal constitutionalism. The third cycle also has three similar stages: (1) deconstitutionalization – a crisis of legitimacy and nominal constitutionalism in the Soviet Union (1989-1991); (2) constitutionalization, in the form of the 1993 Russian Constitution; and (3) reconstitutionalization which has been occurring since 2000 (Medushevsky, 2006, p. 16-17).

Recognition of national identity was an integral part of the Bolshevik strategy. Both Stalin and Lenin publicly supported the right of self-determination. As Walker demonstrates, these overtures may have been more strategic than ideological. Many Bolsheviks thought that support of self-determination would divert attention away from more serious matters, such as the military threat of counter-revolutionary forces. Moreover, support for self-determination was merely a recognition

of the political status quo, and may have been a hedge against outright secession (Walker, 1984, pp. 47-48). The reality was that both Lenin and Stalin wanted to reabsorb minority areas, and by 1922 it had occurred (Walker, 1984, pp. 50-51). Even though the 1924, 1936 and 1977 Soviet constitutions all permitted secession, any talk of serious self-determination or secession was largely rhetorical. Walker identifies several strategic purposes: (1) for internal propaganda purposes; (2) for external propaganda purposes – to convince the colonies of the Third World that the Soviets were adherents to self-determination; (3) to advance the appeal of the republic nearby groups; (4) to aid the Communist parties of multi-national states in believing the Soviet Union to be the motherland of socialism and self-determination; (5) to correct policy on the national question (Walker, 1984, pp. 52-57).

Mirsky (1997) provides an alternate view. The Soviet Union was a highly centralized totalitarian regime, but with substantial local autonomy granted to local elites who were an integral part of the overall ruling class. Curiously, this process of elite-building in a communist state structure also resulted in the promotion of the national consciousness of diverse ethnic groups. Mirsky (1997) remarks how great efforts were made to foster native culture and artistry. Mirsky explains this encouragement of ethnic identity by the influence of the Marxist ideology, the practical political advantages gained by supporting local ethnic groups and using that support to reinforce regime loyalty (Mirsky, 1997, p. 3). Soviet republics were ranked according to their weight and importance. According to Mirsky, the “basic” nations were referred to as republics. Others were deemed autonomous Union republics, national *okrugs* (areas) or autonomous *oblasts* (regions). Regarding the ethnic groups, there were fifteen Union Republics, twenty autonomous republics, eight autonomous *oblasts* and ten autonomous *okrugs*. No meaningful objective criteria explain the classification. The only ascertainable purpose was divide and rule by the Kremlin. Stated succinctly, “[t]he hierarchical setup was a recipe for permanent national ethnic tension” (Mirsky, 1997, p. 5). The least populous

ethnic groups had no official statehood at all; their small numbers made them easy to ignore.

Groups with a few more numbers had the lowest degree of statehood, and so on.

This territorial scheme proved effective for some time; however, during the collapse of the Soviet Union ethnic grievances and claims for autonomy surfaced. *Perestroika* and *Glasnost* and Gorbachev's de-Stalinization effectively doomed the Soviet regime and its Marxist-Leninist ideology. Amidst the ensuing economic collapse, several republics demanded Sovereignty. The Baltic republics sought outright secession." In what Lankina (2009) calls the "parade of sovereignties," "[p]owerful and resource-rich republics like Tatarstan and Bashkortostan declared sovereignty, adopted their own constitutions, elected presidents and parliaments, and pursued paradiplomacy with foreign nations. Other ethnic republics were quick to follow their lead" (Lankina, 2009, p. 227). Mirsky opines that ethnic nationalism and calls for liberation did not play a decisive role in the demise of the Soviet Union. Rather, it was the culmination of the demise and the cause of ethnic violence in post-Soviet Georgia, Ossetia, Moldova and other states (Mirsky, 1997, p. 9).

Stoner-Weiss (2004) agrees with Lankina's assessment; "...Yeltsin's political jockeying with Gorbachev in 1990 and 1991 for Russia's supremacy over the unraveling USSR also undoubtedly hastened the devolution of power from USSR to Russian Republic and from Russian Republic to constituent provinces" (Stoner-Weiss 2004, 302). Many constituent territories readily adopted the new constitution, although many adopted constitutions which violate the Russian constitution (Ross, 2002, p. 35). However, several republics rejected the constitution and voter turnout was below 50% in some places. Chechnya engaged in outright boycott the referendum. When combined with a lack of federal democratic culture, the new constitution was viewed as illegitimate and subject to interpretation by the republics and other constituent territories (Ross, 2002, p. 31). To preempt the wholesale secession of these territories, Yeltsin embraced the assertions of autonomy. While this prevented complete secession, republics gained control over their own natural resources and revenues, designed their own institutions and enacted laws at policies that were at times contrary to

laws promulgated by the federal constitution or legislation. To quote Ross, “as long as republic and regional leaders pledged support for Yeltsin and ‘brought home the bacon,’ in the way of ethnic stability, tax revenues and electoral support federal authorities have been quite happy to turn a blind eye to the flagrant violations of the Russian Constitution by regional elites” (Ross, 2002, p. 157). Four of five autonomous oblasts – Adigai, Gorno-Altai, Karachia, and Khakassia – declared themselves republics. Ross argues that the greater the degree of autonomy granted, the more authoritarian the subnational unit becomes.

Decisions as to the recognition of minorities were generally made arbitrarily by the state. For example, Khazanov (1995) points out that in 1929 there were 194 nationalities, 109 in 1939, 106 in 1970 and 101 in 1979 (Khazanov, 1995, p. 98). Some minorities were forced to change their nationality. Muslim minorities in Azerbaidjan, such as the Talysh and Tats were forced to register as Azerbaidjanis. Members of the Pamir ethnic group were forced to register as Tadjiks. Ironically, these attempts at assimilation usually invigorated ethnic nationalism. According to Kkazanov (1995) the phenomenon of ethnic nationalism in the Russian Federation is distinct for three reasons. First, because the population size, socio-economic development and degree of dispersal vary so greatly, the demands of the groups also vary greatly, ranging from demands for maximum political and economic independence to simple cultural autonomy. Second, titular nationalities constitute a majority in only 8 of the twenty-one republics, while in 10 they constitute 30% or less. Third, Russia is an ethno-territorial federation.

Tatarstan, one of two Muslim republics, held a referendum on independence shortly after the collapse of the USSR. The referendum passed and, in response, Russia a series of federative agreements to all constituent regions. Tatarstan rejected the offer, but later agreed to a series of treaties that established a “special” relationship between Tatarstan and Moscow. It was the leadership of Mintimer Shaimiev, a seasoned Soviet-era politician, and his emphasis on stability, consent and unity that helped Tatarstan achieve self-rule. His more gradualist “autonomy” approach

was often at odds with the radical secessionist approach of Tatar nationalists, but it did allow for the devolution of greater authority from Moscow without widespread ethnic conflict. He advocated the equality and inclusion of all peoples in Tatarstan, rather than exclusion, as shown in the 1990 Declaration of the State Sovereignty of the Republic of Tatarstan. The 1992 Constitution of the Republic of Tatarstan focused on economic sovereignty. In 1992, Tatarstan was granted republic status, and in 1994 became a signatory to additional power-sharing treaties that permitted management of economic affairs and conduct of international affairs (Williams, 2011). Specifically, “...it reserved for [Tatarstan] a special set of rights that other regions did not share – in particular, control over key social and educational programs that enabled the preservation of Tatar ethnicity” (Stoner-Weiss, 2004, p. 303). Tatarstan also gained control over its mineral resources. This brief review shows how a majority-Muslim Tatarstan sought and eventually achieved semi-autonomous status, a status duly recognized in the Russian Constitution and one that imparts a preference that is not imparted to other sub-units.

Not all cases are so clear-cut when determining whether a preference is actually applied in a manner that confers a preference on a group. As in Russia, the 1973 Pakistan Constitution incorporates a typology of subnational units based principally on degree autonomy from the central government. Among other units, it specifically distinguishes between provincial governments and Federal Administered Tribal Areas (FATA). Under the 1973 constitution, Pakistan is comprised of four provinces: Punjab, Sindh, Baluchistan and the North-West Frontier Province (NWFP). It is also comprised of a federal capital (Islamabad), Federally Administered Tribal Areas<sup>41</sup> and Provincially Administered Tribal Areas.<sup>42</sup> Both Provinces and Tribal Areas are subject to executive authority.

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<sup>41</sup> Under art. 246(c) these areas include Tribal Areas adjoining Peshawar district; Tribal Areas adjoining Kohat district; Tribal Areas adjoining Bannu district; Tribal Areas adjoining Dera Ismail Khan district; Bajaur Agency; Orakzai Agency; Mohmand Agency; Khyber Agency; Kurram Agency; North Waziristan Agency, and South Waziristan Agency.

<sup>42</sup> Under art. 246(b) these areas include the districts of Chitral, Dir and Swat (which includes Kalam), [the Tribal Area in Kohistan district,] Malakand Protected Area, the Tribal Area adjoining [Mansehra] district and the

However, with regard to legislative authority, acts of parliament do not apply to Tribal Areas unless so directed by the President (Pak. Const. art. 247(3)). Conversely, the operation of provincial governments is more limited, subject to the supremacy of federal legislation (Pak. Const. art. 143). Neither the Supreme Court nor any high court has jurisdiction over the FATA. Thus, it seems that FATA and Tatarstan are similarly situated with regard to the disproportionate benefits that semi-autonomy can bring. However, apparently independence for the FATA does not come without a cost. As Ali (1999) notes, the constitution “reaffirms the separate legal status of the tribal areas, continuing in the tradition of the colonial powers of simply “containing” the “unruly tribals” rather than extending to them the rights and privileges which are theirs as responsible and equal citizens of an independent country” (Ali, 1999, p. 45). Using FATA as an example, Ali characterizes the legal framework that governs ethnic minorities, specifically affirmative action measures, as counter-productive because it inadequately distinguishes between ethnic and religious groups, thus restricting the availability of citizenship and resources to minorities.

Unitary states can also have autonomy precommitments. Article X, § 1 of the Philippine Constitution designates Muslim Mindanao and the Cordilleras as “autonomous regions.” These regions are created by organic act of congress with input from the regional consultative commission. The act defines the “basic structure of government for the region” including the executive department and legislative assembly and special courts with personal, family, and property law in a manner consistent with the provisions of the national Constitution (Phil. Const. art. X, § 18). The President exercises only “general supervision” over autonomous regions (Phil. Const. art. X, § 16). The grant of autonomy to Mindanao came amidst the historical backdrop of decades of conflict between the ten ethnic groups that make up Muslim Mindanao and: (1) the Spanish when it colonized most of the Philippines in 1565, but tried unsuccessfully to occupy the

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former State of Amb. They also include Zhob district, Loralai district (excluding Duki Tehsil), Dalbandis Tehsil of Chagai District and Marri and Bugti tribal territories of Sibi district.

Mindanao region an convert its inhabitants from Islam to Catholicism; (2) the US when it occupied the islands after defeating Spain in Spanish-American War and implemented a program aimed at the secularization of Mindanao peoples; and (3) against the Philippine government after it denied Mindanao autonomy and continued repressive US policies after independence in 1946 (Islam, 1998).

In response to land confiscation and increasing poverty, the Mindanao Independence Movement (MIM) was formed with the goal of independence. After some of its leaders were co-opted, the MIM was succeeded by the Moro National Liberation Front (MNLF) which engaged in armed conflict with the Marcos government. A short-lived ceasefire was reached, in the form of the form of the 1976 Tripoli Agreement, a splinter group, the Moro Islamic Liberation Front (MILF) was formed. In return for support for Corazon Aquino's call for a democratic government, MNLF and MILF were promised autonomy. The 1987 reflects this promise; however, the constitution provisions pertain only to four provinces while the earlier Tripoli Agreement granted autonomy to thirteen provinces (Islam, 1998). A subsequent agreement between the Ramos regime and the MNLF made the MNLF the overseer of economic projects in all Mindanao projects for 3 years.

Finally, it may be important to distinguish between autonomy and outright secession. The Ethiopian Constitution enshrines the right of every nation, nationality or people to self-determination, including secession (Eth. Const. arts. 39 (1), (4)). While the enumerated requirements to actual secession are rigorous, Abbay (2004) argues that Art. 39 has two purposes

On the one hand, it is designed to serve as a threatening stick against the perennially centralizing and assimilationist forces. On the other hand, not only does it give people the feeling that they are part of the Ethiopian household of their own free will, but it may also give them the feeling that their equitable access to power is safeguarded (Abbay, 2004, p. 608).

There are at least seventy cultural groups in Ethiopia, with the Oromo, Amhara, Tigray, Afar and Somali being the largest. There also exists a significant religious cleavage, with Christian and Muslim each accounting for 40% of the population. Since 1889, the Amharic people have occupied a position of privilege in Ethiopian society. The emergence of Addis Ababa and the construction of a

railroad linking the city with the French port of Djibouti cemented their dominance. In the 1950s the Ethiopian state was a unitary one and followed a strict program of assimilationism. Ethnic particularization was viewed as anathema to nation-building, thus the project of amharization was undertaken, principally through the elevation of the Amharic language and the denigration of minority languages as well as English. These developments, along with unbalanced economic and educational policies contributed to what Abbay “centrifugal inclinations” in the Ethiopian state (Abbay, 2004, pp. 595-597). These attempts at manufacturing homogeneity ultimately failed, as evidenced by the secession of Eritrea and the accommodation of the Oromo amidst the backdrop of secessionist threat (Abbay, 2004).

The succession of ethnic conflicts led Ethiopia to jettison the unitary ideal and embrace a federal model that could mitigate potentially destabilizing conflict and continue trends toward accommodation. The federal concept was introduced by the Ethiopian People’s Revolutionary Democratic Front (EPRDF) in 1991. It was proposed to resolve the war between the EPRDF – a coalition of four ethnic groups – and the Amhar-dominated government. EPRDF believed that a federal arrangement would address “the legacy of the ethnic domination and marginalization in the history of the Ethiopian state” and the “Amhara hegemony” which should be replaced by EPRDF leadership (Aalen, 2006 245-246). However, in practice, the new federal system allocates most economic power to the executive, which then doles out grants to state governments to run their respective administrations. Article 37(f) of the Pakistani Constitution is similar; “[t]he State shall enable the people of different areas, through education, training, agricultural and industrial development and other methods, to participate fully in all forms of national activities, including employment in the service of Pakistan....”

The examination of cases in this section was meant to highlight the variety of ways constitutions memorialize precommitments to degrees of autonomy for a variety of sub-national units. There seems to be a fundamental aversion to outright secession, although there are overtures

to the norm of self-determination in Russia, rhetoric about self-determination was used to prevent movements for secession, a failed strategy in Walker's view (Walker, 1984, p. 60). This approach seems to have also failed in Spain, with the cases of Catalonia and Basque country being illustrative. There are many factors at play in determining whether and how degrees of autonomy are conferred; the ideological predisposition of the regime in power; whether violence is used by independence-seeking minorities and the timing in which claims for preferences are pressed; geo-strategic concerns about how important a territory is politically or militarily, as in the case of Washington, DC; or whether increased autonomy might jeopardize the economic health of the state, as in the case of Catalonia.

#### B. Ethno-development Precommitments

Russia, Pakistan and the Philippines are examples of ethno-federal states with autonomous or semi-autonomous sub-national units in which LERN minorities enjoy preferences that those in majority subunits do not. Ethno-development precommitments differ in that they do not necessarily confer autonomy but do constitutionally authorize economic redistribution to minorities based on territory. Although ethno-development schemes may be authorized by legislation, few cases receive explicit mention. Articles 4 and 122 of the Chinese Constitution have already been discussed. The Indian case offers another example. Article 38(2) of the Indian Constitution asserts that “[t]he State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.” This provision is a clear combination of a social precommitment, evidenced by the patent commitment to alleviating income inequality, and a territorial precommitment, made apparent by the reference to “different areas.”

The Nigerian Constitution contains a mandatory ethno-development precommitment focused primarily on civil service employment. Articles 14(1) and (3) states, in its entirety,

(1) The Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice. The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, -and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few States or from a few ethnic or other sectional groups in that Government or in any of its agencies.

The Nigerian Federal Character Commission (FCC) was established through legislation 1996 to “promote, monitor and enforce compliance with the principles of the proportional sharing of all bureaucratic, economic, media and political posts at all levels of government.” Neither the relevant constitutional provisions nor the FCC’s enacting legislation mention ethnicity or religion as a basis for reservations made under the principle. Rather, the FCC statute maintains, in pertinent part, that the commission is tasked with creating “an equitable formula ... for distribution of socio-economic services, amenities and infrastructural facilities” and “modalities and schemes for redressing the problems of imbalances and reducing the fear of relative deprivation and marginalization in the Nigerian system of federalism as it obtains in the public and private sectors....” (FCC A, Part I (4)(1)(d)(i)(ii)). The legislation calls for formulae on both the federal and state levels to enforce to enforce “equitable representation in all national institutions and in public enterprises and organizations” (FCC B, Part I (1)). This means that under Nigeria’s federal character policy, persons belonging to ethnic and religious minority groups do in fact receive a preference with regard to civil service employment at the state and federal levels. Furthermore, because state boundaries are largely coextensive with ethnic boundaries, certain states are intended to receive greater preferences than others.

China presents an example of the overlap between autonomy and ethno-development. art. 4 of the Chinese Constitution reads, in pertinent part,

The state helps the areas inhabited by minority nationalities speed up their economic and cultural development in accordance with the particularities and needs of the different minority nationalities. Regional autonomy is practised in areas where people of minority nationalities live in compact communities; in these areas organs of self- government are

established for the exercise of the right of autonomy. All the national autonomous areas are inalienable parts of the People's Republic of China. The people of all nationalities have the freedom to use and develop their own spoken and written languages, and to preserve or reform their own ways and customs.

Article 122 reinforces art. 3

The state provides financial, material and technical assistance to the minority nationalities to help accelerate their economic and cultural development. The state helps the national autonomous areas train large numbers of cadres at various levels and specialized personnel and skilled persons of various professions and trades from among the nationality or nationalities in those areas.

Article 113 establishes political preferences minorities *within* the minority autonomous region

In the people's congress of an autonomous region, prefecture or county, in addition to the deputies of the nationality or nationalities exercising regional autonomy in the administrative area, the other nationalities inhabiting the area are also entitled to appropriate representation. The chairmanship and vice- chairmanships of the standing committee of the people's congress of an autonomous region, prefecture or county shall include a citizen or citizens of the nationality or nationalities exercising regional autonomy in the area concerned.

Finally, art. 114 preserves minority political control over their regions; “[t]he administrative head of an autonomous region, prefecture or county shall be a citizen of the nationality, or of one of the nationalities, exercising regional autonomy in the area concerned.”

When the CCP came to power in 1949 it implemented two policies on minorities. First, China was to be a unitary state composed of numerous equal ethnic groups, none of which has the right to secede. Second, the minorities have a right to autonomy (Mackerras, 2003, p. 21). The early years of the CCP saw gains for minorities, but the class orientation of the Cultural Revolution, combined with the rebellion in Tibet, led to the erosion of minority autonomy. Subsequent reforms reinstated autonomy. Inner Mongolia was the first of the five autonomous regions to be established in 1947. The 1984 Law of Regional Autonomy (LRA) memorialized the rules for autonomous subdivisions. Sautman (1998) contends that China has some of the broadest and deepest preferential policies for minorities. There are 156 ethnic minority autonomous areas, composed of five regions, 30 prefectures and 121 counties. Most minorities live in rural areas. China's preferential policies,

referred to as *youbui zhengce*, are an effort to achieve equality-in-fact (*shishishandge pingdeng*) between ethnic groups, as most of these areas are impoverished and underdeveloped.

Not only do minorities receive economic benefits, but they also receive cultural benefits such as vacation days from work to attend traditional festivities and holidays, exceptions from family planning policies such as marriage laws and the “one child” policy. There are also substantial educational preferences for minority children, including the Ethnic Minorities Education Aid Special Fund (*shaoshu minzu jiaoyu buzhu zhuankuan*) Project Hope (*xinwang gongcheng*) and the Border Areas Construction Aid Fund (*banjing diqujianshe buzhu fei*). Minorities also receive preference in attending university outside of their homes. In the area of employment, minorities enjoy preferences in civil service appointments and hiring quotas in some sectors. There are also quotas for minority representation in local government bodies, but not within the CCP leadership (Sautman 2009). Some minorities have been able to take advantage of micro-credit programs (Gustafsson & Shi 2003, p. 808).

The autonomous system does, however, have its restrictions. The LRA stipulates that autonomy must be under unified state leadership, apply the principle of democratic centralism and place the interests of the state above anything else. In addition, the laws of the autonomous entities must be approved by higher bodies: the laws of the five autonomous regions (Inner Mongolia, Guangxi, Ningxia, Xinjiang and Tibet) must be approved by the NPC Standing Committee, and the laws of the 30 autonomous prefectures and 124 counties must be approved at the provincial level. Even still, the LRA affords autonomous areas’ legislatures flexibility in passing laws that non-autonomous areas are not afforded. The State Council’s 1992 Circular on Some Questions about Further Implementation of the LRA directs that state investment prefer minority areas. Minority areas can offer more investment incentives to firms in non-minority areas and can retain a greater proportion of taxes. A second set of regulations, the 1993 Regulations on the Administration of Ethnic Townships, give minority areas preferential access to infrastructure and natural resource

development, use local languages in instruction and schools may employ more staff than in other areas. Finally, under the 1993 Regulation on Urban Nationality Work, subsidized loans, other funds and teachers are allocated for *minzu ban* (ethnic cohorts), cities must protect ethnic structures and minority customs (Sautman, 1999, p. 293). An obvious explanation for the expanse of preferences available to China's minorities is socialism and the companion imprimatur of economic redistribution and substantive equality. According to Hawkins (1978) it is the combination of regional autonomy and Marxism-Leninism that makes China's minority policies unique. China's move toward regional autonomy occurred over a ten-year period, culminating in the 1949 Common Program and later in the 1954 Constitution. As indicated in the previous chapter, Russia also has a rather nuanced scheme or hierarchy of autonomous subdivisions and, like China has a long history of affirmative action (Martin 2001).

### C. Conservation Precommitments

Conservation provisions differ from autonomy and ethno-development provisions in that they tend to emphasize protecting the land and culture of indigenous groups. These provisions tend to be easily recognizable. Article 66 of the Thai Constitution provides an instructive example;

[p]ersons so assembling as to be a community, a local community or a traditional community shall have the right to conserve or restore their customs, local knowledge, good arts and culture of their community and of the nation and participate in the management, maintenance, preservation and exploitation of natural resources, the environment and the biological diversity in a balanced and sustainable fashion.

Article 13(6) of the Philippines Constitution contains similar language;

[t]he State shall apply the principles of agrarian reform or stewardship, whenever applicable in accordance with law, in the disposition or utilization of other natural resources, including lands of the public domain under lease or concession suitable to agriculture, subject to prior rights, homestead rights of small settlers, and the rights of indigenous communities to their ancestral lands.

Finally, art. 231(2) of the Brazilian Constitution maintains that “[t]he lands traditionally occupied by Indians are destined for their permanent possession, and they shall be entitled to the exclusive

infrastructure of the riches of the soil, rivers and lakes existing thereon.” Furthermore, under art. 23, § 3, Indians may, with the approval of the National Congress, use water resources and exploit mineral wealth on indigenous lands. Under art. 231, § 5, absent catastrophe or epidemic, indigenous groups may only be removed from their land by referendum of the National Congress. As bolstering provisions, art. 215, § 1 makes it clear that the state “shall protect” indigenous and Afro-Brazilian cultures and art. 210, § 2 permits indigenous groups to be educated in their native languages.

The Colombian case illustrates how autonomy and conservation can overlap in practice. Columbia confers territorial preferences on its indigenous ethnic groups. Article 176 of the Colombian Constitution states that “[t]he law may establish a special electoral district to ensure the participation in the Chamber of Representatives of ethnic groups and political minorities and Colombians resident abroad. Up to five representatives may be elected for this district.” Under art. 246 “[t]he authorities of the indigenous (Indian) peoples may exercise their jurisdictional functions within their territorial jurisdiction in accordance with their own laws and procedures provided these are not contrary to the Constitution and the laws of the Republic. The law will establish the forms of coordination of this special jurisdiction with the national judicial system.” Finally, under art. 330 “[i]n accordance with the Constitution and the laws, the indigenous (Indian) territories will be governed by councils formed and regulated according to the customs of their communities.” The 1991 Colombian Constitution departed from previous legislation by granting increased autonomy and ethnic self-determination. Legislation passed under the Constitution creates Indigenous Territorial Entities (ETI), autonomous units for indigenous minorities. ETIs could supersede the previous Spanish-era indigenous reserve system, the *resguardo*, which permitted ethnic groups like the Paez to use but not own the land. ETIs could permit the indigenous to gain political control over the *resguardo*, and non-indigenous groups can stay so long as the rules of the indigenous groups permit (Field, 1996).

Indigenous mobilization, beginning in 1971, against exploitation and illegal land appropriation helped prompt the constitutional reforms in Colombia. Prior to this mobilization, Columbia's policy toward the indigenous was assimilationist. During the 1991 national constituent assembly, three of the 70 participants were from indigenous groups (Garcia-Guadilla & Hurtado, 2000, p. 9). Two of the delegates represented the Colombian National Indigenous Organization (ONIC) and the Southwest Indigenous Authorities (AISO), organizations concerned with agrarian reform and the rights of traditional ethnic minorities. The third indigenous participant was appointed. These delegates were successful in having their agenda included in the constitution for two main reasons. First, the groups had an alliance with a centre-left bloc in the National Assembly, led by ASM-19, which had the ability to block legislation. Second, the delegates espoused the ideas of indigenous rights which coincided with Pres. Gaviria's pronouncements about democracy and human rights (Van Cott 2002, 49). In Van Cott's (2002) view, "[c]onstitutional recognition of autonomous territories for indigenous peoples and, to a lesser extent, Pacific Coast black communities, was facilitated by a strong movement for municipal decentralization among a significant sector of the political elite and non-traditional actors represented in the Constituent Assembly" (Van Cott, 2002, p. 50). Indigenous representatives were able to insert their interests into that framework with little opposition. Eventually over 100 *resguardos* were created for the indigenous communities. They also secured legislation that transferred state resources to the *resguardos*. Disbursement of these funds began in 1994, and as of March 1997 each *resguardo* was receiving \$61,000. The indigenous also received support from the new Constitutional Court for exercise of indigenous customary law.

The analysis of territorial precommitments was intended to bring to light the appropriateness of viewing constitutionally prescribed, ethnically-based territorial arrangements through the lens of affirmative action and group preference. The principal objective was to illustrate the different types of arrangements, how those types can overlap and be mutually reinforcing in practice, and to raise

questions about determining whether preferences exist. Although overlapping, the three types are distinct. Autonomy precommitments are more panoramic and all-encompassing than the other two. They involve a devolution of power that encompasses several issue domains. Conversely, the ethno-federal type focuses mainly on economic redistribution to ethnic groups whose populations are largely contiguous with territorial boundaries. Finally conservation is largely about cultural preservation.

## II. Social Arrangements

Social precommitments may operate in a manner sufficient to support state-authorized preferences for target groups. Social precommitments can qualify as affirmative action because of the significant overlap between class cleavages on the one hand, and LERN and gender cleavages on the other. This study classifies social precommitments into three types: (1) cases that are *socialist* because they contain provisions that use the term “socialist” in reference to the state; (2) cases that are *social* because, although they do not contain provisions that use the term “socialist,” they do contain provisions that mandate or permit “social justice,” “social welfare,” resource redistribution amongst social groups and/or provide for entitlements such as social security, housing assistance or health care; and (3) cases that are constitutionally *asocial* because they contain no provisions that clearly indicate the state’s responsibility or option to redistribute resources amongst social groups. These classifications refer to the state as a whole, rather than to a specific provision, and even within these categories there can be wide variation in how certain state’s economies operate in practice. These differences can be in both the type of measures the state may use, as well as the degree to which they may be used.

The cases presented in this section are analyzed mainly by geography and religion (Islam). We can see that three non-majority-Muslim Asian cases - the PRC, Vietnam and India - are formally socialist. The PRC has the most clearly worded statement of socialist intent. Several articles make its intent clear, however Article 1 conveys the overall principle quite cogently: “[t]he People's Republic

of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants. The socialist system is the basic system of the People's Republic of China.” The form of socialism practiced in China is must be distinguished from others in the sample, simply because it is generally considered a non-democracy. Popular elections for local people’s congresses (legislative bodies) are held on the local level; however, elections for congresses at higher levels permit voter participation by deputies elected at the level immediately below. Thus members of the National People’s Congress (NPC) and the President are not directly popularly elected and the Communist Party - ostensibly the only party - maintains effective control over legislative affairs.

Like China, art. 1 of Vietnam’s Constitution also makes its socialist intent clear: “[t]he Socialist Republic of Vietnam is an independent and sovereign country enjoying unity and territorial integrity.” Even prior to the Vietnam War, the three Soviet-borrowed tenets of socialist legality, democratic centralism and collective mastery formed the foundation for what became for the socialist legal principles that undergirded the state. According to these principles, law comes from the state, but the state itself is not constrained by laws. The Party is the leader of both the state and the people. Finally, individual rights must be subordinate to the collective good (Gillespie, 2005, pp. 49-50). As early as 1955, North Vietnam pursued an economic development program of fast collectivization, a shift away from agriculture and a preference in favor of producer goods rather than consumer goods.<sup>43</sup> After its victory over the South, North Vietnam instituted a five-year plan (1976-1980) aimed at alleviating a host of post-war problems, including the differences in standards of living between the north and south, urban unemployment, lack of security and loyalty among those in the South, and reconstruction of agriculture and industry (Tran, 1994, p. 7).

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<sup>43</sup> These policies led to runaway inflation, which the leadership attempted to address with monetary reform in 1959. Inflation did subside, but resurfaced two years later. This was accompanied by a substantial decrease in rice production. Foreign economic aid provided some temporary solution (Tran, 1994, p. 5).

These socialist principles were combined with the revolutionary and moral precepts espoused by Ho Chi Minh. State economic management took firm root, particularly after the Fourth Vietnam Workers Party Congress in 1976. Subsequently, the party adopted its *doi moi* reform program officially at its Sixth National Congress in December 1986. The reforms stemmed from an accumulation of economic difficulties, a policy uncertain about the party's competence, a loss of confidence within the leadership and demonstration effects spurred by other countries (Turley, 1993, p. 1). Even with the market-oriented *doi moi* reforms, Vietnam remains staunchly socialist. Turley (1993) attributes the similarities between Vietnam and China to several factors: (1) the manner in which the socialists came to power (social revolution through guerilla warfare), (2) power based on peasants within agrarian societies rather than the proletariat in an industrial society, (3) shared culture, (4) geographical proximity, (5) familiarity between the two parties' leadership and (6) the presence of the Chinese experience in Vietnamese political debates.

Finally, the Indian Constitution's precommitment to socialism is made most explicit in its 42<sup>nd</sup> Amendment, which came into force in 1976 and clarified the social imperatives articulated in articles 36-51. The amendment substituted the words "sovereign democratic republic" with "sovereign socialist secular democratic republic." As relayed by the amendment's Statement of Objects and Reasons, the impetus for the change was the attempts of "vested interests" to subvert the democratic institutions to promote their own selfish interests rather than "end[ing] poverty and ignorance and disease and inequality of opportunity." Articles 39, 41, 43, 43A, 45 and 47 detail the obligation of the state to the citizenry in fulfilling its socialist agenda. Generally speaking, the Indian constitution, socialism is aimed at achieving human dignity, stability, peace and progress. As former Justice of the India Supreme Court P.B. Sawant states,

There is no master and no servant. All are owners and equal partners in the process of production and distribution which has to be organized for the greatest good of all. It is practicable to achieve that said goal by intelligent planning of the use of resources and by evolving a cooperative and participatory model of management of production and distribution it is not and cannot be disputed that man can intelligently use the resources for

the benefit of all. If that is so, there cannot be a rational objection to any system which intends to do so. That is the essence of the concept of socialism. It is the concept of socialism which was also in the contemplation of the framers of our Constitution (Sawant, 1994, p. 3).

According to Sawant, the framers of the Indian Constitution did not envision a totalitarian socialism similar to that of the former Soviet Union, Eastern Europe or China. Instead, India was to implement its own version of democratic socialism with political parties, civil rights as fundamental rights and social autonomy. The lack of these ingredients is what led to the failure of socialism in its totalitarian form. In his view, there can be neither democracy nor socialism unless the state ensures both political and economic rights.

If we examine the four remaining Asia-Pacific cases – Thailand, South Korea, Japan and the Philippines – we see that all lack the overt socialist language of China and Vietnam. However, Thailand, the Philippines and the ROK do demonstrate social leanings. Although the ROK is a former Japanese colony and, like Japan, had American legal influence since its independence<sup>44</sup>, its constitution does make social democratic overtures which are notably absent from the US Constitution. Article 119 reads that the state may “regulate and coordinate economic affairs in order to maintain the balanced growth and stability of the national economy, *to ensure proper distribution of income, to prevent the domination of the market and the abuse of economic power*, and to democratize the economy through harmony among the economic agents.” This provision seems to be limited by art. 126<sup>45</sup> arguably because of the American liberal influence in their post-war constitution-making processes. Nevertheless, the constitution’s commitment to distributive justice is a departure from orthodox liberalism, albeit not nearly the departure undertaken by the “Socialist Constitution” of its peninsular counterpart, the Democratic People’s Republic of Korea (North Korea).

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<sup>44</sup> For example, the South Korean Constitution has a preamble, individual rights and freedoms, separation of powers and a rigorous amendment process (Ahn, 1997, p. 73).

<sup>45</sup> Under this article, “private enterprises may not be nationalized nor transferred to ownership by a local government, nor shall their management be controlled or administered by the State, except in cases as prescribed by law to meet urgent necessities of national defense or the national economy.”

Like the ROK, the Philippines has a legal tradition with notable American influence (in addition to the Islamic adat and Spanish civil law traditions). It also has social precommitments. Article 2(9) obliges the state to pursue policies that free the people from poverty, provide adequate social services, promote full employment and raise the overall standard of living. The succeeding article incorporates social justice as an integral part of national development. Labor protections are contained in Section 18 and respect for private enterprise is found in Sec. 20. When read together, art. XII, § 1 and art. XIII, § 1 encapsulate the Philippine Constitution's "social" position:

The goals of the national economy are a more equitable distribution of opportunities, income, and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key raising the quality of life for all, especially the underprivileged.

In addition,

The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good. To this end, the State shall regulate the acquisition, ownership, use, and disposition of property and its increments.<sup>46</sup>

Thailand and Japan lie at the other end of the social "spectrum." Article 84(1) of Thailand's Constitution calls for a "free and fair economy based upon market forces and encourage sustainable economic development through repealing and refraining from enacting business-controlling laws and regulations that do not correspond to the economic necessity....) Under art. 84(6) the fair distribution of income is stated as an economic goal, but the constitution makes no other readily identifiable social overtures. Finally, Japan's has a minimal social precommitment. Under art. 25(2), "[i]n all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health." Article 25 entitles all citizens to a minimum standard of

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<sup>46</sup> Because the provision refers not only to "measures" but also the reduction of inequalities through redistribution, Art. 13(1) could be both an express and social precommitment. The 1935 constitution also attempted some balance between the social and the liberal (Benitez, 1935).

living. Japan's post-war constitution – the Meiji or Imperial Constitution – placed sovereignty in the Emperor. Popular rights were curtailed and the duty to obey and serve the emperor was absolute. Conversely, Japan's 1947 constitution instituted popular sovereignty, with the emperor granted symbolic powers, and mandated pacifism. Under the supervision of General MacArthur, a specially-appointed panel laid the foundation for the 1947 constitution. The constitution was adopted after the first democratic elections in June 1946 and did include several fundamental human rights provisions (Hook & McCormack, 2001). These provisions ensure non-discrimination in “political, economic or social relations because of race, creed, sex, social status or family origin” (Japan Const. art. 14, and equality between the sexes in marriage (Japan Const. art. 24). However, absent from the constitution is any mention of a social, socialist or communist institutional orientation. We do find allusions to a social impulse in statements guaranteeing “right of workers to organize and to bargain and act collectively” (Japan Const. Art. 28), and the right of the state to appropriate private property for public use with just compensation (Japan Const. art. 29).

All seven majority Muslim cases in the sample – Iran, Indonesia, Pakistan, Bangladesh, Egypt, Turkey, Nigeria - have social precommitments. However, as in the Asian-Pacific cases, there are varying degrees. According to Ismail (1989) the Islamic state must behave as a Vice-Regent of God and successor to the Holy Prophet. It must discharge its duty by creating those conditions within the state which are necessary for the people to realize the purpose of their own creation. Ismail identifies two cardinal principles of an Islamic economy. The first is the prohibition of *riba*, or interest. It is prohibited because it promotes selfishness and greed, traits which are inimical to the fraternity and human sympathy reverence to Allah requires. The second is charity. In an Islamic state the economy must be balanced. The profit motive is permitted, but only to the extent that it conforms to the moral imperatives of Islam.

From a production standpoint, individuals must realize that they are actually not producing, but simply manipulating raw materials that have been produced by Allah. Thus, contrary to a secular

state, an Islamic state's perspective on economic management elevates recognition of the true relationship between the Creator and man. Regarding distribution, Ismail examines the four factors of production (land, labor, capital and entrepreneur) and poses the following question in his critique of the capitalist model: "how far can a contract entered into between a hungry labourer and a belly-filled entrepreneur be called equitable? In the joint venture of the four [factors], the labour seems to have been shabbily treated, in spite of being as much human as the landlord, the capitalist and the entrepreneur" (Ismail, 1989, p. 337). The Islamic state must collect *zakat* (charitable donations) and distribute the proceeds to those most in need, such as widows, the orphaned and the poor. The Islamic state is one which strives to create a welfare state, characterized by Ismail as one which aspires to provide gainful employment is available, with income sufficient to educate one's children, help poor neighbors and pay taxes.

In the sample, all majority Muslim cases except Nigeria have constitutional provisions that make Islam the state religion. For example, Islam is the state religion of Pakistan (Pak. Const. art. 2) and the state shall take steps "to order their lives in accordance with the fundamental principles and basic concepts of Islam and to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Quran and Sunnah" (Pak. Const. art. 31). Articles 37 and 38 enhance the document's social impulse with express affirmative action precommitments to backward classes or areas (Pak. Const. art. 37(a)), by ensuring just and humane conditions of work (Pak. Const. art. 37(e)), by reducing wealth disparities (Pak. Const. art. 38(e)) and by "preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants (Pak. Const. art. 38(a)). Furthermore, the Pakistan constitution makes the following statement in the succeeding article: "[t]he State shall ensure the elimination of all

forms of exploitation and the gradual fulfillment of the fundamental principle, from each according to his ability to each according to his work.”<sup>47</sup>

The constitutions of the other majority-Muslim cases contain similar language. Not surprisingly, the 1972 Bangladesh constitution (suspended in the 1982 coup and reinstated in 1986) contains a proclamation that Islam religion, (Bang. Const. art. 2a) followed shortly thereafter by a succinct statement of its fundamental principles; “[t]he principles of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, together with the principles derived from them as set out in this Part, shall constitute the fundamental principles of state policy”<sup>48</sup> (Bang. Const. art. 8(1)). These “fundamental principles of state policy” Bangladesh permits state intervention in the social democratic mold. Indeed, the synthesis between democracy and socialism (referred to as Mujibism in Bangladesh) was the most important issue debated by the constitution’s framers at the Constituent Assembly (Huq, 1973; Jahan, 1973). The constitution provides for fundamental individual rights inspired by the liberal tradition; however, under Art. 13 the people own and control the means of production through the state and cooperatives, and Art. 14 requires the state to “emancipate the toiling masses the peasants and workers and backward sections of the people from all forms and exploitation.” Nasir brought “Arab

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<sup>47</sup> This analysis is supported by historical and political events that preceded the enactment of the 1973 Pakistan constitution. As early as the 1960s, even before the partition of Bangladesh, Pakistan showed socialist leanings (Jawed, 1975; Chengappa, 2002). Much of the success of Zulfikar Bhutto’s Pakistan Peoples Party (PPP) in the 1970 elections can be traced to his emphasis on “Islamic Socialism.” As related by Richter (1979), “during the first yeas of Pakistan, capitalism dominated. The upper class tortured the workers and became very wealthy by exploiting them. ... The lower class developed a hatred for capitalism. Then Mr. Bhutto came with the demand for Socialism and there was much support for this” (Richter, 1979, p. 553). The PPPs charter acknowledged the need to protect peasants with a form of socialism with the influence of Islamic values (Monshipouri & Samuel 1995, 977-978).

<sup>48</sup> The transition to socialism in Bangladesh was facilitated by the installation of a parliamentary government, and by permitting the state to requisition of private property without the possibility of legal challenge. Socialism was an integral part of the political platform of the Awami League (AL), the party that had the most support during the constitution-drafting process and which won 292 of 299 parliamentary seats in the 1973 elections. (Maniruzzaman, 1975, pp. 892-93). After the constitution was implemented the size of the public sector increased from 34% to 92% as the AL nationalized abandoned industrial assets, textiles, sugar, banking and insurance. This effort, however, was short-lived as the assassination of Sheikn Mujibhir Rahman along with persistent economic losses, low worker productivity and poor public sector management led to a rethinking of industrial policy (Kochanek, 1996, pp. 710-711).

Socialism”<sup>49</sup> to Egypt and its principles are reflected in its constitution. Egypt is “a democratic, socialist State based on the alliance of the working forces of the people”<sup>50</sup> (Egypt. Const. art. 1) and has Islam as the state religion (Egypt. Const. art. 2). Likewise, Turkey is a “social” state (Turk. Const. art. 2) and must “strive for the removal of political, social and economic obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state...” (Turk. Const. art. 4). The social awakening occurred in Turkey after the 1960 revolution. The social sentiment of the Turkey constitution is clear. Finally, the nexus between Islam and the Iranian Constitution can be summed up by Khan’s (1988) observations

The Iranian Constitution incorporates the principles of socialist justice and roots them into the framework of Islamic values.... The hard-core Islamic clergy, is founded upon the thesis than an Islamic state ... is essentially an egalitarian state. – but rooted of course in the will of God. ...While rejecting both secular socialism and corruptive capitalism the Iranian Constitution gives new meaning to the concept of “Islamic socialism” by attempting to synthesize social justice with Islamic standards (Khan 1988, 293).

Thus, the 1979 Iranian Constitution: (1) rejects capitalist modes of production and the concentration of privately-held wealth (Iran Const. art. 43); (2) vests the guardians of ideology are with decision-making authority – the Guardian Council (Iran Const. art. 91); and (3) embraces the principles of distributive justice and socio-economic rights (Iran Const. arts. 3(12); 28(2); 29; 31; 43; and 48) (Khan, 1988).

Nigeria and Indonesia are the two majority-Muslim cases that do not have Islam as the state religion. So to what can we attribute the social impulse evident in both cases? In the case of

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<sup>49</sup> In Ayubi’s (1980) view Nasserist socialism was more like state capitalism (Ayubi, 1980, p. 485).

<sup>50</sup> Article 4 provides elaboration; “[t]he economic foundation of the Arab Republic of Egypt is a socialist democratic system based on sufficiency and justice in a manner preventing exploitation, conducive to liquidation of income differences, protecting legitimate earnings, and guaranteeing the equity of the distribution of public duties and responsibilities.” The socialist turn in Egypt began in 1952 with land reforms imposed by President Nasir. He continued in 1961 with the promulgation of “Socialist Laws” intended to bring about the realization of what he termed “Arab Socialism.” Measures included the nationalization of all banks and insurance companies, the inclusion of a “workers’ representative” on all boards of directors and an increase in taxes on the upper class (Kerr, 1962, pp. 128-130).

Indonesia, the Islamic influence is apparent although it is not a formal Islamic state because, under art. 29(1) of its constitution, “[t]he state shall be based on belief in only one God.” While it does not reference Islam specifically, we do know, however, that Indonesia experienced Islamization since the 13<sup>th</sup> century and currently has a Muslim population of 86% Muslim, the largest Muslim population of any country in the world. Articles 33(2) under the document’s “Social Welfare” chapter Indonesia’s economy shall be organized as a common endeavor and the state shall control the most important branches of production, along with natural resources for the benefit of the people. Respect for *zakat* is also evident in art. 34; “[The poor as well as destitute children shall be cared for by the state.” Thus, it is reasonable to conclude that Indonesian socialism is a product of Islam. The influence of Islam may also be the reason why Indonesia is the only case with a pre-WWII constitution that also has a social precommitment.

In the Nigerian case, the constitution grants the state substantial power over the economy. The state may “(b) control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity... (Nig. Const. art. 16(1)(b)). The state must also ensure that “the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group...” (Nig. Const. art. 16(2)(c)). Nigeria’s 1979 Constitution Drafting Committee engaged in much debate over whether the document should adopt any ideological preference. Specifically, there was fervent disagreement over economic matters, with the Sub-Committee on National Objectives and Public Accountability arguing in favor of an overt commitment to socialism<sup>51</sup> and the whole committee firmly against it. The language that was eventually adopted makes no specific mention of socialism. However, when the two above-

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<sup>51</sup> The Sub-Committee advocated for the following language; “within the concept of a participatory democracy, informed by the ideals of Liberty, Equality and Justice, the state shall, as a long term goal strive toward a socialist order based on the public ownership and control of the means of production and distribution” (Read, 1979, p. 137).

mentioned provisions are read together a case can be made that some moderated “social” influence can be found in Nigeria’s effort to preserve its mixed-economy heritage (Read, 1979). Moreover, the language could be said to be a form of African Socialism, popularized by Ghanaian President Kwame Nkrumah.

Three of the four Latin American countries – Brazil, Argentina and Colombia – have social precommitments. Social tendencies in Brazilian constitutions is nothing new. An analysis by Wyler (1949) shows that beginning with Brazil’s 1937 Constitution, Brazil had become influenced by Italian, Portuguese and German ideas. The 1937 constitution permits state intervention into private enterprise, but “only in so far as it supplies the deficiencies of private initiative and coordinates the factors of production” and to introduce “the thought of the interests of the Nation” into individual competition (1937 Braz. Const. art. 135). Labor, however receives substantial protection; “[i]ntellectual, technical and manual labor has the right to protection and special care of the State” (1937 Braz. Const. art. 136). Article 137 enumerates the labor protections. They include collective labor contracts, the right to weekly rest and paid vacation, a minimum wage, an eight-hour work day and a right to medical insurance. However, even amid the special protections for labor, the 1937 constitution effectively outlaws the Communist Party (Wyler, 1949, p. 58). Labor protections are also found in the 1988 Brazilian Constitution (Comparato, 1990). Article 1(IV) makes it clear that Brazil is a social democracy that acknowledges “the social value of labor and of free enterprise.” Furthermore, one of Brazil’s stated objectives is “to eradicate poverty and substandard living conditions and to reduce social and regional inequalities...” (1988 Braz. Const. art. 3(III). Workers’ rights are included under Art. 7 of the “Social Rights” chapter and are far more extensive than those listed in the 1937 constitution. Brazil’s economic order must be in accordance with “the dictates of social justice” (1988 Braz. Const. art. 170).

Like Brazil, Colombia is a social state (Col. Const. art. 1) that protects the economically vulnerable (Col. Const. art. 13). Chapter 5, entitled “Concerning the Social Purpose of the State and

of the Public Services” elaborates in relative detail the obligations of the state to secure the general welfare and improve the quality of life (Col. Const. Art. 366). Public expenditures receive budgetary priority (Col. Const. art. 366). Regarding labor, in Colombia, “[w]ork is a right and a social obligation and in all its forms enjoys the special protection of the state. Every person is entitled to a job under dignified and equitable conditions” (Col. Const. art. 25). The same article, in conjunction with arts. 39 and 53 - 57, recognizes the legitimacy of labor unions and workers’ rights. Article 48 provides for social security and art. 58 protects and promotes collective forms of property. The state is responsible for the general management of the Colombian economy (Col. Const. art. 334) and makes “special effort” to ensure full employment and the availability of goods for the poor (Col. Const. art. 334). Free enterprise in Colombia is promoted, so long as it observes its “social function.”

In the cases of Argentina and Mexico, both countries exhibited what Ameringer (2009) refers to as the “socialist impulse,” but only in Argentina do we find an explicit social declaration. The social and economic reforms found in Mexico’s 1917 constitution, advocated by Zapata, Díaz Soto y Gama and later by anarchists and *jacobinos obregonistas* at the constitutional convention, undeniably gave the state more interventionist authority over industry and land use. The Mexican socialist state grew through the 1970s, but the ideal began to fade after the 1982 oil crisis crippled Mexico’s economy. President Miguel de la Madrid, elected in 1982, then instituted neo-liberal policies and privatized state-owned enterprises (Ameringer, 2009, pp. 4-7). Mexico’s constitution does, however, contain state control over natural resources (Mex. Const. art. 27) and worker’s rights protections reminiscent of Brazil and Colombia (Mex. Const. art. 123.1). Perhaps the most liberal of the cases is Argentina, and a reasonable explanation is readily available. An economic boom early in the twentieth century attracted Italian and Spanish immigration to and British investment in Argentina. These immigrants encountered discrimination and began political agitation, drawing on European anarchist and syndicalist movements. Combined with Argentine intellectuals like José Ingenieros and Juan Justo, the socialist movement was able to invigorate the political and economic

transformation that occurred under the Peron regime. Article 14(b) of the constitution provides for social security and art. 75(19) empowers Congress to embark upon “economic progress with social justice” and “to promote differential policies in order to balance the relative unequal development of the provinces and regions.” However, many economists attribute Argentina’s 1989 financial crisis to the failure of Peron’s statist policies, thus creating the political opening for a more liberal free-market economy instituted by Menem (Miller, 1993).

Next, we have the European cases: Russia, Ukraine, France and Germany. That the Eastern European cases – Russian and Ukraine – have social precommitments is not surprising, given their communist legacies. Russia is a social democracy that supports the labor and health of its citizens (Russ. Const art. 7(1)). However, its constitution guarantees “the integrity of economic space, free flow of goods, services and financial resources, support of competition, and the freedom of economic activity...” (Russ. Const art. 8(1)). This is a clear departure from the overtly socialist language used in the former Soviet constitution. However, as we have seen in cases such as Vietnam *doi moi*, eventual moderation seems to be less of an anomaly and more of a trend. The Ukrainian Constitution is also a social democracy (Ukr. Const. art. 1). Additional provisions emphasize the social orientation of the economy. Article 13 states plainly that “[p]roperty entails responsibility. Property shall not be used to the detriment of the individual or the society.” The language of art. 41 bolsters Ukraine’s social qualification to the ownership and use of private property. Although everyone has “the right to own, use, or dispose of his property,” “[t]he use of property shall not prejudice the rights, freedoms, and dignity of citizens [or] the interests of society....” Economic competition, as well as workers’ rights, are protected (Ukr. Const. art. 42; 43-46). Medical care, a minimum standard of living and housing (Ukr. Const. arts. 49, 48, 47).

The Western European constitutions also memorialize social democratic principles. Article 2(1) of the French Constitution declares the French state as social, but the minimalist document mentions little else in the way of state power, economic institutions or labor. In this way, France’s

1958 Fifth Republic constitution differs from the 1946 constitution which did make clear reference to these concerns in its Preamble. This difference between the two constitutions makes sense, for as Wahl (1958) notes Cold War liberals inspired the 1958 constitution as much as the socialists inspired its immediate predecessor (Wahl, 1959, p. 377). Language ostensibly directed at banning the Communist Party was considered but ultimately left out (Wahl, 1958, p. 368). Germany is also a social state (Germ. Const. art. 20(1)) and permits state taking beyond simple eminent domain: “[l]and and landed property, natural resources and means of production may, for the purpose of socialisation, be transferred to public ownership or other forms of publicly controlled economy by way of a law which shall regulate the nature and extent of compensation” (Germ. Const. art. 15). Like France and Germany, Italy is a social state. Although “private economic initiative is free” (Italy Const. art. 41), private enterprise may not conflict with social utility and “the law determines the appropriate programs and controls is “a democratic republic based on labor” (Italy Const. art. 1), and will remove obstacles which prevent “the effective participation by all workers in the political, economic and social organization of the country” (Italy. Const. art. 3; arts. 35-40; art. 46).

### III. Conclusion

The primary objective of Chapters 5 and 6 was to elucidate a basic conceptual framework with which to evaluate the existence and prevalence of different categories of constitutional precommitments to affirmative action. When constitutional precommitments to affirmative action are viewed through the conceptual lens provided here we can see how multifarious and multidimensional they are. To properly understand the constitutional underpinnings of affirmative action all of the categories and sub-categories must be considered together in a synergistic way. The synergy, in addition to the periodic overlap, of the types is what permits the true nature of preferences for LERN minorities and women to be made clear. Conversely, traditional approaches to affirmative action applied no general method of classification. The categories articulated here are intended to facilitate technical and substantive evaluation of the precise terminology used to

construct precommitments to affirmative action, as well as how that language may be interpreted in various political moments. To be sure, other categorization schemes may be possible. However, the framework elucidated here is parsimonious and efficient created so that it may be easily improved.

## CHAPTER 7

### AFFIRMATIVE ACTION PRECOMMITMENTS FOR WOMEN

#### I. Introduction

The previous two chapters developed a framework that can be used to identify affirmative action provisions in constitutions and to help us understand how those provisions can operate singularly or cooperatively to confer preferences on certain groups. This chapter is concerned chiefly with applying those categories to women. Four issue domains will be examined: political (POL), economic/employment (ECON/EMP), education (EDU) and cultural (CULT). This chapter examines affirmative action precommitments within and across domains. Of particular interest is the prevalence of types and sub-types of precommitments within issue domains and the proposal of hypotheses to explain preference prevalence differences across types, sub-types, domains and target group categories. The social varieties of precommitments are, unless accompanied by a direct mention of a domain, non-domain specific.

#### II. A Note on Group and Domain Sub-types

In addition to the four broad categories of precommitments – classical, tacit, territorial and social – precommitments can also be categorized as group-specific or non-group-specific. As the name indicates, non-group-specific precommitments do not mention a specific group, but rather embody a much broader precommitment to any group that may deserve preferential treatment, as adjudged by state officials in interpreting the constitution. Non-group-specific, non-domain-specific precommitments are the most expansive form of affirmative action precommitments. For example, art. 28(H)(2) of the Indonesian Constitution provides a classical, minimalist example: “[e]very person shall have the right to receive facilitation and special treatment to have the same opportunity and benefit in order to achieve equality and fairness.” The use of the classical term “special” indicates that the intended goal is equality of outcome or substantive equality; thus, it supports the legality of state-instituted preferential treatment for any person. The provision mentions neither a specific

group nor a specific issue domain, making it potentially applicable to all groups and all domains. The language in § 30 of Thailand's Constitution is similar; with "measures" effectively substituted for "special"; "[m]easures determined by the State in order to eliminate obstacles to or to promote persons' ability to exercise their rights and liberties as other persons shall not be deemed as unjust discrimination...." Article 9(2) of the SA Constitution also uses "measures" to assist persons or categories of persons "disadvantaged by unfair discrimination." These provisions illustrate a general model for articulating non-group-specific affirmative action precommitments. The breadth of these provisions give legislatures great latitude in passing preferential legislation and give courts similar latitude in interpreting statutes in a manner favorable to minority groups.

The Columbian and Argentine Constitutions also contain non-group-specific, non-domain-specific provisions, replacing the classical terms "special" and "measures" with the tacit terms "real and effective" and "promote" while still retaining the underlying sentiment of eliminating undue discriminatory obstacles that act as an encumbrance on the full exercise of constitutionally guaranteed rights and liberties. Article 13 of the Columbian Constitution maintains "[t]he state will promote the conditions necessary in order that equality may be real and effective and shall adopt measures in favor of groups which are discriminated against or marginalized." Similarly, in Argentina the state must "[p]romote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective, to remove the obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life (Arg. Const. art. 9(2)). Finally, art. 13(1) of the Filipino Constitution adopts perhaps the most powerful non-group-specific, non-domain-specific recommitment, combining it with a social precommitment and emphasizing economic and political redistribution; "[t]he Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good."

Group-specific affirmative action precommitments are precommitments that identify a specific group of persons to be the target of the state-mandated or -permitted preference. By identifying a particular group as the recipient of preferential treatment, constitutional framers acknowledge historical discrimination against the said group and the state's obligation to mandate or permit certain actions to remedy the material consequences of the discrimination. Group-specific precommitments differ from non-group-specific precommitments in several ways. First, they allow a constitution's framers to define the potential pool of preference recipients so as to not only include groups, but to exclude groups that are not entitled to a preference. This can most easily be seen in precommitments for women. As discussed above, Art. 35 of the Ethiopian Constitution provides for "special attention" for women because of the "historical legacy of inequality and discrimination suffered by women...." The obvious implication is that men are not the targets of the preference and thus have no right to initiate litigation to enforce such a right. Second, group-specific precommitments can make target groups' legal claims easier to prove should litigation arise over the constitutionality of affirmative action legislation. Group-specific precommitments can offer greater interpretive certainty to bodies (supreme courts, constitutional courts) tasked with adjudicating legal disputes over the proper identification of target groups. However, there can also be drawbacks to group-specific precommitments. Their lack of flexibility may hinder preferential opportunities for groups which may not have been originally intended by the framers, but who subsequently are found to be worthy. Additionally, group specificity might require any group not specified to seek a constitutional amendment, a very arduous undertaking in most states.

Affirmative action precommitments may also respond to a certain issue domain. Non-domain-specific provision can theoretically apply to any domain. The Indonesian and Thai examples discussed in the previous section are instructive. As stated above, this study uses four domains for both women and LERN minorities: POL, ECON/EMP, EDU and CULT. Several examples of domain-specific provisions of the group-specific variety are presented throughout this chapter. With

regard to domain-specific provisions of the non-group-specific variety, they often take the form of a general “right to” a particular service provided by the state to all citizens. For example, art. 6 of the Brazilian Constitution states, “[e]ducation, health, nutrition, labor, housing, leisure, security, social security, protection of motherhood and childhood and assistance to the destitute, are social rights, as set forth in this Constitution.” Here, art. 6 mentions several domains and essentially operates as a more detailed art. 3, which is Brazil’s primary social precommitment. Other constitutions contain provisions that apply to singular domains such as EDU (e.g. Russ. Const. art. 43, § 1; Phil. Const. art. XIV, § 1; Turk. Const. art. 42); Ukr. Const. art. 53) and ECON/EMP (e.g. Iran Const. arts. 29, 43, § 1; Spain Const. art. 41; Thai Const. art. 55; ROK Const. art. 34). These provisions are important insofar as they may buttress or be interpreted as adjunctive to other preferential precommitments, as the discussion of the Brazilian case in the chapter will illustrate. However, for the purposes of this study, neither social nor equality precommitments are categorized by domain. Thus, non-group-specific, domain-specific provisions will not play a major role in the instant analysis, but can be the subject of future research.

### III. Non-group-specific precommitments

Before analyzing the precommitments for women, a brief elaboration of the prevalence of non-group-specific, non-domain-specific precommitments is warranted. Of the 30 cases studied, only eight had a non-group specific, non-domain-specific precommitment. Given its marriage of classical and social precommitments, the Philippines non-group-specific precommitment appears to be the most legally robust model for interested constitution-makers to adopt. Indonesia, Colombia and Spain have social precommitments as well, but none combine the social and non-group-specific and only in the case of Spain is the redistributionary imprimatur as well articulated as it is in the Filipino Constitution. All states enacted their current constitutions after WWII; however, aside from that broad commonality, it is difficult to determine why these countries chose to incorporate a non-group-specific, non-domain-specific precommitment. They are not geographically linked and have

diverse legal traditions. All are ethnically or racially diverse to varying degrees, and the Catholic, Muslim and Buddhist traditions are all represented. Not even all constitutions were enacted under democratic regimes or during transition toward democracy – Thailand’s constitution was passed under the rule of a military junta in 2007. In all of these cases, constitutions also contain provisions indicating LERN and women-specific precommitments.

It is difficult to determine why so few cases have non-group-specific affirmative action precommitments. One might speculate that too general a grant of rights may result in interpretive ambiguity for legislators and judges. This might lead to a preference “free for all” and any group with even a marginal claim for redress may attempt to make a claim. Such a situation might be detrimental to judicial economy and may divert sometimes scarce legal resources away from more meritorious claims. The result can be administrative inefficiencies and undue delays in resolving crucial disputes. On the other hand, a non-group-specific precommitment could facilitate timely resolution of issues of equality, can have significant impact on the amelioration of LERN cleavages, and could facilitate nation-building and democratic consolidation by offering a judicial mechanism for groups which had previously sought to address grievances over power asymmetries through violence. All in all, the ambiguity of non-group-specific, non-domain-specific constitutional precommitments to affirmative action, and the prospect of “preference exploitation” by groups not anticipated as beneficiaries by constitution-makers, seems to best explain their paucity in the sample of cases considered here.

#### IV. SEX-specific Precommitments

In large part, the criteria for identifying women-specific precommitments mirrors the basic principles for identifying classical precommitments as explained in the previous chapter. As with classical precommitments, women-specific precommitment language should make a clear, unambiguous and unequivocal commitment to the amelioration of the status of women by undertaking extraordinary or exemplary steps. Classical language or terminology may not be

necessary to deem a particular provision a precommitment for women, as many take the form of sporadic precommitments. The economic, social and political marginalization of women is historically and geographically ubiquitous. In none of the cases under study here were men an historically marginalized group.

**Table 1: Total cases with SEX-specific affirmative action precommitments by group and domain**

Domain		<u>Group</u>	
		<u>Specific</u>	<u>Non-Specific</u>
	Specific	21	-
	Non-Specific	9	8

**Table 2: Cases with SEX-specific affirmative action precommitments by group and domain**

Domain		<u>Group</u>	
		<u>Specific</u>	<u>Non-Specific</u>
	Specific	China, India, Brazil, Pakistan, Bangladesh, Mexico, Philippines, Ethiopia, Vietnam, Germany, Turkey, DRC, Iran, Thailand, France, Italy, South Korea, Myanmar, Ukraine, Columbia, Argentina	-
	Non-Specific	India, Pakistan, Bangladesh, Ethiopia, Germany, Turkey, DRC, South Korea, Argentina	Indonesia, Philippines, Thailand, SA, Vietnam, Columbia, Spain, Argentina

The data show that 22 of the 30 cases have some form of SEX-specific, domain-specific affirmative action precommitment.

**Table 3: Cases with SEX-specific, domain-specific and equality precommitments**

SEX-specific precommitment		<u>Equality precommitment</u>	
		<u>Yes</u>	<u>No</u>
	Yes	China, India, Brazil, Pakistan, Bangladesh, Mexico, Philippines, Vietnam, Ethiopia, Germany, Egypt, Turkey, DRC, Iran, Thailand, Italy, ROK, Myanmar, Ukraine, Colombia	France, Argentina
	No	Nigeria, Russian Federation, Japan, SA, Spain	US, Indonesia

**Table 4: Cases with SEX-specific, domain-specific and social precommitments**

		<b>Social precommitment</b>	
		<b>Yes</b>	<b>No</b>
<b>SEX-specific precommitment</b>	<b>Yes</b>	China, India, Brazil, Pakistan, Bangladesh, Philippines, Vietnam, Ethiopia, Germany, Egypt, Turkey, DRC, Iran, Thailand, France, Italy, Ukraine, Colombia; Argentina	Mexico, ROK, Myanmar
	<b>No</b>	SA, Spain, Nigeria, Russian Federation, Japan	US, Indonesia

Of those 22, 20 have SEX-specific equality precommitments – Iran and Argentina do not. Nineteen of the 22 cases have some sort of social precommitment. Five of the cases with non-group-specific, non-domain-specific precommitments – the Philippines, Vietnam, Thailand, Colombia and Argentina – also have SEX-specific affirmative action precommitments. Nine cases had SEX-specific, non-domain-specific precommitments: India (art. 15, § 3), Pakistan (art. 25, § 3), Bangladesh (arts. 10, 28, § 4); Ethiopia (art. 35), Germany (art. 3, § 2), Turkey (art. 10)) DRC (art. 14), South Korea (art. 34(3)) and Argentina (art. 75, § 23). Precommitments within the ECON/EMP domain were most prevalent at 17. Five were found in the POL domain and none in the EDU domain. Finally, two cases had SEX-specific, CULT-specific affirmative action precommitments. All constitutions were enacted post-WWII, however not all post-WWII cases have these precommitments. As variables, geography and legal tradition do not seem to explain variation.

A. SEX-specific, non-domain-specific

As previously mentioned, this study classifies group-specific affirmative action precommitments into two basic sub-types – domain-specific and non-domain-specific. Non-domain-specific precommitments contain language broad enough to arguably be applied to any of the four policy domains that pertain to the SEX category. For example, art. 3, § 2 of Germany’s Constitution states that “[m]en and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.” The use of the tacit terminology, “actual implementation” and “steps,” would seem to indicate an affirmative action precommitment and the lack of domain specificity could indicate that the framers intended the preference to apply across domains. However, as Totten (2003) notes, there has been considerable disagreement over how art. 3, § 2 is to be interpreted. The Christian Democratic Union (CDU) argued that the precommitment excludes quotas as a vehicle for realizing substantive sex equality while the Social Democrats (SD) argue that quotas are permissible. As of 2006, the German Federal Constitutional Court has not ruled directly on the issue. In this case, the German provision is a SEX-specific, non-domain-specific affirmative action precommitment because it theoretically applies across domains. However, the manner in which the preference for women is implemented within these domains is not unlimited.

Like Germany, the Turkish and ROK SEX-specific, non-domain-specific affirmative action precommitments use tacit language. Under the Turkish Constitution, “[m]en and women have equal rights. The State shall have the obligation to ensure that this equality exists in practice” (Turk. Const. art. 10). This rather vague provision was approved in September of 2010 along with a package of 26 constitutional amendments proposed by Pres. Erdogan. Just as the constitutionality of quotas is an issue in the German case, Turkish courts have yet to determine whether the positive discrimination amendment permits quotas. However, given the history of the amendment, there is little doubt that

the intent is to accord preferences to women in some form.<sup>52</sup> The ROK language is more minimal and indefinite than Germany's or Turkey's; "[t]he State endeavors to promote the welfare and rights of women" (ROK Const. art. 34, § 3). Although marginal, this provision is classified as a SEX-specific, non-domain-specific affirmative action precommitment because the tacit term "promote" is used.<sup>53</sup> Perhaps more to the point, the ROK government has, in fact, passed legislation instituting quotas for women in certain civil service occupations as well as for local elections.

The remaining cases with SEX-specific, non-domain-specific provisions use classical precommitment language. As might be expected, the Indian, Pakistani and Bangladeshi provisions employ substantially similar classical language. India's art. 15, § 3 and Pakistan's art. 25, § 3 use identical language; "[n]othing in this article shall prevent the State from making any special provision for women and children."<sup>54</sup> The Bangladeshi Constitution has two provisions. Its art. 28, § 4 is substantially similar to India and Pakistan, with the substitution of "or" for "and" and the accompaniment of a LERN affirmative action precommitment. Its art. 10, however, uses sporadic

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<sup>52</sup> Akman and Tutuncu (2011) maintain that the 2010 amendments opened the way for positive action for women, although whether and how such policies will be implemented remains to be seen.

<sup>53</sup> Indeed, affirmative action has been credited with increasing the number of women in the South Korean foreign and civil services, as well as the number of professors at public universities. South Korean women had begun to fight for "gender mainstreaming" as early as 1995 at the United Nations International Conference on Women in Beijing. They employed a strategy of engagement with the government which resulted in the creation of various governmental organizations tasked with oversight of gender policy and the increased participation of women leaders. The umbrella organization, Korean Women's Association United (KWAU), Policy successes such as the Gender Equality Employment Act and the Gender Discrimination Prevention and Relief Act helped provide the legal basis for implementing affirmative action. Revisions made in 2002 to the government's Framework Act on Women's Development actually substituted the term "affirmative action" for "temporary measure of preferential treatment." Additional achievements were the passage of the 2004 Act to Prevent Prostitution and the 2005 Abolition of the Family-Head System, both of which ended long-established institutionalized patriarchal regimes (Kim & Kim, 2011).

<sup>54</sup> In the case of India, MacKinnon (2006) acknowledges that India's constitution "holds a great potential for ameliorating the subordination of women to men" (MacKinnon 2006, 189). India's equality provisions, when considered in conjunction with the affirmative action provision of art. 15, § 3 have led to courts upholding preferential policies for women under a theory of "compensatory justice." Upon interpreting the court's decision in *University of Madras v. Shanta Bai*, 1854 A.I.R. (Mad.) 67 (1954), Davis (1996) concludes that when the court determines the constitutionality of state action that discriminates on the basis of sex, "[i]f the bias is 'favorable' to women then there is no discrimination and the legislation cannot be challenged on the ground that there is no reasonable basis for the classification because the affirmative action provision under art. 15, § 3 automatically validates the provision in question (Davis, 1996, pp. 47-48).

language; “[s]teps shall be taken to ensure participation of women in all spheres of national life.”<sup>55</sup> The language of art. 75, § 5 of the Argentine Constitution leaves little doubt as to whether a SEX preference is intended; “[t]o legislate and promote positive measures guaranteeing true equal opportunities and treatment, the full benefit and exercise of the rights recognized by this Constitution and by the international treaties on human rights in force, particularly referring to children, women, the aged, and disabled persons.” The DRC offers a more recent example (ratified in 2005); “[t]he [public authorities] take in all areas, and most notably in the civil, political, economic, social and cultural areas, all appropriate measures in order to ensure the full realization of the potential of women and their full participation in the development of the nation” (DRC Const. art. 14). This provision uses classical language and, although certain domains are mentioned, is non-domain-specific because the provision makes no indication that the preferences are exclusive or restricted to any specific domain. Article 35 of the Ethiopian Constitution also mentions domains, while being explicitly applicable to both the public and private spheres and offering a justification for the precommitment.

It is somewhat surprising that Turkey’s SEX-specific, non-domain-specific precommitment does not employ classical language, given that it is the most recent of all eight. A reasonable explanation might take into account other endogenous variables, such as the impact of religious mores on sex equality, specifically the role of Islam and Turkey’s general policy of equal opportunity rather than substantive equality. We would then have to explain the presence of classical language in the Pakistan and Bangladesh constitutions, which could be done by invoking the normative influence of the Indian constitutional lineage. Both the German and Argentine precommitments were enacted

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<sup>55</sup> The 1972 constitution was the first to explicitly recognize the equality of the sexes, albeit in a circumscribed manner. To be fair, the transitional government was likely preoccupied with institution-building, rule of law and political stability. This could have led them to focus much less on equality of the sexes. However, the secular platform of the Awami League, the party that came to power immediately after independence and stewarded the 1972 constitution, established the space necessary for women’s rights to germinate.

in 1994 but only the latter contains classical language. The South Korean language came just a few years earlier with the 1987 amendments, and also lacks classical language. The DRC case seems to make the most intuitive sense because it is very recent and very expansive. The only informed conclusion that can be drawn here is that no single variable can explain why certain cases have SEX-specific, non-domain-specific affirmative action precommitments, and why those that do opt for classical or particular language.

B. SEX-specific, domain-specific precommitments

When we turn to domain-specific affirmative action precommitments the wide variety of preferences becomes clear. The data used in this section are gleaned from Tables 1, 2, and 3 above.

i. POL-specific precommitments

SEX-specific, POL-specific precommitments almost invariably take the form of party-list quotas or outright seat reservations in electoral bodies at the national, provincial (intermediate) and/or local levels. In the context of party-introduced quotas, Caul (2001) argues that gender quotas may arise from a combination of exogenous and endogenous factors including: (1) women activists – a “critical mass” of women participating in parliament or within a particular party; (2) electoral system – party list PR systems seem advantageous to women; (3) diffusion and competition – through “contagion” one party may influence another party to adopt its policies; and (4) party characteristics – a party’s ideology, organizational structure, and age (Caul, 2001, pp. 1215-1218). Krook (2006) identifies four similar factors: (1) women’s mobilization, (2) strategic advantage recognition by political elites; (3) emerging notions of equality and representation; and (4) international norms spread through transnational sharing (Krook, 2006, pp. 307-309). Although controversial from a normative and outcomes-based perspectives, political parties in more than 90 countries have some gender quota, and international groups such as the Inter-Parliamentary Union, the Socialist International, the Council of Europe, the European Union, the Organization for Security and Cooperation in Europe, the African Union and the Organization of American States

have endorsed implementation (Baldez, 2006). In a cross-national comparison of 153 countries, Tripp & Kang (2007) analyzed the effect of a variety of institutional, social, economic, cultural and religious variables on women's representation and found that the best predictors are a combination of institutional factors, including quotas. The authors concluded that quotas, particularly those for reserved seats, are the most consistent explanatory factor for female legislative representation.

Dahlerup & Freidenwall (2009) define electoral gender quotas as "legal or voluntary regulations of public elections that require a certain minimum number or percentage of women or of both sexes on one of three levels: aspirant, candidate or electee (Dahlerup & Freidenwall, 2009, p. 33). They identify six quota types: legal aspirant quotas, voluntary aspirant quotas, legal candidate quotas, voluntary candidate quotas, legal reserved seat quotas and voluntary reserved seat quotas. Aspirant quotas regulate the pool of potential candidates from which a political party's nominating body selects the electoral list. Candidate quotas require that a certain percentage of candidates be represented on a candidate list that political parties present to voters.<sup>56</sup> Reserved seat quotas require a fixed minimum number of women be elected. In general, different types of quotas are chosen for different electoral systems. Forty-eight countries have some form of gender quota. This is true for democratic, semi-democratic and non-democratic systems. Democratic states tend toward voluntary party quotas while semi-democratic countries tend toward legal quotas (Dahlerup & Freidenwall, 2009).

Experiences with gender quotas have varied by region. Several European countries have gender quotas. In the UK, which has no formal constitution, the Labour Party has internal quotas for women. In 1993 Labour extended its quota policy, referred to as the "all women shortlist policy," but it was subsequently stricken by an Industrial Tribunal decision (*Jepson v. Dyas-Elliot v. The*

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<sup>56</sup> In a candidate quota system, it is important to include rules about rank ordering in the quota rules. As Dahlerup & Friedenwall note, "[a] quota of 30 percent women candidates who are placed at the bottom of a candidate list in PR systems, closed or open, means nothing but disappointment" (Dahlerup & Freidenwall, 2009, p. 37). Many systems require that there must be at least one woman among the top three on a list of candidates, one among the next three, and so on.

*Labour Party* [1996] IRLR 116 ET (holding that selection as a candidate for office qualifies as “authorization or qualification” for employment under Section 13(1) of the SDA). However, upon appeal, the Court of Appeals held that selection as a candidate does not qualify as “employment” under either the SDA or the RRA (Russell & O’Cinneide, 2003). Since then, the passage of the 2010 Equality Act extended the the period in which all-women shortlists may be used to 2030 (Kelly & White, 2012, p. 11). Conversely, quotas in Sweden (a case not under study here, but one which does have SEX affirmative action precommitment<sup>57</sup>) have been in place since the Social Democratic Party implemented them in 1994. As a result of agitation from women’s groups, quotas were implemented, with little antagonism. Germany, a case with a classical SEX-specific, non-domain-specific affirmative action precommitment, but not a POL-specific one, appears to permit quotas. However, there has been controversy over whether such quotas are congruent with Arts. 21 and 38 of the German Constitution. Finally, France amended its Constitution in 1999 to permit gender quotas<sup>58</sup> (Russell & O’Cinneide, 2003).

Globally, Latin America has been the trailblazer on gender quotas. Between 1991 and 2000, 12 countries passed national legislation establishing a minimum of 20-40% for women’s participation as candidates in national election. The confluence of women’s movements in the 1970s and international agreements such as CEDAW and the Beijing platform for action contributed to the maturity of gender norms toward equal participation in politics (Htun & Jones, 2002). In her study of Mexican gender quotas, Baldez (2006) argues that gender quotas result from three additional factors: (1) factions within a party exploit electoral uncertainty to initiate internal party reform; (2) courts which view equal protection pivotal when evaluating gender quotas; and (3) female legislator

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<sup>57</sup> Chapter 2, art. 16 of Sweden’s 1974 Instrument of Government states that “[n]o act of law or other provision may imply the unfavorable treatment of a citizen on grounds of gender, unless the provision forms part of efforts to promote equality between men and women or relates to compulsory military service or other analogous official duties.”

<sup>58</sup> The relevant language in art. 1 reads, “[s]tatutes shall promote equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility.”

cross-party mobilization raises issue awareness and increases costs of opposition. Bruhn (2003) adds the “democratic-ness” of the party and a lack of will to balance tickets as additional variables.

Women currently occupy approximately 13% of the seats in the lower houses of parliament in Latin America (Htun & Jones, 2002). More than half of Latin American democracies have some form of gender quota at the national or sub-nation levels (Jones, 2009, pp. 1-2).

Women’s representation in Sub-Saharan Africa generally lags behind other regions. In 1997, the member states of the Southern African Development Community (SADC)<sup>59</sup> passed the Declaration on Gender and Development. The Declaration commits member states to increase women’s participation in decision-making to 30% by 2005. In 2001 the Programme on Women in Politics and Decision-making recommended the use of quotas to achieve the goal. South Africa and Mozambique use voluntary party-based quotas in a proportional representation system.

Consequently, in 2004 SA and Mozambique had the highest levels of female participation in national legislatures at 31.2% and 31.3%, respectively (Kethusegile-Juru, 2004, p. 23). Other countries have adopted mandatory legislative quotas in a PR system (Namibia), mandatory legislative quotas in a no-party system (Uganda), special nominations and appointments (Botswana, Swaziland, Zimbabwe) or constitutional quotas (Tanzania, Rwanda). Yoon (2004), posits that access to education, labor force participation, a country’s economic condition and a country’s culture work to determine women’s legislative participation. Like Tripp & Kang, she found that gender quotas, along with proportional representational systems, play a substantial role in women’s representation in African parliaments (Yoon, 2004, p. 458).

The Argentine women-specific, POL-specific provision is the most expansive; “[a]ctual equality of opportunities for men and women to elective and political party positions shall be guaranteed by means of positive actions in the regulation of political parties and in the electoral

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<sup>59</sup> The SADC has 15 member states: Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, SA, Swaziland, Tanzania, Zambia and Zimbabwe.

system”<sup>60</sup> (Arg. Const. art. 37). This classical precommitment is bolstered by art. 75, § 23, under which the state must “[legislate and promote positive measures guaranteeing true equal opportunities and treatment, the full benefit and exercise of the rights recognized by this Constitution and by the international treaties on human rights in force, particularly referring to children, women, the aged, and disabled person.” Electoral laws promulgated under art. 37 require party lists to have a minimum 30% of female candidates in both the Senado (currently 35% female) and Camara de Depudaos (currently 39% female). There are also quotas at the sub-national level. None of the other Latin American cases in this study have similar precommitments, although both Brazil and Mexico have legislative electoral quotas.<sup>61</sup> The quota debate in Argentina came at a time of political upheaval as the country was rebuilding democratic institutions after years of dictatorial rule. The Peron Party had instituted party quotas, but, after intense lobbying by a coalition of women’s groups, the Argentine parliament approved the *Ley de Cupos* which mandated a 30 percent minimum quota for women on party lists<sup>62</sup> (Dahlerup & Freidenwall, 2009, pp. 40-41).

In contrast to the classical language of Argentina’s art. 37, France’s precommitment is tacit and embedded in an equality provision. art. 1 of the French Constitution states that, “[s]tatutes shall

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<sup>60</sup> Lubertino cites the following influences for electoral quotas: the travel of some Argentine women to the United Nations Women’s Conference in Nairobi, Kenya, in 1985; the United Nations Convention on the Elimination of All Forms of Discrimination Against Women; discussions with Spanish socialist women when they traveled to Argentina in the early years of the transition; distribution of the first proposed legislation on real equality for women, and the resolutions of the XVIII Congress of the Socialist International, in June 1989, in Stockholm, Sweden (Lubertino, 2003, p. 2). Argentine women benefited from electoral quotas even before Art. 37 became part of the constitution. In fact, the quota laws that existed prior to art. 37, made it possible for 26.2% of the delegates elected to the 1994 Constituent Assembly to be women. This representation, in turn, made it possible for art. 37 to be part of the constitutional reform package. (Gray, 2003).

<sup>61</sup> Legislation passed in 2000 established 30% party-list gender quotas in the upper and lower houses. In Mexico, parties must meet a 40% threshold (QuotaProject.org).

<sup>62</sup> In 1993, President Menem clarified the quota law by issuing Executive Decree 379/93. The decree identified the 30 percent quota as a “minimum quantity” that should apply to the entire party list. In addition to the number of seats a political party is expected to win. Under Art. 4 of the decree, the list must include one woman for every two men until the percentage required by law is met across all seats up for election. Even with the clarification, many party lists failed to conform. Lawsuits were filed challenging the constitutionality of the quota law. These disputes were settled when the 1994 constitutional reform amended art. 37 (Dahlerup & Freidenwall, 2009, p. 41).

promote equal access by women and men to elective offices and posts as well as to professional and social positions.” In addition, art. 4 maintains that “[political parties and groups] shall contribute to the implementation” of equal access of women to elected office. France’s Socialist Party instituted quotas in 1974, and in 1982 Parliament passed a provision on town council elections limiting candidate lists to a maximum of 75 percent of people of the same sex. The Constitutional Council invalidated the quota law finding that it violated the principle of universalism and equality set forth in the *Declaration of the Rights of Man and of the Citizen of 1789*. In 1999, the issue resurfaced, with proponents making a “parity” argument – parity could not contravene the issue of universalism because sex was a universal difference among human beings. A subsequent law, Law no. 2000-403, limited the application of the quota rule to larger town councils, regional councils, the Corsican assembly, the half of the Senate elected by proportional representation and the European Parliament. In the first election held under the new parity law in June 2002, the proportion of female parliamentarians increased by only 1.3 percent. In the next election it increased by only 6.3 percent. Both results were far from stipulated goals. Results in local election were much better, with an overall 21.8 increase in female council members (Dahlerup & Friedenwall, 2009). Dahlerup & Friedenwall attribute the results to the difficulty of implementing quotas in majority/plurality systems because of the limited number of seats for which a candidate is competing. They also highlight the importance of good faith compliance and strong sanctions for non-compliance (Dahlerup & Friedenwall, 2009, p. 43).

India, Pakistan and Bangladesh all have women-specific, POL-specific precommitments that specify level of government and, in some instances, the precise numerical quota. The Indian electoral reservations for women apply only to the *panchayat* and municipal levels (arts. 243, § (D)(3); 243, § (T)(3)), with none for the national or provincial levels. Both provisions require 33% direct seat reservations. The Pakistani Constitution has women-specific precommitments at all three levels of government. Article 51, § 1 states that “[t]here shall be three-hundred and forty-two seats for

members in the National Assembly including seats reserved for women and non-Muslims.” Sixty seats in the National Assembly are reserved for women. The Pakistani Constitution does not provide for reservations in the Senate, but they are required by legislation.<sup>63</sup> Regarding provincial assemblies, “[e]ach Provincial Assembly shall consist of general seats and seats reserved for women and non-Muslims...” (Pak. Const. art. 106, § 1). On the local level, “[t]he State shall encourage local Government institutions composed of elected representatives of the areas concerned and in such institution special representation will be given to peasants, workers and women” (Pak. Const. art. 32). Finally, Bangladesh has a local election women-specific precommitment similar to Pakistan (Bang. Const. Art. 9), as well as a quota for its national Parliament. (Bang. Const. art. 65, § 3).<sup>64</sup> Thirteen

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<sup>63</sup> Reyes (2002) notes that in March 2000, Pakistan’s military regime adopted a Devolution of Power Plan as part of its democratization process. Under the plan, provision was made for a 33 percent quota for women in the district, tehsil and union councils. A total of 6,022 seats were reserved for the union councils, 305 for the tehsil council and 96 for the district councils. At the national level the National Reconstruction Bureau announced 17% gender quotas in the Senate and National Assembly. The 17% quota fell far below the 30% demanded by women’s groups such as the Ministry of Women and Development and the National Campaign for Restoration of Women’s Reserved Seats, even though a number of political parties endorsed the 33% quota (Reyes, 2002).

<sup>64</sup> Under the rule of the British, women in Bangladesh had little political power, gaining the franchise in 1935 (Panday, 2008, p. 491). With regard to local government participation, the 1976 Union Parishad Ordinance ensured that women would be reserved two seats in each union parishad. The quota was increased to three in 1983, with reservations being further cemented by the Local Government Second Amendment Act. Quotas for women in national electoral politics has also grown in Bangladesh, increasing from 15 seats (4.8%) under the original constitution in 1971, to 30 (9.7%) seats in 1979, a three-year lapse of the relevant provisions from 1987-89 and a reinstatement of the 30-seat quota in 199. The quotas lapsed again in 2000 and, through constitutional amendment and amidst much controversy, was again reinstated and increased from 30 to 45 seats in Parliament to be distributed among political parties based on their strength. (Panday 2008, 492). That said in 1994, women occupied only 8% of ministerial level positions, and only 9.1% of parliament seats in 2001, below the 13.8% global average (Hossain & Tisdell, 2005, p. 449).

According to Panday (2008) it was the confluence of actions by the government, women’s organizations, NGOs and donors that made the electoral quotas possible. Overall, the government of Bangladesh has done much for the advancement of women. According to Panday (2008). It is a signatory to several international initiatives geared toward women, such as the Beijing Platform for Action (PFA). The government has also made increased economics resources available for health, education, employment and credit for women and girls. Panday concludes that “[a]ll told, the government of Bangladesh has set up a comprehensive network of mechanisms and institutions for the advancement of women” (Panday, 2008, p. 498). This institutional reform has aided the growth and influence of women’s organizations in Bangladesh. Once small in number, modest in influence and narrow in its agenda, women’s organizations were able to expand beyond their urban confines and welfare-related activities. They were able to do this by growing their memberships from the 1970s through the 1990s, adopting a platform that included both welfare as well as

percent of its Parliament seats are reserved for women. Pakistan and Bangladesh are the only two majority-Muslim cases with women-specific, POL-specific precommitments. The Philippine Constitution also offers temporary preferences for women in national elections (Phil. Const. art. VI, § (5)(2)).

No African case has women-specific, POL-specific affirmative action precommitments. Regarding Nigeria, Omotola's (2007) survey of the Nigerian gender studies literature revealed that Nigerian women are considered the weaker sex, and this perception is borne out politically. During the First Republic (1960-66) there were but two female legislators in the federal parliament. During the Second Republic (1979-83) there was one female senator out of 571 and 11 members in the House of Representatives out of 445. Omotola posits that constitutional inadequacies, a lack of political will on the part of Nigerian leadership, harmful traditional practices, and the legacy of colonialism may have contributed to women's political inequality. Okeke-Ihejirika & Franceschet (2002) point to lack of a viable women's movement, or state feminism. They argue that, unlike Latin American countries, African countries have not undergone sufficient democratic consolidation. Nigerian women did play a role in the national liberation struggle, but the movement suffered during the post-colonial transition. Women's gains in electoral politics were marginal during the First (1960-66) and Second (1979-83) Republics and elite women's groups steered the equality discourse toward

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development issues (credit, employment, literacy health care, etc.) and by becoming more inclusive, courting both urban and rural constituencies.

Panday also highlights the role of the Bangladesh Mahila Parishad (BMP) as an example of how women's organizations were able to be effective institutions in lobbying for progressive change. They established support groups for the women representatives and built meaningful alliances with political leaders and government officials. As a result of these political relationships, the women "realized their individual potentials better and gained confidence in their ability to challenge social norms and other forms of discrimination" (Panday, 2008, p. 500). NGOs have also played an integral role in elevating the economic potential of Bangladeshi women, through micro-credit programs offered by enterprises such as the Grameen Bank and efforts to encourage rural constituents to run for local offices. Finally, Panday recognizes the role of international donors such as the UN or the IMF, but dedicates only a brief discussion to the issue and provides no specific data, quantitative or qualitative, as to how they enhanced the political bargaining power of women.

charitable causes and more neutral subjects. In the opinion of the authors, deeply ingrained social, political and social gender roles have forced African women to “build their political platforms around socially acceptable roles in society, cautiously framing their demands to the state to avoid overstepping the boundaries set by existing gender ideologies that keep them outside the formal political sphere” (Okeke-Ihejirika & Franceschet, 2002, p. 450). In Omotola’s view, the art. 15(2) equality provision is insufficient, as are the other governmental measures taken to achieve gender equality.<sup>65</sup>

ii. ECON/EMP-specific precommitments

There are 17 cases that have women-specific affirmative action precommitments in the ECON/EMP domain. Like the POL domain, economic and employment relations are colored by historical cultural gender inequalities that, although ubiquitous, vary by case in type, degree and cause. Two main types of precommitments were found – those that concern maternity and those that authorize labor market incentives. One case – China – has a SEX-specific, civil service provision at art. 48. Article 49(B) of the Turkish Constitution is the most minimal classical example of a SEX-specific working-conditions precommitment; “[m]inors, women and persons with physical or mental disabilities, shall enjoy special protection with regard to working conditions.” Turkey has enacted wage equality legislation. However, Ozkanli & Ozbilgin (2001) maintain that despite constitutional and legislative efforts, and the pressure of feminist groups and academics, gender equality in Turkey remains rudimentary. They argue that the negative social effects of economic recession, together with accelerated migration from rural to urban areas and the resurgence of the religious right, has operated to sustain gender inequality in the Turkish labor market, even in light of Art. 49(B) and the broader art. 10.

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<sup>65</sup> Omotola identifies the 1995 creation of the Ministry of Women’s Affairs, various economic empowerment strategies for women and the work of a number of NGOs as initiatives aimed at helping Nigerian women. It must be noted that Omotola believes that affirmative action policies may not be a good idea because of a lack of substantive outcomes. Instead, the author urges us to “refocus beyond affirmative action” and look to power politics (Omotola, 2007, p. 43).

Other provisions address the issues of maternity and working conditions more specifically. Article 32, § 3 of the ROK Constitution reads, “[s]pecial protection shall be accorded to working women, and they shall not be subjected to unjust discrimination in terms of employment, wages or working conditions.” This provision is bolstered by art. 34, § 3 and art. 36, §§ 1 and 2, which promote the rights of women and protect maternity, respectively. Kim (2006) argues that art. 32, § 3 gained inclusion into the Sixth Republic Constitution in 1987 because women’s organizations and feminist law scholars were active during the democratization process. These same groups, in conjunction with labor organizations, fought for revisions to the Labor Standards Act (LSA) to ensure maternity protections. By working with female members of the Korean Assembly, revision was achieved.<sup>66</sup> The 1987 Korean Gender Equality in Employment Act (GEEA), and its subsequent revisions, was also the result of interest group mobilization and pressure.<sup>67</sup> South Korea does have affirmative action legislation, permitting the state to use special measures in the promotion of women’s equality. GEEA defines affirmative action as “temporary special measures to be taken to give preference to a particular gender to remove the existing discriminations” (Kim, 2006, p. 63).

Article 13, § 14 of the Philippines Constitution has a tacit maternal reference; “[t]he State shall protect working women by providing safe and healthful working conditions, taking into account their maternal functions, and such facilities and opportunities that will enhance their welfare and enable them to realize their full potential in the service of the nation.” The provision makes no mention of wages, although the Philippines does have equal pay legislation. The Philippines has had

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<sup>66</sup> Under the legislation, women were prohibited from working in hazardous occupations during pregnancy or soon after childbirth. These women could consent to working nights and holidays, with certain qualifications for overtime pay. Maternity leave was increased from 60 to 90 days, with 30 days unpaid. In 2003, women’s menstrual leave was debated, but ultimately, retained as unpaid leave. In 2005, new maternity provision required employers had to provide protection in case of natural abortion or still birth, and women in small and mid-size firms could be paid for 90 days leave before and after childbirth from employment insurance (Kim, 2006, pp. 57-58).

<sup>67</sup> GEEA prohibited employment discrimination in recruitment, hiring, firing and dismissal. Women had to be granted childcare leave of up to a year if a female worker with a child less than one year old so requested. Nursing facilities also had to be implemented. In 1989 an equal pay provision was included. Revisions made in 1995 and 1999 outlawed indirect discrimination, such as height requirements (Kim, 2006, pp. 59-60).

maternity leave policies since 1952, but the leave applies only to those employed in the formal sector; agricultural workers or urban poor who are “informal” are not covered. What’s more, maternity leave is tied to social security and not all businesses comply with the social security law (Rivera, 2008). In the Mexican Constitution, the type and amount of maternal benefits receive further explication;

[d]uring the three months prior to childbirth, women shall not perform physical labor that requires excessive material effort. In the month following childbirth they shall necessarily enjoy the benefit of rest and shall receive their full wages and retain their employment and the rights acquired under their labor contract. During the nursing period they shall have two special rest periods each day, of a half hour each, for nursing their infants (Mex. Const. art. 123, § (A)(V)).

Also,

[w]omen shall be entitled to one month's leave prior to the approximate date indicated for childbirth and to two months' leave after such date. During the nursing period, they shall have two extra rest periods a day, of a half hour each, for nursing their children. In addition, they are entitled to medical and obstetrical attention' medicines, nursing aid, and infant care services (Mex. Const. art. 123, § (B)(X)(c)).

The Ukrainian and Ethiopian Constitutions contain similar language (Ukr. Const. art. 24; Eth. Const. art. 35, § A).

Brazil is the only case with affirmative action precommitments that concern women in the labor market. Brazil’s art. 7, § (XX) is concise and broad; “[i]n addition to any others designed to improve their social condition, the following are rights of urban and rural workers: protection of the job market for women through specific incentives, as provided by law.” Brazil, a social state, permits such broad intervention by the state into the economy on behalf of women writ large. Whether such intervention occurs, however, is debatable. During Brazil’s democratization in the 1970s, women fought for and achieved several constitutional protections. Women, specifically Afro-Brazilian women, were able to make greater labor market inroads through “pink-collar” jobs. From 1976-1998 women’s participation in the labor force grew by 175%. From 2001 to 2007 women participants in the labor force grew from 20.1 million to 25.8 million. (Wageindicator.org, 2009, p. 16). Brazil is a

signatory to several international labor recommendations and conventions, including ILO Recommendation No. 90 and Convention No. 100 on the equality of remuneration of male and female workers, and Recommendation No. 165 and Convention No. 156 on the equality of opportunity and treatment of men and women with dependents, Brazil's 2005 *National Plan of Policies for Women* makes it clear that "the State undertakes the responsibility for implementing public policies [and] the consolidation of citizenship and of gender equality" (National Plan of Policies for Women, 2004, p. 23). These actions may include the elimination of economic inequalities through wealth and income distribution. More to the point, the federal, state and local governments should "encourage and implement affirmative action policies as instruments necessary for the full exercise of all fundamental rights and liberties to different groups of women" (National Plan of Policies for Women, 2004, p. 25). For example, in the agricultural sector, the Programme of Affirmative Actions, of the Ministry of Agrarian Development (MDA), established that a minimum of 30% of the resources of the National Programme of Family Farming (PRONAF) should be earmarked to female farmers.

iii. EDU-specific precommitments

No case has an EDU-specific precommitment. The closest is Vietnam;

[w]omen workers shall enjoy a regime related to maternity. Women who are State employees and wage-earners shall enjoy paid pre- natal and post-natal leaves during which they shall receive all their wages and allowances as determined by law. The State and society shall create all necessary conditions for women to raise their qualifications in all fields and fully play their roles in society, they shall see to the development of maternity homes, paediatric departments, creches and other social-welfare units so as to lighten house work and allow women to engage more actively in work and study, undergo medical treatment, enjoy periods of rest and fulfill their maternal duties (Viet. Const. art. 63).

This provision does not mention any specific educational preferences for women, and overall tenor is that of maternity. Thus, it does not qualify as an EDU-specific preference.

iv. CULT-specific precommitments

Two cases had a precommitment in the CULT domain – the DRC and Iran. The CULT domain concerns principally interpersonal gender role performativity within the home and in domestic financial matters. On the one hand, gender roles are constructed based on case-specific cultural norms and, thus, by their very nature, become particularized. On the other hand, the cultural ubiquity of patriarchy in the formulation, institution and reproduction of both individual and group male-female relations cannot go undiscussed. Issues such as domestic violence, dowry, the assignment of household tasks, rights of inheritance, and even issues of maternity and motherhood may prevent many women from taking advantage of affirmative action preferences in the other more “public” domains: ECON/EMP, EDU and POL. Thus, arguably, the most critical domain is the one that is least addressed.

Article 14 of the DRC Constitution does address the issue of personal protections for women, specifically in the area of sexual violence; “[decisionmakers] take measures in order to fight all forms of violence against women in their public and private life.”<sup>68</sup> It works in conjunction with art. 15 and its prohibition of sexual violence as a tool to destabilize or displace families, and its labeling of such an act a crime against humanity. During the Congolese civil war, armed groups on both sides of the conflict routinely used “sexual terrorism” as a weapon against women. Abduction, gang rape and sexual enslavement of young women were not uncommon. In 2002, as the new constitution was being contemplated, women’s groups met with rebel groups and civil society organizations to ensure that the post-civil war peace process incorporated women’s issues. On the basis of UN Security Council Resolution 1325,<sup>69</sup> women were ultimately included in the Inter-

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<sup>68</sup> In the 2005 constitutional referendum 60% of all voters were women. Women were active participants during the entire constitutional process.

<sup>69</sup> Key provisions of the resolution include: increased participation and representation of women in all levels of decision-making; attention to specific protection needs of women and girls in conflict; gender perspective in post-conflict processes; gender perspective in UN programming, reporting and in Security Council missions; and gender perspective and training in UN peace support operations.

Congolese Dialogue (ICD), which was called for by the 1999 Lusaka Ceasefire Agreement. Of the 73 delegates selected to represent the Congolese at the dialogue 6 were women and some women were specifically asked not to voice women's issues. Rape of Congolese women was prevalent during the war and unfortunately continues after the cease-fire. Whitman concludes that participation in the peace process was positive, but more work needs to be done (Whitman, 2007, p. 47). Indeed, as Davis (2009) maintains, even with the constitutional provisions and the sophisticated legislation promulgated under its authority very few cases of sexual violence go to court, and those that do are recommended for settlement so that the perpetrator can avoid justice<sup>70</sup> (Davis, 2009, p. 21).

Although, the DRC may seem an extreme example, the dearth of affirmative action precommitments in the CULT domain is striking. Social, cultural and familial discrimination does not go unaddressed in the constitutions sampled in this study. Nine cases have women-specific equality precommitments that address cultural and familial relations between the sexes: China (art. 48), Japan (art. 14), Vietnam (arts. 63, 64), Ethiopia (art. 35), Egypt (art. 11), Turkey (art. 41), South Korea (arts. 11, § 1; art. 36, § 1), Ukraine (art. 51) and Colombia (art. 42). Some provisions are quite minimal, such as Turkey – “[t]he family is the foundation of Turkish society and based on the equality between the spouses” (Turk. Const. art. 41) – and South Korea – “[m]arriage and family life are entered into and sustained on the basis of individual dignity and equality of the sexes, and the State must do everything in its power to achieve that goal” (ROK Const. art. 36, § 1).

Provisions like art. 35 of the Ethiopian Constitution present a borderline case and fall at the other end of the spectrum; “[m]en and women without any distinction as to race, nation, nationality or religion, who have attained marriageable age as defined by law, have the right to marry and found

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<sup>70</sup> Poor, rural Congolese women face several obstacles in trying to seek justice for sexual violence, including lack of funds to file a complaint or obtain a medical certificate, lack of access to counsel, the lack of available courts and no provision for witness protection. Furthermore, women generally have the responsibility of taking care of families, making it difficult to find time to travel to court (Davis, 2009, p. 21). As a result, many women are forced to endure the physical and psychological trauma, unwanted pregnancies and social rejection. NGOs have raised awareness about these issues (Bosmans, 2007). For an in-depth analysis of rape during the ethnic conflict in the Congo see Kirchner (2008).

a family. They have equal rights while entering into, during marriage and at the time of divorce.” Articles 35, secs. (1) and (4) provide further protections; “[w]omen have equal rights with men in marriage as prescribed by this Constitution” and “the State shall enforce the right of women to eliminate the influences of harmful customs that oppress women or cause bodily or mental harm....” Furthermore, “[w]omen have the right to participate in national development policies” (Eth. Const. art. 35, § 6), and to acquire administer, control, transfer and benefit from property“(Eth. Const. art. 35, § 7). Because art. 35, sec. (3) is a classical women-specific affirmative action precommitment and is located under the section entitled “Rights of Women,” it may be reasonable to assume that the rights accorded to women via the other sub articles of art. 35(3) can in fact justify state preferences for women within the PERS domain. However, the language of art. 35(4) suggests non-discrimination rather than a preference.

#### IV. Discussion

All in all, the review of the relevant data shows that most cases have some form of women-specific precommitment. However, the range of precommitments is not very broad. Those in the POL domain are relatively recent, with Pakistan’s being the most recent. Precommitments in the ECON/EMP domain are almost entirely confined to issues of maternity, and precommitments in the EDU and CULT domains are almost non-existent. One explanation for this paucity might be the lack of shocks, both endogenous and exogenous, that could serve as an impetus for constitutional amendment. As we have seen in the POL domain with cases such as France and Argentina, and in the ECON/EMP domain with Turkey and the ROK, the creation and exploitation of opportunity structures that would permit the enactment of constitutionalized SEX preferences require a particular confluence of events. Mobilization and political pressure applied by women’s movements and academics appear to be indispensable in forcing political elites to act. From an exogenous vantage point; demonstration effects and the pressure of international and regional standards memorialized in covenants work to determine whether an enactment of a precommitment is possible, either during

transition to democracy or through later amendment. Precisely how these factors must manifest and interact to produce the desired outcome in a particular political context is complex and requires further study.

What is clear is that some form of classical constitutional precommitment would be optimal to ensure the constitutionality of gender preferences, particularly quotas. It is also clear that a women-specific, non-domain-specific affirmative action provisions alone, without domain-specific additions, may be insufficient to provide legal protections for certain gender preferences. India, for example, has a women-specific, non-domain-specific precommitment and a POL-specific precommitment in the form of local-level seat reservations. The other three domains have no women-specific affirmative action provisions; however affirmative action legislation in these domains has been upheld. In her discussion of gender relations in India, MacKinnon (2006) relates that Indian jurisprudence has upheld reservations for women in employment, underscoring its evolution toward achieving substantive equality for women. However, gains in the CULT domain lag behind. As evidence, she points to the 1996 Hindu Succession Act, which gives sons of intestates almost unilateral authority to block property sales, even to the detriment of a daughter's inheritance. Christian personal laws regarding divorce required women to allege several grounds while men need only allege one. Under Muslim personal laws in India, women must be monogamous, but men may have up to four wives and can divorce unilaterally. In MacKinnon's view "[i]t appears to be more important [to Indian courts] to leave determinations of family life to religion than to deliver on the constitutional and international sex equality rights that the Court has shown itself so capable of guaranteeing in other areas, and the challenges to family laws have so amply justified (MacKinnon, 2006, 192-93). Indeed, MacKinnon finds this reluctance by the state to extend sex equality to the family to be culturally ubiquitous, as all societies are male dominated. Thus, although the entrenchment of religious and cultural norms may make it difficult, the safeguarding of affirmative

action rights for women may require that constitution drafters include non-domain-specific provisions as well domain-specific provisions.

In fact, explicit and detailed mention of some domains in a constitution may be more important for ending discrimination in those domains than in others. Bangladesh has no women-specific, EDU-specific precommitment but does have a social precommitment at art. 10, a women-specific equality precommitment at art. 28, § 2, and a non-group-specific, non-domain-specific precommitment at art. 28, § 4. However, evidence suggests that women and girls have nevertheless made great strides in education thanks to special measures (Siddique, 1998, p. 1097). Although the traditional position of women in Bangladesh has been inside the home, and the high poverty level forces many parents to choose to educate male children over female, various educational indicators show progress. A study by Hosain (2005) shows that, in absolute terms, between 1974 and 1998 primary school enrollment grew by about 200, secondary school enrollment grew by more than 700%, college enrollment grew by 2,300% and university enrollment grew by 230%. When compared to males, female-male enrollment ratios (FMER) demonstrate that the gender gap has been reduced and, if current trends persist, enrollment at the primary, secondary and college levels should be equalized by 2009, 2012 and 2021, respectively (Hosain & Tisdell, 2005, p. 442).<sup>71</sup>

Bangladesh's progress toward gender equality has not been as robust in the CULT and ECON/EMP domains. For example, in 2004, the UN Human Development Report listed Bangladesh as 110<sup>th</sup> out of 144 countries on gender-related violence. Child marriage is still practiced, property rights that exist under Shar'iah have not undergone egalitarian reform and domestic

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<sup>71</sup> In their study of primary school enrollment in Bangladesh, Mushtaque, Chowdhury, Nath & Chowdhury (2003) point out that government "affirmative action" programs targeted at the disadvantaged – school stipends and "food for school" incentives – worked in conjunction with NGO recruitment programs to narrow the enrollment gap between girls and boys. As the authors state plainly, "[t]hat the increase in girls' enrollment is induced by affirmative action taken by the government and NGOs cannot be doubted..." (Mushtaque et al., 2003, p. 613). There has also been an increase in workforce participation and income earning activities, principally among rural women. Hossain concludes that there have been significant improvements in education and labor force participation, a measurable decrease in earnings inequality in the manufacturing sector, and modest improvement in formal political participation. There is, however much more to be done to achieve equality (Hossain & Tisdell 2005, p. 451; Siddique, 1998).

violence remains a viable tool for men to enforce domestic gender roles (Khan, 2005, p. 221). In addition, many women have become the items of sex trafficking and prostitution, perhaps a consequence of the familial disruption that occurs during rural-to-urban migration. And even with gains in labor force participation in the garment and shrimp export industries<sup>72</sup>, women continue to face job insecurity, rape, harassment and acid throwing. (Khan, 2005, p. 223). Khan contends that economic development in Bangladesh has shifted the site of gendered violence from the private to the public, perhaps increasing its frequency. In doing so, she highlights the irony seemingly inherent in the relationship between economic development and women's equality

In a society where women have remained invisible for generations, economic development through private and public initiatives has very quickly thrown them outside their protected, albeit discriminatory private settings. The exploitation of their vulnerability and powerlessness in the marketplace as well as the backlash from the traditional patriarchy have left them with little safeguard and, hence, agency (Khan, 2005, p. 229).

Therefore, it stands to reason that when it comes to legal protection for legislative preferences aimed at substantive sex equality, certain domains require more explicit and detailed precommitments than others, particularly where paradigms of gender inequality are most durable and most pernicious. Specifically, the CULT domain requires the most attention because of its inherently private nature, which tends to shield it from state interference. Articles 14 and 15 of the DRC Constitution provide a basic blueprint, but specification of sub-domains such as preferences in spousal abuse, marriage, divorce and inheritance should be made, even though this is generally done through legislation. The

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<sup>72</sup> The forces of globalization were the central impetus for the growth of the garment industry, and the consequent expansion of employment opportunities for women. Kabeer & Mahmud (2004) report that trade liberalization has greatly expanded the wage-earning opportunities for women of all backgrounds. However, the poorer women who populate the garment factories suffer much more discrimination and job insecurity than the more educated women who are hired in the export processing zones (EPZ). Additionally, all women's voices, regardless of class, remain muted, with their reluctance to unionize under the threat of layoffs and their fear of promotion within the factory hierarchy because of the fear of sexual harassment. Fears of greater voice also penetrated the domestic site, as garment factory women handed their entire pay over to their husband so as not to disrupt traditional gender roles and notions of social stratification (Ahmed, 2004). Thus even though the garment industry has allowed rural women to earn income, its effect on public and private liberties seems at best negligible and at worst deleterious. As Ahmed (2004) notes, "[b]ecoming a garment worker and keeping your job is synonymous with losing collective voice and staying mute" (Ahmed, 2004, p. 41).

Ethiopian language addresses these issues. Under the 1995 Ethiopian Constitution, women challenging customary laws can choose to have a dispute adjudicated under customary laws or under the 1960 Civil Code which attempted to harmonize the discordant personal laws of the diverse ethnic and religious group in Ethiopia. The Civil Code expanded women's economic and personal rights in matters of inheritance and ownership of household property (Gopal, 1999, p. 6).

It should be noted at this point that most of the majority-Muslim cases in the sample – Iran, Pakistan, Bangladesh and Turkey – have a SEX-specific preference. Only Nigeria and Indonesia do not, but Indonesia does have the broad non-group-specific, non-domain-specific precommitment at art. 28, § (H)(2). Article 21 of the Iranian Constitution addresses women's rights and provides for “special insurance for widows, and aged women and women without support” (Iran Const. art. 31(4)). That said, the implementation is explicitly qualified by a “conformity with Islamic criteria” requirement. This qualification is important, as relevant literature shows that in the instance of gender, Islamic legal thought and doctrine have assigned men and women distinct social roles. As Tucker (2008) explains “[a]lthough in general the Qur'an deals with women in an egalitarian and non-discriminatory fashion, there are verses that have provided the basis on which to build gender hierarchies (Tucker, 2008, p. 24). From Quranic passages such as chapter 4, verse 34, the male was interpreted as breadwinner with broad domestic authority over the dependents and the woman as subservient and obedient. Such discriminatory practices are not limited to the domestic domain. Historically, men have been permitted to seek several wives, prostitution is criminalized but the male client faces no charges, and the financial compensation for accidental death of a spouse is halved for a woman (Tucker, 2008, p. 26). An ethnographic study conducted by Basu (2008) in the Kolkata Family Court in India highlighted the disadvantages that Muslim Indian women face in seeking legal remedies in divorce and divorce maintenance disputes.

In accord with MacKinnon, Tucker opines that the arena of domestic relations has historically been one in which women have suffered material subordination. The reach of law into

the private realm of society was deep. This reach operated to permit the state to regulate familial relations and, consequently, a woman's freedom over her own body. Simply stated, "[t]he long arm of the law did not stop at the bedroom door, and the woman's physical comforts and sexual experiences within marriage, the legitimacy of her pregnancy, and her special needs as a nursing mother were all well within its purview" (Tucker, 2008, p. 28). Islamic law, in its many permutations does countenance the female experience, but does so in a way that makes them subject to male patriarchal priorities. (Tucker, 2008, p. 29). This asymmetrical gender dynamic is not only strictly legal, but is articulated and reproduced through linguistic apparatuses that infuse legal discursive. Thus, it would seem as if there is a conflict between the fundamental fairness and redistributive tenets of Islamic Socialism and the effectuation of substantive women's equality, particularly in the CULT domain. Given this, backdrop the paucity of SEX-specific precommitments is predictable. Perhaps we can best explain the existence of precommitments in Pakistan and Bangladesh through their reliance on, and arguable improvement upon, the Indian legal tradition of reservations for women. Turkey's precommitment is relatively new and was likely enacted as a result of exogenous pressures – to buttress its application for EU membership.

## CHAPTER 8

### AFFIRMATIVE ACTION PRECOMMITMENTS FOR LERN MINORITIES

#### I. LERN-specific precommitments

In large part, the criteria for identifying LERN precommitments follows the basic principles for identifying precommitments, as explained *infra*. In their classical form, LERN precommitment language should make a clear, unambiguous and unequivocal commitment to amelioration the status of LERN groups it deems necessary by undertaking extraordinary or exemplary steps that favor LERN groups over another group(s). Classical terminology may not be necessary to deem a provision a LERN precommitment. The LERN precommitments in this study target a variety of minority groups including racial, ethnic, linguistic and national. Obviously, achieving mutual exclusivity is a virtually impossibility because there is substantial overlap amongst these groups. Even still, the overlap does not prohibit rigorous analysis of the prevalence of precommitments that target these groups.

As it is a widely accepted principle, the ubiquity of economic, social and political marginalization of LERN minority groups will not be belabored. Suffice it to say, there are several causal factors that create and reproduce the institutions that facilitate and reify subaltern marginalization and dispossession. Potential causes include colonial exploits, forms of slavery or involuntary servitude and immigration. In the case of colonialism, whether colonial powers created the LERN cleavages upon arrival, or simply manipulated and exacerbated existing tribal/clan/caste cleavages is a contentious issue and one which must be considered on a case-by-case basis. What we do know, however, is that in the cases in which colonialism did occur, material and discursive subordination generally resulted. Colonial powers used LERN cleavages to legitimize their own subordination of the indigenous peoples and to facilitate the introduction of new economic and governmental institutions, institutions that inevitably operated to the detriment of the indigenous. Most of the cases in this study can be classified as former colonies.

Given the historical specificity and spatial contingency of racial projects, perhaps the best approach to analyzing the treatment of LERN minorities is to first compare and contrast treatment by geographical region. In the European context, Panayi (1999) identifies three types of minorities: dispersed peoples, localized minorities and post-WWII immigrants. Dispersed groups come in four general types. First, Jews were already residents of Europe and migrated west and north in subsequent centuries. Gypsies originated in India and moved west and north. Germans began their move eastward as early as the tenth century, inhabiting the areas left after the collapse of the Austro-Hungarian and Ottoman Empires. Finally, Muslims moved westward into Eastern Europe. Localized minorities are indigenous groups that reside in individual states or small areas of Europe. Some examples are the Celts in Britain and peripheral peoples of the Russian empire. Local minorities can also be created by states through unification. The unification of Spain in the fifteenth century, the creation of Italy and Germany during the nineteenth century and the formation of Yugoslavia and Czechoslovakia at the end of WWI are instructive examples. In post-WWII Europe, immigrant and refugee flows increased dramatically. The first phase of this migration affected primarily Nazi-controlled areas: victims of Nazism, foreign workers used by the German economy, German expellees and victims of Stalinism. The second phase involved the importing of foreign labor for European economies. Both push and pull factors contribute to this migration from the European periphery. Some states like Turkey encouraged emigration as a tool for population management. During the third phase, many industrial western European states closed their doors to immigrants while countries on the Mediterranean periphery began importing foreign labor (Panayi, 1999, pp. 2-3).

In Panayi's view, the emergence of centralized states is what made ethnicity in Europe problematic. To be sure, the Roman, Ottoman and Habsburg empires all ruled over diverse populations, favored certain ethnic groups within those populations and persecuted others. However, assimilationism was not the policy. As Panayi explains,

in the agrarian non-technological societies and economies of the Ottoman and Habsburg Empires, different religious and ethnic groups could keep themselves to themselves barely conscious of their ethnicity.... They recognized the existence of other peoples, but accepted the differences. They had no desire to eliminate them until nation-states arose in the nineteenth and twentieth centuries (Panayi, 1999, p. 10).

There were, however, instances of pre-technological and pre-literate ethnic nationalism. Some sense of ethnicity did exist among English elites in monarchical England as early as the eleventh century and fifteenth century Spain persecuted Jews, Gypsies, Moriscos, Basques and Catalans. Mass nationalism spread throughout Europe during the eighteenth and nineteenth centuries, and by the twentieth century the nation-state had become recognized as the only legitimate political unit. And, in the twenty-first century socio-political environment immigration and racism are key issues in Europe. As an extension of Panayi's discussion of post-WWII migration, there have developed new patterns of migration to Europe since the fragmenting of the Soviet Union, and a combination of political instability, economic and natural disasters and the threat of genocide have increased the number of asylum seekers. Today, Europe has seen a resurgence of right-wing nationalistic animus directed at racial and ethnic minorities and their cultural, religious and linguistic differences (Wrench & Solomos, 1993, p. 8).

In Latin America, LERN minority groups have historically been divided between blacks imported from Africa and the indigenous peoples, with the former considered a "race" and the latter considered "ethnic" groups. Wade (1997) contends that Africans and Indians occupied different positions in the Portuguese and Spanish colonial orders. For example, there was little agreement among Spanish thinkers and clergy as to whether Indians should be made slaves. Popular discourse at the time characterized them as savages and barbarians, but civilizations such as the Aztecs and Maya had constructed large cities and a system of rule of law. By 1542, slavery of the indigenous had been abolished in Spanish colonies. Conversely, enslavement of Africans was not the subject of controversy (Wade, 1997, p. 27). Over time, the Spanish/Portuguese, Indians and Africans mixed

creating *mestizaje*,<sup>73</sup> and making rigid classification difficult, if not impossible. A person of black-white mixture was called *mulatto* and black-indian mixed persons were referred to as *zambo*. For census purposes, the Spanish maintained an *indio* category for Indians; however, the classification for blacks was much more vague. In the Spanish colonies, this system of stratification was referred to as the *sociedad de castas*, although the situation in Brazil was more fluid, the basic structure was similar; “whites were at the top, Indians and blacks at the bottom and positions in the middle were defined by various criteria of status, among which colour and descent were very important, without being definitive” (Wade, 1997, p. 29). The Indian/ethnic-black/race dichotomy persisted after decolonization.

In Latin America, policies to address the race or ethnic question have more recently become influenced by a “neoliberal anti-racist platform” embodied in a “colorblind ideology manifesting weak to non-existent race-based collective identities and low, if any, emphasis on race matters in everyday discussions, public policy or social analysis” (Warren & Sue, 2011, p. 42). Assimilationist policies such as race-mixing, like that practiced in Mexico, were an attempt to erode racial divisions and black or indigenous identities. Several countries also employed the strategy of color-blindness, or ignoring race as a social category. Instead, group disadvantage is explained by class or economic cleavages (Warren & Sue, 2011; Hoffman & Centeno, 2003, p. 378). Note that both Venezuela and Peru have publicly denied that racism exists (Warren & Sue, 2011, p. 40). The authors point to several instances in which the use of race was banned altogether. In post-independence Bolivia, many sought to ban the term “Indian” and replace it with “Bolivian.” During the Cuban revolution,

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<sup>73</sup> Martinez-Eschabal (1998) describes *mestizaje* as the process of inter-racial and or inter-cultural mixing. In the nineteenth century it was linked to the trope of *lo Americano*, or the authentic Latin American. From the 1920s through the 1960s *mestizaje* was used to affirm one’s cultural identity. More recently, it has been descriptive of the mixture of culture in Latin America such as Japanese Brazilians, Argentine Jews and Afro Cubans. As Martinez-Eschabal states, “because Latin America is one of the regions in which racial and cultural mixing has taken place most extensively and most violently because of the nature and timing of colonization, *mestizaje* is a theme that virtually every Latin American writer/intellectual has addressed in one fashion or another” (Martinez-Eschabal, 1998, p. 21).

Afro-Cuban communities were dismantled because their existence conflicted with a colorblind ideology. In 1930, Mexico removed the question of race from its census because race-mixing has rendered such data “progressively inaccurate” and “meaningless” (Warren & Sue, 2011, p. 41). The deleterious effects of these assimilationist and color-blind approaches have been mitigated to some extent by a trend of multi-culturalism that privileged ethnic diversity. However, this seeming departure from *mestizo* nationalism has been undermined by everyday acts of racism and policies that are more symbolic than substantive.

In their examination of the changes in race and class discourse in Latin American history, Applebaum, Macpherson & Rosenblatt (2003) identify four critical historical moments. First, European notions of racial hierarchy were imposed on colonial subjects, excluding racial and ethnic minorities from political and economic authority. Pro-independence elites purported to restructure racial classifications while also relying on principles of classical liberalism. Only white or creole persons could be deemed to have the “civic virtue” required for self-government; blacks, Indians and those without property were denied full citizenship. For example, Latin American anti-colonialist Simon Bolivar viewed diversity as an impediment to democracy. He believed that mixed-race Venezuelans lacked virtue and that they required serious political education before they could be permitted to participate in government. During the second moment, late nineteenth century republics experienced a rise in commodity exports, the end of slavery and the spread of proletarianization. Commercial agriculture was an attack on indigenous communal landholding. Elites simultaneously sought cultural homogeneity among the races while continuing the racial classification scheme that was so integral to labor group stratification. Population control of minorities was attempted, undergirded by eugenic notions of inherent inequality and effectuated through control of reproduction and other social activities aimed at improving the “lower” races’ stock. In the third moment, late nineteenth and early twentieth century populist nationalist projects emerged to form independence movements. Many of these movements rallied workers through

discourses of racial harmony, as the doctrines of import substitution and national self-sufficiency began to take root. In Cuba, Jose Marti mobilized ex-slaves and slave masters against imperial Spain by defining the Cuban nation as raceless. Intellectuals like Gilberto Freyre and Manuel Gamio began to repudiate the eugenics theory and argued that *mestizaje* actually benefitted humanity. Blacks found pride through the negritude movement and the *indigenistas* elevated the beauty of native peoples. Finally, the fourth moment many Latin American scientific and political elites began to avoid the terminology of race. In the post-WWII environment, they opted instead for the term “ethnic.”

In the latter part of the twentieth century, ethnic movements began to take shape. Yashar (2005) describes how indigenous movements shut down commerce in Ecuador, the Ciapas made demands of the Mexican government, the Maya in Guatemala organized the Second Continental Meeting of Indigenous Popular Resistance and indigenous movements in Ecuador helped topple two leaders. In Yashar’s words “they are demanding equal rights; but they are also demanding special rights as native peoples – with claims to land autonomous juridical spheres and the right to maintain ethnonational identities distinct from, but formative of, a multinational state” (Yashar, 2005, p. 5). By using citizenship regimes, the state privileges certain groups. In her comparison of Ecuador, Bolivia, Guatemala, Peru and Mexico, Yashar (1998) argues that indigenous movements have emerged to challenge citizenship hierarchies, through exploitation of the opening created by political liberal liberalization and their own cultural identities. In Ecuador, Bolivia, Guatemala and Mexico ethnic cleavages have become more politicized in recent years, spawning national and regional organizations mobilized around the defense of “Indians as Indians.” Conversely, in Peru ethnic identity has been overshadowed by class-based identity, leading to weak mobilization efforts (Yashar, 1998, p. 27). Yashar’s arguments are grounded in comparative historical analysis, rather than primordialist, rational or post-structural paradigms.

Minority treatment in Southeast Asia has been explained by an illiberal application of “Asian values,” which privileges the collective good over individual and minority rights. However, the

simplest explanation is that Southeast Asian governments comprise elite ruling classes that prioritize their own self-interests over those of society. And in the words of Brown (2007),

[t]he capitalist economic development of these nation-states depends in part on their capacities for transforming the economies of their pre-capitalist peripheries. The location of ethnic minorities, in particular the 'indigenous peoples', in such pre-capitalist peripheries thus explains the interventionism of the state, and the societal disruptions which stimulate ethnic minority mobilization (Brown, 2007, p. 68).

Finally, nationalism may explain ethnic majority treatment of minorities. Authoritarian or semi-authoritarian Asian leaders legitimize their rule by constructing the nation-state as ethnic, and whose survival depends upon the subordination and marginalization of minority interests. Minority subordination results in uneven economic development, an occurrence which engenders resentment within the minority consciousness.

Brown asserts that "[t]he dominant view in the literature on Asian nationalism and ethnic politics has long been that Asian nation-states were conducted so as to favour one dominant cultural community at the expense of the diverse indigenous, migrant or ethno-national minorities" (Brown, 2007, p. 62). In this narrative, the ethnic minorities are victims with legitimate claims to autonomy. Brown (2007) argues that western-style multinational federalism may be problematic because many Asian states have authoritarian or illiberal tendencies. These factors result in a fear that ethnic-based autonomous or semi-autonomous sub-national units may come to be governed by militant ethno-national elites, perhaps eventuating in political instability and disintegration. In the case of Southeast Asia, ethnic minorities have indeed been victimized by states' authoritarian features. This may be caused or at least complemented by the ethnic majority's mimicry of oppression wrought against them by the colonizer (Brown, 2007, p. 67).

In addition to the ethnic dimension of Asian nationalism, a civic dimension operates. Here, "civic" implies the generally recognized norms embodied in democracy and democratization: legal and political equality, access to social programs, rule of law, etc. In this scenario, democratization goes hand in hand with capitalist development. As Brown puts it, "[d]emocratization requires a shift

of political focus away from the politics of ethnic minority versus ethnic minority, and toward the politics of collective civic nationalism versus liberal civic nationalism” (Brown, 2007, p. 72). What also occurs is a shift away from protective democracy and toward deliberative democracy.

Deliberative democracy requires that full citizenship and participatory rights be extended to all groups, even, and perhaps especially, to marginalized ethnic minorities. This sort of national integration through accommodation may come in the form of autonomy; however, in states with weak capacity and legitimacy, state concessions to demands of territorial autonomy may prove destabilizing and may lead to further demands for outright independence. Brown summarizes his position on territorial/federal solutions to ethnic minority integration in the following way: “[i]f deliberative democracy is the goal, then federalism is desirable only if institutionalized and symbolized in territorially inclusive, rather than ethnically exclusive, terms and if it functions to reduce the alienation of those in the marginalized provinces so as to promote their state-national integration, rather than their ethno-national self-determination” (Brown 2007, p. 77).

In Southeast Asia, ethnic, linguistic and religious minorities are subsumed under the heading “ethnic minority” and are distinguished from indigenous peoples. Generally speaking, ethnic minorities are settler populations with no primordial ties to a particular territory. Conversely, indigenous peoples are the earliest known inhabitants of a territory (Clarke, 2010, p. 415). In practice, the distinction between the two can be difficult to make. As Clarke notes, Vietnam does not acknowledge the term “indigenous peoples” and instead recognizes all minorities as “ethnic minorities.” In addition, it can be difficult to define the dominant ethnic group and to distinguish it from minorities. Overlap between ethno-linguistic and religious groups also exists. In terms of development, the fates of ethnic minorities and indigenous groups have both converged and diverged. What is clear, though, is that both groups have, as Brown described suffered discrimination at the hands of the state.

In the 1990s, political liberalization and democratization led Southeast Asian states to partner with minority organizations to engage in ethno-development, described by Hettne (1996) as a combination of cultural pluralism, internal self-determination, territorialism and sustainability. Clarke asserts that the central cause for the change was the end of the Cold War. As examples, Clarke points to the 1986 collapse of the Marcos regime in the Philippines, an elected government in Thailand in 1988, the introduction of *doi moi* in Vietnam and the New Economic Mechanism in Laos, and democratic elections in Laos in 1993. These events were followed by the collapse of the Suharto regime in Indonesia (Clarke 2010, p. 428). States began to pay greater attention to minority issues, such as territorial autonomy, recognition of ancestral land rights, development projects with NGOs and international donors. That said, minority policies do vary among Asian cases. For example, minority policies in China and Japan occupy different ends of the cultural pluralist-assimilationist spectrum. According to Min (1992), the Chinese Communist government emphasized ethnic equality and ethnic autonomy, recognizing the value of ethnic diversity. The 1952 Regulation on Autonomy of Minority Areas adopted by the Communist State Council established politically autonomous regions for Koreans and other groups such as Mongolians and the Hui. During the Reunification Movement (1957-1959) and the Cultural Revolution (1966-1976) minority policy moved toward integration, national unity and political centralization. After the Cultural Revolution, pluralism returned. The state restored the use of minority languages in ethnic schools and increased enrollment of minority college students through quotas (Min, 1992, p. 15).

By contrast, Murphy-Shigematsu (1992) notes that for some time Japanese political leaders have believed that Japan should be mono-ethnic. Minorities such as the Ainu and Ryukyans were subjected to assimilationist policies meant to destroy their cultures. Doak (1997) argues that it was Japan's Meiji Restoration that precipitated the debate over the relationship between national identity and state structures. This debate has culminated in Japan's policy of assimilationism, typified by the relationship between the majority Wajin and indigenous minority Ainu. As Howell (1996) explains,

Japan's policy is an outgrowth of the "myth of ethnic homogeneity" that "protects Japanese society from overt ethnic conflict because it forces minorities, through the organizations that represent them, to choose between ethnic abnegation and the purgatory of institutionalized 'otherness'" (Howell, 1996, p. 171). The Ainu are Japan's indigenous minority, the original inhabitants of Hokkaido, Japan's northernmost island. As a result of Japan's assimilationist policies, very few Ainu can speak their native language and traditional economies and cultures have almost completely disappeared. They have a disproportionate poverty rate and suffer from employment discrimination, consequences brought about by policies such as the 1899 Aborigines Protection Act, which sought to turn the Ainu into petty farmers on marginal land (Howell, 1996, p. 173). Although Japanese policy toward the Ainu taken a sympathetic turn, this sympathy has not been extended to other indigenous groups such as the Burakumin, who, although culturally distinct, have no objective "ethnic" characteristics that distinguish them from the majority.

This brief review was intended to not only frame our discussion of LERN affirmative action precommitments, but also to illuminate the commonalities and divergences in regional LERN policies. Historical specificity of racial projects is key; however, serious comparison cannot ignore the transnational sharing of theories of racial and ethnic hierarchization such as those imparted by Spain upon Latin America and Britain upon African states. When we compare regions, several key points become remarkable. First, regardless of colonial history, legal heritage or economic system, all regions exhibited some form of racial and/or ethnic stratification that was perhaps created by, and certainly exacerbated by, state policies that began with colonial powers and was reproduced by political elites in the subsequent nascent republics. This is essentially what the Winant, Goldberg, Marx "racial project" line of argument maintains. Second, LERN classification systems change over time, with certain group identities undergoing reformation and re-valuation; however, LERN discrimination and the consequent political and economic power asymmetries never seem to diminish in salience. The equilibrium of inequality retains intractability even in the face of

constitutional and legislative reforms that have granted LERN minorities more rights. Third, in many cases there is a significant policy distinction when it comes to the treatment of indigenous vs. non-indigenous groups, most notably in Latin America and Southeast Asia.

A. LERN-specific, Non-domain-specific precommitments

Table 5 shows the cases with social precommitments and LERN-specific, domain-specific precommitments. Table 6 shows the cases with equality precommitments and LERN-specific, domain-specific precommitments. The data show that 16 of the 30 cases have classical or tacit LERN-specific affirmative action precommitments. Of those 16, only one – Brazil - has no LERN-specific equality precommitments. Only five cases lack some sort of social precommitment.

**Table 5: Cases with LERN-specific, domain-specific and social precommitments**

		<b>Social precommitment</b>	
		<b><u>Yes</u></b>	<b><u>No</u></b>
<b>LERN-specific precommitment</b>	<b>Yes</b>	India, Brazil, Pakistan, Bangladesh, Nigeria, Russian Federation, Philippines, Vietnam, Ethiopia, DRC, Italy, Myanmar, Ukraine, Colombia, Spain	SA
	<b>No</b>	China, Indonesia, Japan, Germany, Thailand, Turkey, Iran, France, ROK	US, Argentina, Mexico, Egypt

**Table 6: Cases with LERN-specific, domain-specific and equality precommitments**

		<u>Equality precommitment</u>	
		<u>Yes</u>	<u>No</u>
<b>LERN-specific precommitment</b>	<b>Yes</b>	India, Pakistan, Bangladesh, Nigeria, Russian Federation, Philippines, Vietnam, Ethiopia, DRC, Italy, SA, Myanmar, Ukraine, Colombia, Spain	Brazil
	<b>No</b>	China, Japan, Mexico, Germany, Egypt, Turkey, Iran, Thailand, France	US, Indonesia, ROK, Argentina

Four of the cases with non-group-specific precommitments – the Philippines, SA, Colombia and Spain – also have LERN-specific affirmative action precommitments. Seven cases have LERN-specific, non-domain-specific precommitments: India, Bangladesh, Nigeria, Russian Federation, Vietnam, DRC and Italy. The POL domain has five cases with affirmative action precommitments and the ECON/EMP domain has eight cases, respectively. Six were found in the EDU domain and eight were found in the CULT domain. Again, as variables, geography and legal tradition do not seem to explain variation. Finally, relative homogeneity alone is not determinative. An analysis of the data reveals that, indeed, several of the cases with relative ethnically heterogeneity – where no one LERN group constitutes more than 50% of the population – have LERN-specific affirmative action precommitments. However, several other relatively homogenous states also have precommitments, such as China, Bangladesh, Russia and Vietnam.

**Table 7: Cases with LERN-specific precommitments by group and domain**

Domain	Group	
	Specific	Non-Specific
Specific	India, Brazil, Pakistan, Bangladesh, Nigeria, Philippines, Ethiopia, Vietnam, SA, Myanmar, Ukraine, Columbia, Spain	-
Non-Specific	India, Bangladesh, Nigeria, Russian Federation, Vietnam, DRC, Italy	Indonesia, Philippines, Thailand, SA, Columbia, Spain, Argentina

If we subject three of the LERN-specific, non-domain-specific affirmative action precommitment cases – India, Bangladesh and Nigeria – to comparative analysis, we can shed light on two sequential issues crucial to unpacking and elaborating the complexity of LERN-specific affirmative action precommitments. First, we can gain greater insight into the constellation of macro- and micro-variables that interact to produce the precommitment. Second and subsequent, and more specific to the LERN target group, after the preference has been constitutionalized we will see how its actual articulation can make practical application in the manner intended by the framers a difficult and contentious enterprise. Stated plainly, whether these three cases are actually indeed non-group-specific – that is, applicable to all minority groups – becomes debatable because of uncertainty about what groups are entitled to the preference. This uncertainty can be largely attributed to three factors: (1) a lack of constitutional definitional specificity, (2) complex historical and constantly changing LERN political dynamics and (3) a change in social and human rights norms. Finally, it is important to note that both India and Nigeria are LERN heterogeneous societies, as well as former British colonies that achieved relatively peaceful independence after WWII. Conversely, Bangladesh, also with British colonial influence, is a relatively homogenous society that gained independence through a civil war with Pakistan. India and Bangladesh have classical precommitments, while Nigeria is characterized by its tacit “federal character” precommitment. All three cases have social precommitments and LERN-specific equality precommitments.

Bangladesh has a classical, LERN-specific, non-domain-specific affirmative action precommitment at art. 28, § 4, the same provision that contains the SEX-specific precommitment “[n]othing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.” Gaining its independence through civil war with Pakistan in 1972, Bangladesh is a relatively homogenous society, with 98% of the population being ethnically Bengali and 83% being Muslim. An examination of the academic literature reveals two minority groups of note. First, the plight of the thirteen indigenous communities that reside in the Chittagong Hill Tracts (CHT) has been a major issue for human rights groups. Each group is linguistically distinct and historically the CHT had been geographically separate. Under British occupation, the tracts enjoyed a semi-autonomous status, as memorialized in CHT Regulation 1900. Under the Regulation, outsiders, particularly Bengalis, faced several administrative hurdles if they wanted to settle on the tracts. In 1935, the tracts gained the status of “totally excluded area”<sup>74</sup> (Chakma, 2010, p. 284).

Curiously, even though Bangladesh has what seems to be a LERN-specific affirmative action precommitment, several constitutional provisions operate against the Chittagong minorities. The Bangladesh Constitution has no territorial precommitment and makes no mention of indigenous people, likely because of their small population. Indigenous peoples, or *Adibashi*, constitute approximately 1.5% of the population. Generally speaking, *adibashi* are viewed as inferior, in part because of their animistic religious practices. The principal author of the constitution, Kamal Hossain, recommended specific recognition of indigenous peoples, in art. 29, which prohibits

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<sup>74</sup> As relayed by Uddin (2010) the Government of Pakistan changed the administrative status of the CHT from “excluded area,” opening the area to Bengalis. A 1963 constitutional amendment abolished the special status of the CHT altogether. According to Uddin,

[t]he most significant transformation to take place during the Pakistan period was the change in designation of the CHT from ‘excluded area’ to ‘tribal area’, which resulted in the shift of identity of CHT people from ‘hill men’ to ‘tribal people’. In fact, this was the state’s politics of marginalization that designated the *Pahari* as ‘tribal’ to indicate the people of a lower category and inferior in comparison to others in Pakistan (Uddin, 2010, p. 288).

discrimination on grounds of “religion, race, caste, sex or place of birth” alone. This recognition did not occur. It also seems unlikely that indigenous peoples were intended to be included in among the “backward class of citizens” which may receive state preferences under art. 29 (Biswas, 2008). Under the constitution, it seems logical that the CHT groups are citizens under applicable citizenship laws (unlike the Biharis whose citizenship status is not fully recognized by the government (Paulsen, 2006)). However, whether they qualify under art. 28, sec. 4 as a “backward section of citizens” is unclear. What is clear is that the CHT minorities’ status as indigenous rather than Bengali has made them susceptible to victimization by the Bangladesh government.

Chakma (2010) argues that Bangladeshi independence set in motion the “ethnocide” of the CHT tribes through three cooperative processes: (1) nation-building and development visions of the bureaucratic state, (2) the struggle for autonomy by CHT indigenous communities, and (3) the militarized pursuit of a national security agenda in the CHT by the Bangladeshi state. When the new constitution was passed, the new government’s agenda was furthered, to the unfortunate detriment of the CHT groups. Article 9 instituted “Bengali nationalism,” implicitly outlawing competing national allegiances, and art. 9 declared that all citizens were to be referred to as “Bengalis.”. For Chakma, these provisions evince a classic program of assimilation and homogenization, inimical to continued CHT autonomy. Indeed, when Manobendra Narayan Larma, a representative of the CHT groups, met with Prime Minister Rahman during negotiations over the constitution, his demands for continued political autonomy were met with overtures of Bengali nationalism and the rejection of any non-Bengali indigenous identity.<sup>75</sup> In response, the tract groups formed a political party, the PCJSS, and when conventional avenues failed, the party opted for armed struggle. The party became viewed as a national security threat and Bengali settlement in the CHT region increased. Indigenous land dispossession became state policy (even in light of art. 42), sometimes accompanied by rape,

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<sup>75</sup> Uddin (2006) argues that it was the machinations of nineteenth-century reformers and Muslim elites who, in their attempts create a unified sub-continental Muslim culture, inadvertently reinforced a uniquely Bengali conception of Muslim community.

massacre and Islamization (even in light of art. 41). The 1997 peace accord did little to stem the evictions (Chakma, 2010). In his analysis of the constitution-making process Huq (1973) states that unlike India, in Bangladesh there was no significant minority problem, as there was general agreement on the four major issues: democracy, socialism, secularism and nationalism (Huq, 1973, p. 70).

Conversely, India had a significant minority concern. In the Indian Constitution, we can find the LERN-specific precommitment under art. 15, § 4, Under that article, the state's anti-discrimination provisions do not prevent the state from "making any special provision for the advancement of any socially or educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."<sup>76</sup> Article 15(4), enacted as a constitutional amendment in 1951 was precipitated by a legal controversy in *Champakam Dorairajan v. State of Madras*, 1951 AIR Madras 120. In that case, the state of Madras had implemented a reservation system for admission to its institutions of higher education. For example, certain seats at any of the four Madras medical colleges would be apportioned in a manner that "protect[ed] the weaker flexion of the people." As such, seats had been reserved for Non-Brahmin Hindus, Backward Hindu Communities, Brahmins, Harijans, Anglo-Indians, Indian Christians and Muslims. Plaintiffs, prospective students whose

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<sup>76</sup> The caste system in India is a system of Hindu societal stratification based on birth. Perhaps beginning in the sixth century B.C. upon independence from Britain, the ruling Congress Party sought to abolish caste distinctions and "untouchability" (art. 17). It also attempted to retain the system of reservations that existed prior to and through the colonial period. India's reservation policies began toward the end of the 19<sup>th</sup> century, mostly benefiting those of the Brahmin caste. According to Parikh (2001), the British had a strategic purpose in creating reservations. For example, when representatives for the congress were to be elected rather than appointed in 1906, the British contemplated separated electorates for Muslims. Later, this plan was to be extended to Sikhs, Christians and untouchables. These separate electorates could have the effect of maintaining social divisions at preventing coalition-building. The Indian National Congress (INC), including Mohandas Gandhi, opposed the move because he believed it would divide Hindu society. Gandhi and others later relented, due in no insignificant part to increased mobilization on the part of dalits, led by Ambedkar and his advocacy during the Poona Pact negotiations in 1932. Even after independence, the preference was retained in the form of congressional seat reservations. Caste is an institution with deep roots in Hindu culture, and efforts to ameliorate it and other social distinctions have encountered disagreement among decision-makers and ordinary citizens alike.

application for admission had been rejected, but who would have been admitted had there been no reservation policy, argued that Madras' reservation method violated the non-discrimination principles memorialized in arts. 14<sup>77</sup>; 15, sec. 1<sup>78</sup>; 15, sec.2;<sup>79</sup> and 29, sec. 2<sup>80</sup> of the Indian Constitution. The Madras High Court ultimately held that the reservation scheme did violate the applicable equality provisions of the Indian Constitution. The Indian Supreme Court affirmed.<sup>81</sup>

Following the decision, art. 15 was amended and subsequent jurisprudence overturned the *Dorairajan* decision.<sup>82</sup> As amended, art. 15, sec. 4 carved out an exception to India's non-discrimination precommitment "for the advancement of any socially or educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."<sup>83</sup> However, controversy arose over the parameters of the reservation scheme and precisely which groups could qualify for reservations. In *Balaji v. State of Mysore*, AIR 1963 S.C. 649, the Court limited education quotas to 50% and held that factors other than just caste had to be considered. *Devadson v. Union of India*, AIR 1964 S.C. 179, applied the 50% rule to government employment and *Chitrakleha v. State of Mysore*, AIR 1964 S.C. 1825, held that institutions were not mandated to take caste into account. In *Rajendran v. State of Madras*, AIR 1968 S.C. 1012, the Court held that caste could be the exclusive criterion for eligibility, but only if the entire caste was proved to be educationally and socially backward. Finally, in *Indra Sawney v. Union of India*, AIR, 1993 S.C. 477, the Court overruled *Balaji* and *Devadson* to the

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<sup>77</sup> Under art. 14, "[t]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

<sup>78</sup> Under art. 15(1), "[t]he State shall not discriminate against any citizen on grounds of only religion, race, caste, place of birth or any of them."

<sup>79</sup> Article 15(2) reads, in pertinent part, "[n]o citizen shall, on grounds of religion, race, caste, sex, place of birth or any of them, be subjected to disability, liability, restriction or condition...."

<sup>80</sup> Under art. 29, "[n]o student shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

<sup>81</sup> AIR 1951 S.C, 226, 1951 SCR 525.

<sup>82</sup> The two seminal cases are *State of Kerala v. Thomas*, AIR 1976 S.C. 490, and *Visanth Kumar v. State of Karnataka*, AIR 1985 S.C. 1495.

<sup>83</sup> Article 338 compels the president to appoint a commission to investigate matters relating to the safeguards for SC and ST.

extent that they construed affirmative action as an exception to constitutional equality. Rather, it was interpreted as an inherent part of achieving substantive equality (Neuborne, 1993, pp. 496-500).

The controversy over reservations has not been limited to the SC and ST. The OBC category receives less constitutional treatment, but they have been the subject of recent discussions regarding how broadly reservations can be applied. Article 341 of the Constitution required the Indian government to set up commissions to investigate the conditions of OBCs in society. In 1953, the Kaka Kalelkar Commission issued a majority report that recommended civil service preferences. The commission was composed of members of backward and non-backward communities. Kalelkar, the chairman of the commission was staunchly opposed to reservations based solely on caste. Instead, he favored preferences that took caste and other factors into account when hiring decisions were to be made. Unfortunately, the report provided no concrete definition of “backward class.” As such, the 2,399 groups that qualified for the preferences were too numerous for the government’s liking. Consequently, the government rejected the commission’s recommendations (Maheshwari, 1991, p. 20).

Then, in 1978, the Mandal Commission was formed. The members of this new commission were exclusively of the backward castes. Under its eligibility criteria, there were 3,743 groups that qualified for OBC status, approximately 52% of the Indian population. In light of the report, the V.P. Singh government instituted a 27% quota for socially and educationally backward classes (SEBC) for civil service appointments. Opponents of the quota maintained that such policies were unfair, inefficient and perpetuated caste cleavages. Proponents supported the quotas on the basis of social justice (Bajpai, 2011). In 2008, the Supreme Court upheld the Central Education Institutions Act which, which extended a 27% quota to OBCs in institutions of higher education. It held that art. 15(5) was valid only insofar as it was applied to federally funded institutions, but the Court severed the reference to “unaided” institutions because it violated the basic structure of the Constitution. However, the “creamy layer” of OBCs would not qualify for reservations because they are not

considered socially and educationally backward. Additionally, the Court noted that “creamy layer” inclusion violates the right to equality. That is, non-exclusion of creamy layer and inclusion of forward castes in reservations violates the right to equality in art. 14, 15 and 18 as well as the basic structure of the Constitution.

The “federal character” concept in Nigeria’s Constitution has also resulted in complicated application. Under art. 14, § 3,

[t]he composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few State or from a few ethnic or other sectional groups in that Government or in any of its agencies.

Further explanation can be found in art. 14, § 4;

the composition of the Government of a State, a local government council, or any of the agencies of such Government or council, and the conduct of the affairs of the Government or council or such agencies shall be carried out in such manner as to recognise the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the people of the Federation.

Under art. 171, § 5 the President must take federal character into account when making appointments. Governors must do the same under art. 208, § 4. Federal character also applies to the composition of the armed services (Nig. Const. art. 217, § 3; art. 219, § b) and the leadership of political parties (Nig. Const. art. 223, § b). Several provisions in the Third Schedule, passed in 1999, pertain to federal character.

The federal character idea originated during meetings of the 1975 Constitution Drafting Committee in an effort to promote national unity in a multi-ethnic society. Afigbo (1989) relays the position of the proponents:

There had in the past been inter-ethnic rivalry to secure domination of the government by one ethnic group or combination of ethnic groups to the exclusion of others. It is therefore essential to have some provisions to ensure that the predominance of persons from a few states or from a few ethnic or other sectional groups is avoided in the composition of

government or the appointment or election of persons to high offices in the state (Afigbo, 1989, p. 4).

The opposition argued that a federal state alone was sufficient to protect minorities. The compromise was the “federal character” principle, and, reminiscent of the less-than-comprehensive language in the Bangladeshi and Indian constitution, “the acceptance of the phrase by most members [of the committee] lay partly in its novelty, partly in its cosmetic character, partly in its rhetorical appeal, but above all, in its vagueness. In fact, it was so vague ... the Committee ended up displaying almost total ignorance of what it had accepted” (Afigbo, 1989, p. 4). The committee, however, did provide a definition. Federal character

[r]efers to the distinctive desire of the peoples of Nigeria to promote national unity, foster national loyalty and give every citizen of Nigeria a sense of belonging to the nation notwithstanding the diversities of ethnic origin, culture, language or religion which may exist and which it is their desire to nourish, harness to the enrichment of the Federal Republic of Nigeria (Afigbo, 1989, p. 5).

Although the geographical and tribal complexities existed long before 1975, no notion of group preference can be found in the 1963 Constitution.

As indicated in the discussion of territorial cleavages *infra*, Ekeh (1989) notes that the North-South problem is the oldest imperative of the federal character doctrine. The second imperative is the nature of Nigerian federalism itself. The state itself began in 1914 with Northern Provinces and Southern Provinces, and was followed in 1939 with the devolution of administrative power into regions. The South was bifurcated and the North remained intact. Nigeria became federal in 1954 and in 1964 the Mid-West and Western Regions were created amid great controversy. In 1966, Gen. Ironsi overthrew the First Republic government and abolished the federal system. Ironsi was later killed in a counter-coup and his successor Gowon reinstated the regional system and created more regions, totaling 12. Then, in 1979, Obasanjo came to power through coup of the Murtala Muhammad government. He added seven regions in an attempt to create cross-cutting cleavages: four for the Hausa-Fulani, four for the Yoruba, two for the Igbo and nine for ethnic minority groups

(Ekeh, 1989). The 1979 constitution cemented the federal government's authority over the states. Read (1979) contends that the ascendancy of federal power was inevitable, as ethnic communalism at the regional level was undermining the creation of truly federal political parties. Ethnic loyalties were to blame for the conflict over the censuses held between 1964-65 and the combustibility of such heterogeneity had to be addressed. Even still, "federal character" remained a part of the 1999 Constitution (Yakubu, 2000).

The Federal Character Commission (FCC), the institution charged with implementing the "federal character" principle, was established in 1996. The scope of its authority is broad, extending beyond civil service and military appointments to inequalities in social services, infrastructure and the private sector. The FCC essentially uses a quota system. The Commission must ensure that "each state in the Federation, and FCT, respectively attain not less than the statutory 2.5% and 1% representation in the manpower distribution of each of the federal government ministries, agencies and parastatals by 2010" (FCC, 1997, Functions and Targets, vii). Although the quota formulae may be straight-forward, their application has caused consternation among certain segments of the polity. A central cause of controversy is the indigene/settler dichotomy. Under FCC guidelines, "indigenes" receive preferential treatment that "settlers" do not." The Nigerian Constitution implicitly recognizes the distinction between the two groups, e.g., in § 147; "... [t]he President shall appoint at least one Minister from each state, who shall be an indigene of such state." However, the Constitution does not define either of the terms. Under the FCC definition scheme, an "indigene" for local government purposes is someone "either of whose parents or any of whose grandparents was or is an indigene of the local Government concerned; or "[w]ho is accepted as an indigene by the Local Government" (FCC Guiding Principles, Definitions 1(a), (b)). An "indigene of a state is "an indigene of one Local Government in that state" (FCC 1997, Guiding Principles, Definitions 1(2)).

Stated plainly, an indigene is "indigenous" to a particular state, which, under "federal character" policies, would entitle them to preferential treatment in state civil service hiring and state-

administered benefits. Settlers are not native to a particular territory and the states and localities should protect indigene populations from their encroachment. The indigene/settler dichotomy has important implications for: educational opportunities and benefits, employment opportunities and benefits, access to public and military service, property ownership and allocation, government infrastructure and public works projects, and political participation.<sup>84</sup> The indigene/settler issue was one of the causes of the conflict between the Muslim Hausa-Fulani settlers and the Christian indigenes (the Berom, Amo, Buji, Anaguta, Jere, Jawawa, Afizere,) in the city of Jos in Plateau State. The Hausa-Fulani settlers migrated to Jos for tin mining, through the active encouragement of the colonial government. After mining, the Hausa-Fulani began farming, which was so lucrative others from the ethnic group were pulled to the region. Having resided in Jos and being in rulership for over a century, the Hausa-Fulani contended that they were no longer “settlers” and thus entitled in indigene rights (Adesoji & Alao, 2009, p. 155). Recently, disputes over farmland and local chieftancy titles in Jos led to the 2002 killing of hundreds of Christians by Hausa militias. In 2004, Christian reprisal killing left between 650 and 700 Muslims dead. The Plateau Peace Conference was commenced to resolve the conflict, without much success. Litigation has also been initiated in the Federal High Court in Kaduna by a group of twenty Nigerian citizens and an NGO over the indigene/settler dichotomy and its relationship to the 2009 Fundamental Rights Rules.

Given the pervasive problems with the implementation of the “federal character” principle, many have advocated that it be abolished. Critics like Ekeh argue that the goals of “federal character,” to mitigate ethnic loyalties and manage sometimes bloody conflict political party conflict and to provide protections for ethnic minorities, could never be realized, in part because the creation of the 19 states did little to ease political domination of minority groups by majorities. What’s more,

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<sup>84</sup> In terms of employment, indigenes receive job reservations, settlers generally receive contract work, does not come with pension benefits. Some advertisements for employment read “only indigenes need apply.” Indigenes have reserved seats in public institutions of higher education, as well as scholarships. University fees are also higher for non-indigenes. Finally, in many localities, non-indigenes can vote but cannot stand for elections (Alubo, 2009, pp. 5-6).

he argues, the concept itself seems flawed. Ekeh identifies four conceptual inadequacies. First, the concept was overgeneralized to include intra-ethnic conflicts, not just inter-ethnic conflicts. Second, the principle seeks a permanent solution to what may be a temporary problem, because territorial boundaries, wealth distribution and other variables that create group conflict may surpass ethnicity in importance. Third, the implementation of “federal character” may be overly burdensome to implement because the federal and state governments must apportion appointments in a manner that pleases many ethnic groups. Fourth, the principle allows politics to invade the domain of the bureaucracy, which can lead to unqualified persons being appointed to vital government posts, serving the end of disunity rather than national loyalty (Ekeh, 1989). Ekeh’s criticisms could quite easily be applied to the Indian and Bangladeshi cases as well.

The comparison of LERN-specific, non-domain-specific affirmative action precommitments from Bangladesh, India and Nigeria reveals several analytical points that are instructive for understanding how the provisions operate in practice. First, the language used to articulate a precommitment matters. The groups that may benefit from a particular LERN precommitment hinges critically on the political processes that created the constitutional instrument itself, as well as on future processes that cannot be predicted with any precision. These processes, in turn, shape how certain provisions are defined and interpreted in the face of controversial application or non-application to a specific group. Second, it also seems as if the size and robustness of the group(s) seeking inclusion of preferences plays a key role in success. In the cases of India and Nigeria, minorities were actively mobilized and sufficiently large to secure language that permitted reservations and federal character policies. Conversely, in Bangladesh, the CHT groups were comparatively small in number and, although mobilized, could not seriously oppose Rahman’s nationalist schemes as the dalits had opposed Gandhi’s.

Third, just as with preferences for women, the type of preference sought may also play a role. In the case of LERN groups, territorial autonomy may be more difficult to secure than

political, economic or educational preferences simply because the former seek separation and the latter ultimate seek inclusion. Stated plainly, because territorial autonomy is so inherently inimical to the implementation and consolidation of the nationalist project it may be more difficult to get political elites, who are in the process of nation-building, to agree to, particularly when the group seeking territorial preference is small. Furthermore, absolute size of LERN population, degree of effective mobilization of LERN group, usefulness by political parties of LERN population as a voting bloc and use of state-directed violence by LERN group are important variables. The clusters of issues that are prominent in the comparison of the cases with LERN-specific, non-domain-specific affirmative action precommitments – nationalism, nation-building and state-building; indigently and minority identities; integration, assimilation and territorial autonomy; constitutional definition and interpretation of LERN preference target groups; and group mobilization, contestation and conflict – are the same issues that are central to the study of Comparative Politics as a sub-field on Political Science.

#### B. Territorial Precommitments

Although addressed in Chapter 6, the issue of territorial precommitments will receive further treatment, less as examples of the “territorial precommitment” category,” but more so to illustrate how these precommitments function as LERN preferences. Of the three types of territorial precommitments, autonomy is the most prevalent. The cases of the Russian Federation and Pakistan, reviewed in Chapter 6, are instructive examples. The chief concern here is determining when a territorial arrangement qualifies as a LERN preference. To reiterate, three criteria must be met: (1) the territorial arrangement must be provided for in the constitution, (2) territorial boundaries must be largely coextensive with LERN boundaries and (3) the territories inhabited by minority LERN group(s), or the members of the groups thereof, must receive some government mandated or permitted preference that the territories inhabited by other group(s), or the members thereof, do not receive. Again, the Russian Federation, Pakistan and the US would all qualify because they have

territorial subdivisions with varying degrees of autonomy, with co-extensive ethnic and territorial boundaries, and the arrangements are constitutionally provided for, albeit with much more articulated specificity in the first two cases.

A total of 15 cases in the sample have some form of territorial precommitment. Eleven cases have autonomy precommitments, five cases have ethno-development precommitments and four cases have conservation precommitments. Five cases have multiple sub-types of territorial precommitments. Ten of the cases also have a LERN-specific precommitment, whether domain-specific or non-domain-specific. The fact that half the cases in the sample have a territorial precommitment means that the conferring minority group preferences through territorial schemes is a widely accepted tool for managing group conflict, facilitating territorial integrity and for promoting national unity.

**Table 8: Cases with LERN-specific and territorial precommitments – specific provisions**

	Territorial	LERN-Specific, Non-Domain-Specific	LERN-Specific Domain-Specific			
			POL	ECON/EMP	EDU	CULT
<b>China</b>	Arts. 4 ( <i>S, M, A, ED</i> ); 115 ( <i>A</i> ), 122 ( <i>M, A, ED</i> )	-	-	-	-	-
<b>India</b>	Art. 38(2) ( <i>M, ED</i> ); 244 ( <i>M, A</i> ); Fifth Schedule (5) ( <i>P, A</i> )	Art. 15(4) ( <i>Cl, P</i> )	Arts. 243(D) ( <i>Cl, M, E, Q</i> ), 243(T) ( <i>Cl, M, E, Q</i> ); 330(1), (2) ( <i>Cl, M, E, Q</i> ); 331( <i>T, P, E</i> ), 332(1), (2), (3) ( <i>Cl, M, E, Q</i> )	Arts. 16(4) ( <i>Cl, P, CS</i> ); 46 ( <i>Cl, M</i> ); 336(1) ( <i>Cl, M, CS, Q, N</i> )	Art. 15(5)( <i>Cl, P</i> ); 46 ( <i>Cl, M</i> ); 337 ( <i>T, M, Q, N</i> )	-
<b>U.S.</b>	Art. IV(3) ( <i>P, A</i> )	-	-	-	-	-
<b>Brazil</b>	Art. 231 ( <i>M, Cons</i> )	-	-	-	-	Arts.210(2) ( <i>T, M</i> ); 215(1) ( <i>T, M</i> );
<b>Pakistan</b>	Art. 37(f) ( <i>M, ED</i> ); 247(3) ( <i>P, A</i> ); 247(7) ( <i>P, A</i> )	-	-	Arts. 27(1) ( <i>Cl, P, CS</i> ); 36 ( <i>T, M, CS</i> ), 37(a) ( <i>Cl, M</i> )	Art. 37(a) ( <i>Cl, M</i> )	Art. 28 ( <i>T, P</i> )
<b>Nigeria</b>	Art. 14(3) ( <i>M, ED</i> )	Arts. 14(3), (4) ( <i>T, M</i> )	Art. 223(b) ( <i>T, M, PP</i> )	Arts. 14(3), (4) ( <i>T, M, CS</i> ); 171(5) ( <i>T, M, CS, FG</i> ); 208(4) ( <i>T, M</i> )	-	-

					CS, SG); 217(3) (T, M, CS, FG)		
<b>Russian Federation</b>	Arts. 65, 66 (P, A)	Art. 69 (T, M)	-	-	-	-	-
<b>Mexico</b>	Art. 2 (A)	-	-	-	-	-	-
<b>Philippines</b>	Art. Art. 13(6) (M, Cons); 10(1) (M, A); 10(15), (20) (M, A)	-	-	-	Art. 10(20)(7) (T, M)	Art. 12(5) (T, M)	
<b>Thailand</b>	Secs. 66 (S, M, Cons); 67 (M, Cons)	-	-	-	-	-	-
<b>France</b>	Tit. 12 (M, A)	-	-	-	-	-	-
<b>Italy</b>	Art. 116 (M, A)	Art. 6 (Cl, M)	-	-	-	-	-
<b>Myanmar</b>	51(f)-(h) (M, A)	-	Art. 15 (T, M, E, SG); 17(c) (T, M, E, SG); 161(b), (c) (T, M, E, SG)	Art. 22(c) (T, M)	Art. 22(c) (T, M)	Art. 22(a) (T, M)	
<b>Colombia</b>	Arts. 246 (M, Cons); 329 (M, A), 330 (M, A, Cons); TA 55 (M, Cons, ED)	-	Art. 176 (Cl, P, E, FG)	-	-	TA 55 (T, M, Cons, ED)	
<b>Spain</b>	Secs. 143 (P, A); 148 (M, A); 156 (M, A)	-	-	-	-	Sec. 3(3) (Cl, M)	

**Key: Classical (Cl); Tacit (T); M (Mandatory); Permissive (P); Autonomy (A); Ethno-federal (ED); Conservation (Cons); Elections (E); Political Parties (PP);**

C. LERN-specific, Domain-specific Precommitments

As one might expect, the LERN-specific, domain-specific affirmative action precommitments are more numerous than the non-domain-specific variety. In addition to drawing our attention to the multitude of variables that determine the mechanics of affirmative action precommitments within cases, as well as those which determine differences in preference regime implementation between cases, the above comparisons identified the fundamental overlapping nature of the POL, ECON/EMP, EDU and CULT issue domains. In assessing how constitutional preferences operate practically *viv a vis* LERN minorities, the impossibility of achieving issue domain mutual exclusivity becomes readily apparent. Indeed, to confine any one constitutional provision to any one discrete domain denies the synergistic and interactive effects of the policies which are more often than not cross-domain in their consequences. Further, their cross-domain interactivity cannot be viewed without also appreciating how precommitments communicate and gain effectiveness across types and sub-types. This synergistic effect is more salient for LERN minorities than for women, primarily because of the interaction between the territorial and domain-specific precommitments. Although there is overlap, these four general domains are in many ways distinct, and are important analytical tools for understanding broadly the types of preferences considered by constitution-makers.

i. POL-specific precommitments

Five cases have POL-specific precommitments. As with women, these precommitments concern electoral preferences at the local, state and/or federal levels. Although not classified as domain-specific, territorial preferences also contribute to LERN minority political preferences. The Colombian case is instructive here. Under art. 176 of the Colombian Constitution, “the law may establish a special circumscription to ensure the participation in the Chamber of Representatives of the ethnic groups and the political minorities. Up to four representatives can be elected by this circumscription.” Article 7 gives support to this exception; “the State recognizes and protects the

ethnic and cultural diversity of the Colombian Nation.” Provisions such as these are indicative of constitutional reforms that occurred in Latin America in the 1990s. Regarding the issue of indigenous rights, the reforms share five general characteristics: (1) formal recognition of the multicultural nature of their societies and the existence of indigenous as distinct sub-state social collectivities; (2) recognition of indigenous peoples’ customary law as official, public law; (3) collective property rights with restrictions on alienation or division of communal lands; (4) official status for indigenous languages in territorial units where they are settled; and (5) a guarantee of bilingual education (Van Cott, 2000, pp. 42-43). The constitutions of Argentina, Brazil, Colombia and Mexico all have provisions that recognize indigenous peoples in some way. Prior to these revisions, many Latin American countries operated under a nationalist assimilationist narrative which, over time, gave way to more multicultural attitudes.

Article 329 of the Colombian Constitution provides for the creation of “indigenous territorial entities” in accordance with the Organic Law of Territorial Ordering. These entities are “reservations” which are non-alienable and based on the principles of collective property. Under art. 330, the indigenous territorial entities are to be governed by local councils “formed and regulated according to the usages and customs of their communities.” These communities have the right to design their own economic and social programs, promote public investment in their territories, distribute resources as they see fit and represent the territories before the national government. Colombia currently has two seats reserved in the senate for indigenous representatives (Van Cott, 2000, p. 48). Colombia has also carved out a space for indigenous law. In 1994, the Colombian Constitutional Court provided the following criteria for determining the status of indigenous law *vis a vis* civil law. First, indigenous cultural traditions are to be respected to the extent those traditions have been preserved. Second, the decisions handed down by indigenous tribunals must not conflict with constitutional or international human rights. Third, indigenous customary law has supremacy over civil law that conflicts with cultural norms and over legislation that does not protect a

constitutional right of the same rank as the right to cultural and ethnic diversity. A 1996 decision even permitted Colombia's Paez Indian community to utilize corporal punishment in contravention of civil law (Van Cott, 2000, p. 45). Colombia also has a special senatorial district for the indigenous and has granted autonomy to *resguardos*, reserves governed by indigenous authorities.

In addition to provisions for indigenous groups, Colombia's constitution provides preferences for black communities through territorial, ethno-development/conservation precommitment. Transitory article 55 states,

Within the two years following the entry into effect of the present Constitution, the Congress will issue, following a study by a special commission that the Government will create for that purpose, a law which will recognize to the black communities which have come to occupy the uncultivated lands in the rural riparian zones of the rivers of the *Cuenca del Pacifico*, in accordance with their traditional practices of production, the right to collective property over the areas which the same law will have to demarcate.

... The same law will establish mechanisms for the protection of the cultural identity and the rights of these communities and for the promotion of their economic and social development.

Transitory art. 55, ¶ 1, extends these protections to other parts of the country, pending approval by the special commission. The Constitution protects the predominantly black Raizal population in San Andres, Providencia and Catalina (Van Cott, 2000, p. 38). Statues regulate residency and property ownership in the archipelago, and guarantees Raizal representation in departmental assemblies.

According to Van Cott, the rights afforded to Afro-Colombians are less expansive than those for the indigenous populations. In Colombia, indigenous groups constitute 3.4% of the population but have been granted 29.8% of the land, while blacks account for 10.6% of the population and have been granted 4.1% of the land (Paschel, 2010, p. 735). This finding seems to contradict the importance of the role of the size of the LERN minority in achieving state preferences. Both Van Cott and Paschel agree that shifts in global policy norms toward human rights and multiculturalism allowed indigenous groups to press claims for cultural and collective recognition. In Colombia, this discursive shift, along with the domestic upheaval brought on by the

civil war presented an opportunity for already-mobilized indigenous groups to take advantage during the constitution-making process. Blacks, conversely, were not as mobilized. This discursive shift may have been absent or less pronounced in the case of the CHTs in Bangladesh.

In the 1980s, black Colombian activists unsuccessfully pressed claims based on affiliation with student or peasant movements and not based on an ethno-racial identity. During the constitution-making process, proposals were submitted on the rights of women and the disabled. Afro-Colombians were at a disadvantage because of ideological and regional fragmentation, and lack of resources. In addition, Afro-Colombians faced opposition from political elites concerned that the passage of legislation targeting blacks would contribute to inter-ethnic conflict. One member of the constitution-drafting committee, Cornelio Reyes, argued that including Afro-Colombians in the constitution would create apartheid and inter-ethnic conflict. Others agreed, opining that integration, rather than separation, should be the goal. To combat the opposition, Afro-Colombians forged alliances with indigenous groups, staged sit-ins and organized marches. They created the Black Telegram Campaign, sending 25,000 telegrams to policy-makers to demand inclusion in the new constitution. *El Tiempo* began covering the protests. Indigenous leader Rojas Birry took up the cause of Afro-Colombians. In his proposal to the constituent assembly tasked with writing the constitution (ANC) entitled “The Rights of Ethnic Groups,” he maintained that the indigenous and black causes were linked and that both deserved inclusion in the constitution.

Blacks did receive mention in transitory art. 55, but in Paschel’s view the simple fact that the provision was transitory highlights the reluctance of ANC participants to treat blacks and indigenous groups similarly (Paschel, 2010). Transitory art. 55 does recognize collective property rights for Afro-Colombians and Law 70, passed in 1993, regulates those communal land rights, as well as economic and social development, social and health services professional training and the protection

of cultural identity (Browne & Shea, 2010, pp. 28-9).<sup>85</sup> Law 70 also contained language reserving two seats for Afro-Colombians in the House of Representatives. In 1996, the Colombian Supreme Court expanded blacks' rights, perhaps beyond those intended by the constitution's framers. The Court held that all Colombian blacks, even though not meeting the constitution's narrow definition of a traditional, river-based culture, are entitled to protections and positive measures extended to ethnic groups under the constitution. The court found that blacks qualified as a "discriminated or marginalized group" under art. 13 (Colombia's non-group-specific, non-domain-specific precommitment), and were thus entitled to state-enforced preferences (Van Cott, 2000, p. 50). As we can see from the recent legal history, black Colombians have been successful in broadening rights that they were unable to attain during the constitution-making process.

Hooker (2005) asserts that the disparity in the rights afforded to indigenous groups and blacks in Latin America is a consequence of political elites' perception of indigenous peoples as having a distinct cultural group identity. She agrees with Van Cott and Paschel that significant multicultural reforms have taken place in Latin America. However, she contends that indigenous groups have been much more successful than blacks in gaining collective rights. Only in Honduras, Guatemala and Nicaragua – none of which is included in this study – do the indigenous and blacks enjoy the same collective rights (Hooker, 2005, p. 286). She posits that theories that rely on variables such as relative population size, organizational capacity of political movements and mobilization do not adequately explain indigenous inclusion and black exclusion. Hooker does concede that "the presence of a well-organized and visible indigenous or black movement that can take advantage of

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<sup>85</sup> Unfortunately, many aspects of Law 70 have yet to be implemented. The state has not allocated the requisite funds for development projects, and bureaucratic and institutional support have been lacking. Many applications remain without resolution, there is no reliable mechanism for resolving land disputes and black communities are not always consulted when the legislature adopts land resource legislation (Browne et al., 2010, pp. 32-3). In her study of the post 1991 property rights regime as it relates to Afro-Colombian communities on the Pacific Coast, Velez (2011) found that the new property regime had: (1) changed the political structure of the region, with the emergence of new local authorities; (2) changed the perception of the territory to a formal common property regime; and (3) promoted the development of new communal institutional arrangements that co-exist with de facto individual land holdings. Between 1996 and 2008, 156 Pacific Coast communities received collective land titles.

changing political opportunities is an important factor in the adoption of collective rights in Latin America (Hooker, 2004, p. 296), but concludes the key to understanding the disparity is Afro-Latinos' lack of distinct cultural group status. The issue may be one of framing, for as Hooker notes, "Latin American states and publics have been much more amenable to the demands made by the bearers of indigenous rather than black identities, and to calls for group rights posed in terms of cultural difference or ethnicity (indian-ness) rather than race or racism (blackness)" (Hooker, 2004, p. 299).

The other Latin American cases do not follow Colombia's lead with regard to LERN preferences. Argentina, which also has black and indigenous populations, has electoral reservations for neither group. Paschel notes the diversity among Latin American countries in affirmative action for blacks. Some have adopted limited legislation, some none at all. Even among those that have, there is great variation in rights granted. Brazil's affirmative action controversies are well documented; however, neither Brazil nor any other Latin American case in this study has LERN-specific, POL-specific precommitments. However, Brazilian women, along with women from Mexico and Argentina, *do* benefit from mandatory party list quotas in federal and regional elections. Fear of deepening LERN cleavages, inter-ethnic conflict or of including certain groups in the formal electoral process may explain the disparity between LERN and SEX preferences in the POL domain for certain Latin American cases.

However, as we have seen, other cases have adopted a different approach to the political management of a multicultural society, perhaps one more amenable to the demands of minorities. The case of India provides an instructive example. As previously discussed, India confers preferences on certain LERN groups, specifically the SC, ST and OBC. The Indian Constitution reserves seats in its House of the People for the Scheduled Castes and the Scheduled Tribes (Ind. Const. art. 330). The President also has the authority to "nominate" two members of the Anglo-Indian community if the President feels they are under-represented (Ind. Const. art. 331). There are

also mandatory electoral quotas in legislatures at the state level (Ind. Const. art. 332). There are even mandatory preferences for SC and ST representation in the Panchayats (Ind. Const. art. 243 § D, para. 1), and permissive preferences for backward class of citizens (Ind. Const. art. 243, § D, para. 6). India also has POL preferences that extend to the territorial category. These reservations began under British rule and continued after independence. These quotas apply to the SC, ST and OBC groups (Jain & Ratnam, 1994). Finally, India also territorial precommitments, found in art. 244. That article grants certain tribal areas and the state of Assam autonomous status. Assam also benefits from grants-in-aid from the Consolidated Fund of India for the purpose of development (Ind. Const. art. 275),<sup>86</sup>

ii. ECON/EMP-specific Precommitments

In the ECON/EMP domain, eight cases have precommitments. There are four cases with provisions which cover the economy broadly and four cases with civil service precommitments. Even in the absence of a LERN-specific, ECON/EMP-specific precommitment, territorial ethno-development or conservation provisions can work with social and other precommitments to confer economic preferences for LERN minorities. Article 46 of the Indian Constitution, art. 37, § a of the Pakistan Constitution and art. 89, § 4 of the Ethiopian Constitution are examples of broad, classical, mandatory ECON/EMP-specific precommitments. In India, “[t]he State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular,

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<sup>86</sup> Hussain (1987) argues that primordial loyalties and identity consciousness were sharpened during the socio-political change that occurred during Indian independence. As we have seen with many other cases, the grant of autonomy came about through movement-based protest. Because of their cultural similarities, three of the Assam tribes – the Khasis, the Jaintas and the Garos – were able to unite in pursuit of a separate state similar to that of Nagaland. In January 1967, the Indian government proposed a scheme to reorganize Assam. The proposal was rejected; consequently, a committee was formed under the chairmanship of Ashoka Mehta to investigate the issue. The Mehta committee rejected the idea of creating another autonomous hill state. Instead, proposal to offer the tribes themselves was made and was summarily rejected. And although the protests, organized principally through the All Party Hill Leaders Conference (APHLC) had been peaceful, some Khasi youths threatened guerilla warfare if their demands for the creation of a new state were not immediately met. In the latter part of 1979, Indira Gandhi indeed sought to grant autonomy to Assam, culminating in art. 244. The autonomous state of Assam has the authority to make its own laws on 61 out of 66 subjects. This authority distinguished Assam from other “autonomous” Indian states like Nagaland or Meghalaya (Hussain, 1987).

of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.” Similarly, but more succinctly, in Pakistan, “[t]he State shall promote, with special care, the educational and economic interests of backward classes or areas....” Finally, in Ethiopia, “[g]overnment shall provide special assistance to Nations, Nationalities, and Peoples least advantaged in economic and social development” (Eth. Const. art. 89(4). Article 22, § c of the Myanmar Constitution is the lone tacit example, although, unlike India, Pakistan and Ethiopia, it does mention certain economic sectors to which the provision might apply.

Concerning civil service appointments, Pakistan safeguards “the legitimate rights and interests of minorities including their due representation in the Federal and Provincial services” (Pak. Const. art. 36). Under art. 27, § 1 public service posts “may be reserved to persons belonging to any class or area to secure their adequate representation in the service of Pakistan.” The preference here is classical and permissive, however, as mentioned in the previous chapter, the government is the largest employer in Pakistan and there is a long history of civil service quotas for ethnic minorities from underdeveloped regions. Art. 37, § f seems to address this “federal character” like, geographical approach to affirmative action for LERN groups as a function of social justice, without mentioning LERN groups explicitly; the state shall “enable the people of different areas ... to participate fully in all forms of national activities, including employment in the service of Pakistan.” These provisions must also be read in the context of Pakistan’s social precommitments in which the state obligates itself to “secure the well-being of the people, irrespective of sex, caste, creed or race ... by preventing the concentration of wealth and means of production and distribution in the hands of a few” (Pak. Const. art. 38, § a).

Kennedy (1984) argues that Pakistan’s quota policies are a result of three familiar variables: ethnic diversity, unequal regional development and unbalanced institutional growth (Kennedy, 1984, p. 691). He argues further that the quota policies are governed by two contradictory principles; the compensatory principle and the proportional representation principle. The original 1949 federal civil

service quota system was essentially designed to integrate Bengalis. Originally an administrative directive promulgated by the federal government's Establishment Division, the quota policy grew to become a statutory exception to the constitution's non-discrimination provision in 1956, and again in 1962. After the secession of Bangladesh, the quota transformed to apply to six zones and four provinces. Then, in August 1973, it was altered to reflect its current form: 10% merit, 50% Punjab (including Islamabad), 7.6% urban Sind (Karachi, Sukkur and Hyderabad), 11.4% rural Sind (areas in Sind other than those above), 11.5 NWFP, 3.5% Baluchistan, 4% Northern Areas and FATA and 2% Azad Kashmir. Prime Minister Benazir Bhutto's nationalization of the banking insurance, heavy machinery, natural resource extraction and other industries expanded the quotas to the new semi-autonomous corporations. In 1970 the quotas expanded to the sub-national level when provinces enacted civil service quotas (Kennedy, 1984). The Pakistani LERN civil service preferences do not seem to extend to federal elections. Although several classical provisions make electoral preferences for women clear, there is no such similar language for LERN groups. There are reserved seats for non-Muslim minorities in the Assembly (Pak. Const. art. 51, §§ 1, 4) and the Senate (Pak. Const. 59, § 1, ¶ f).<sup>87</sup> Finally, and as discussed in the previous chapter, the LERN minorities that inhabit the

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<sup>87</sup> The treatment of religious minorities in Islamic societies has its foundations in the Constitution of Medina, a contract between the Prophet Muhammad, his followers and the eight tribes of Medina entered into about AD 627. (Scott, 2007, 3). Under the contract, Jews and other religious minorities were a protected minority, but were not considered equal. This document formed the foundation of the *dhimma* relationship. Dhimmis were not compelled to convert to Islam, as stated in Quran 2:256. They were also granted rights of life, security, property and retained their own personal codes. Under the Ottoman Empire Dhimma rights were further institutionalized with the *millet* system, an ad hoc arrangement that granted significant legal autonomy to major religious communities. In Scott's view, this system embodied the ideal of the plural society far before John Locke articulated the notion. (Scott, 2007, p. 3). That said, the rights granted to *dhimmis* were not held by the individual, but by virtue of their membership in a protected class. The *dhimma* system was effectively abolished by the 1856 Hatti Humayoun decree. Under the language of the document, there was to be no discrimination on the bases of race, religion or language, although Shar'ia courts would retain jurisdiction over matters of personal law.

With regard to religious minority groups that reside within majority Muslim societies, the practice of toleration, *ahl al-kitab*, has been used to accord such minorities rights and privileges as a result of their subjugated status. With the discourse of human rights in 1979 Dr. Muhammad Salim al-Awwa argued that the Constitution of Medina established by the Prophet Muhammad argued that in the Islamic state citizenship should be founded on a common commitment to the Prophet and the original community included the Jewish

FATA do seem to enjoy some degree of political autonomy that the Provinces do not (i.e. relief from jurisdiction of Supreme Court or High Courts). However, in reality FATA tribesmen only attained the right to vote in the Assembly in 1996 and political parties were only allowed to operate in 2011.

Like Pakistan, Bangladesh preserves the right to “make[] special provision in favor of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic” (Bang. Const. art. 29, § 3, ¶ a). According to Zafarullah (2001), the framers’ motivation behind for instituting the preferences was to “uphold the values of democracy ant to provide legitimacy to governance” (Zafarullah, 2001, p. 39). The Bangladesh recruitment policy began with Interim Recruitment Rules, issued by executive order in 1972. Critics like Wahhab (2009) argues that the current Bangladeshi quota system is ineffective. He cites a lack of transparency in implementation and a lack of competence among civil servants as major problems. He concludes that quotas should apply only to tribal peoples and should be temporary (Wahhab, 2009).

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tribes of Medina (Nielsen, 2003, p. 329). He believes that in general the Qur’an and the Sunna require kind and just treatment, regardless of religion, and that a contemporary understanding of the Islamic state - one rooted in common struggle, constitution and citizenship, and not conquest and contract – should guide the treatment of religious minorities. Ah\_mad Kama\_l Abu\_ al-Magd is in accord, contending that the traditional concept of *dhimma* – non-Muslim subjects of Islamic governments who suffered discriminatory treatment and inferior social and legal status – is antiquated and that modern Islamic constitutions should provide equal rights for all (Nielsen 2003, 330). In traditional Islamic thought the, *dhimma* represented a contract between the Islamic state and religious minorities.

In his discussion of Islamic approaches to moral obligations to non-Muslims, March (2009) identifies four approaches. The first, relevatory commands, refers to explicit texts in which rights for non-Muslims are mandates. This approach is generally limited to specifically enumerated rights and may implicitly prelude a broader moral dialogue about the rights and duties of non-Muslims. Second, relevatory sources can be read to demand a “general attitude of treating non-Muslims with equity (March, 2009, p. 49). While clearly broader than the previous approach, this general approach also has its shortcomings – there are substantive disagreements among scholars about what justice and equality mean, and that the terms themselves are inherently vague. Third, the contractual approach, centers on the *aman*, a contract for mutual security. “Jurists are unanimous in holding that the enjoyment of the *aman* imposes on a Muslim certain moral and sometimes legal obligations to the non-Muslim entity in question” (March, 2009, p. 55). The final approach, the “comprehensive-qualitative” approach emphasizes mutual concern and soldarit through the discourse of the *da’wa*.

Ethno-development schemes also operate to confer economic and employment preferences on LERN minorities. The Chinese, Vietnamese and Thai cases demonstrate how economic preferences can be conferred even in the absence of an ECON/EMP-specific precommitment, primarily through ethno-development schemes. In Vietnam, the majority ethnic group is the Kinh, comprising approximately 86% of the population. Current Kinh policy toward minorities mirrors that of its former French colonial rulers, often referring to minority groups and their customs as poor, unhealthy, backward, savage and uncivilized. Minority economics, largely dependent upon jewelry, woven goods and tourism are described as incompetent and inferior because of a lack of reliance on money. There are 53 minority indigenous cultures in Vietnam, although this figure is disputed. In 1993, there were five groups with populations under 1,000 and 11 with populations under 4,000. These numbers indicate that cultural extinction is a very real possibility for some groups (Lempert, 2001). Most minorities live in the mountainous areas and highlands. Only three groups – the Hoa, Cham and Khmer – live in the plains. Although they reside in almost all Vietnamese provinces, ethnic minorities reside mainly in the Northwest, Northeast North-Central, South Central and Central Highlands. Levels of development among the various groups varies, due in part to differences in cultivation conditions and infrastructure (Ahn, 2005).<sup>88</sup>

Article 5, § 4 of the Vietnamese Constitution is a tacit, mandatory LERN-specific, non-domain-specific precommitment; “[t]he State carries out a policy of comprehensive development and gradually raises the material and spiritual conditions of the national minorities.” Article 94 establishes a Nationalities Council, tasked with “stud[ying] and mak[ing] proposals to the National Assembly on issues concerning the nationalities; supervis[ing] and control[ling] the implementation of policies on nationalities, the execution of programs and plans for socio-economic development of the highlands and regions inhabited by national minorities.” From a plain meaning interpretive

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<sup>88</sup> Lempert (2001) asserts that ethnic law in Vietnam can be divided into three categories of rules: (1) written codified law, (2) law codified in traditions of oral poetry and (3) social practices that can be translated into legal rules (Lempert, 2001, p. 545).

perspective, the use of the term “raises” implies a minority rights framework that includes state assistance of some sort, but it does not necessarily imply minority preferences. It could reasonably be construed as a rather obtusely worded equality provision which is intended to bestow equality of opportunity rather than substantive equality. In the absence of any classical terminological cues art. 5, § 4 fails to make it clear that minority groups in Vietnam are entitled to economic benefits that non-minorities are not.

However, as with all tacit precommitments, context is important. In this case, there are two relevant and intersecting layers of context that provide evidence for this conclusion. The first concerns the constitution’s overall ethnic minority protection scheme, embodied most obviously in art. 5, § 4 and the other provisions of art. 5. Generally speaking, the constitution recognizes the basic equality of all nationalities and acknowledges the depressed and underdeveloped conditions under which many minority groups live. Article 5, §§ (1)-(3) contextualize the state’s drive toward nationalism while also carving out space for the expression of a plurality of cultures. Article 5, § 1 emphasizes Vietnamese nationalism through a unified state, while art. 5, § 3 strikes a more particularistic tone by focusing on the uniqueness of the various cultures. When read in the light of the equality provision of art. 5, § 2 there is evidence of intent to give preferential attention to minorities. Furthermore, there are LERN precommitments elsewhere in the constitution. For example, under art. 36, § 4 “the State adopts the priority policy to ensure the educational development in mountainous areas, regions inhabited by ethnic minority people and regions encountering exceptional difficulties.” Additionally, art. 39, § 2 reads, “[p]riority is given to the program of health care for highlanders and national minorities.” These two provisions’ emphasis on priority assistance for national minorities, in conjunction with the constitution’s unambiguous commitment to the protection of minority rights, evidence an affirmative action precommitment.

A second layer of context – Vietnam’s clear commitment to socialism – provides additional justification for the precommitment. Some of the relevant provisions were discussed in the previous

chapter. Under French colonial rule, many of the Central Highland minorities were converted to Catholicism. At the same time, the French imposed heavy taxes on the indigenous groups and forced many into *corvée* indentured bondage. During the war for independence, many of the ethnic minorities became anti-Vietnamese. After partition in 1954, it became the policy of South Vietnam to move Kinh settlers into the Central Highlands. This migration also existed in the uplands. According to Frederichsen (2011) this program of internal migration was an integral part of nation-building that served three important functions: (1) to settle “empty” areas and address over-population in the delta, coastal plain areas and urban centers; (2) to contribute to the productive development of areas of in-migration; and (3) so that migrants could ensure security and national defense in remote and border areas. This sort of resettlement program continued under new post-Vietnam War government. Poor Kinh farmers migrated to the coffee-producing areas of the Central Highlands. At the same time, a policy assimilationism was pursued by discouraging minority customs and languages and by conducting primary education in Vietnamese (Baluch, Chuyen & Haughton, 2008, p. 1164).

The economic changes that accompanied *doi moi* shifted government policies toward minorities. Under *doi moi* the state initiated the process of de-collectivization. There were three legislative milestones. First, Decree 100 (1981) allocated to households land use rights to fields and allowed them to keep a percentage of their harvest as surplus. Second, Resolution 10 (1988) guaranteed households longer-term land use rights and reduced the role of cooperatives to service provision only. Third, the 1993 Land Law allocated land use rights to households for terms of between 20 and 50 years. Although ownership of the land would remain with “the people” and be managed by the state, individuals could exchange, lease or inherit land rights (Frederichsen, 2011). Also in 1993, the Committee for Ethnic Minorities in Mountainous Areas (CEMMA) was established with a budget of \$546 million to aid in the development of ethnic minorities. The funds have been used for subsidizing the cost of transporting goods to remote areas, salt, reforestation, potable water,

road maintenance, livestock, seedlings and for connecting villages to the national grid (Baluch et al., 2008, pp. 1164-65). Minority languages have been officially recognized and scholarships have been established to allow ethnic minority children access to secondary boarding schools and institutions of higher education. Ethnic minority representation has also increased at all levels of government.

Progress has not been uniform, however. In his analysis of quantitative and qualitative data from Vietnam's Community-Based Monitoring System (CBMS) Ahn (2005) found that although Vietnam's economy has grown, the rate of poverty reduction was not equal across all regions. Poverty reduction rates for ethnic minorities trailed similar rates for Kinh. Ahn attributes the high minority poverty rates to several factors including geographical isolation, language barriers, poor farm land, lack of capital and low education levels. The 1993 Land Law and its formalization of individual land use rights have clashed with the collective land titling of the minorities. Program 135, a poverty reduction program for the extremely difficult and mountainous areas, was instituted to eradicate hunger and improve living conditions. Additional state policies are aimed at freight subsidies and health care. The government recently implemented Decision 134/2004/QĐ-TTg to provide general relief, improve infrastructure, improve social services and assist households. Housing loans with deferred payments are offered for housing in the Mekong Delta and Central Highlands. From a strictly economic development perspective, Program 135 focuses on solving the shortage of production land. Through Decision No. 186/2001/QĐ-TTg, settlement and cultivation stabilization through sedentarization programs to stabilize wandering hill tribes, preferential loan rates to increase credit access and activity, and technology transfer to improve cultivation and husbandry (Ahn, 2005, pp. 314-315). Thus, even without a territorial, ethno-development precommitment, Vietnam's art. 5, § 4 works with Vietnam's declared socialist status under art. 2, § 1, its stated tendency toward equitable development under art. 3, and its collectivist economic principles under Chap. II, to become a LERN-specific, ECON/EMP-specific precommitment.

If we compare the case of Thailand, we can see similar processes. Like Vietnam, Thailand has some social leanings in terms of economic redistribution under art. 84, § 6, although it is decidedly not socialist and Thailand's constitution makes it clear that the country's economy is based on market forces (Thai. Const. art. 84, § 1). Like Vietnam, the Thai Constitution has a classical, permissive non-group-specific, non-domain-specific precommitment at § 30. It maintains that "measures determined by the state in order to eliminate obstacles or to promote persons' ability to exercise their rights and liberties in the same manner as other persons shall not be deemed unjust discrimination ...." The list of sources of discrimination in § 30 includes race, sex and disability, but also mentions economic or social standing. However, the constitution makes no specific mention of LERN-specific, ECON/EMP-specific preferences. Like Vietnam, Thailand's constitution also has territorial precommitments at §§ 66 and 67. Section 66 states that "[p]ersons so assembling as to be a community, a local community or a traditional community shall have the right to conserve or restore their customs, local knowledge, good arts and culture of their community and of the nation and participate in the management, maintenance, preservation and exploitation of natural resources...." This provision seems more concerned with guaranteeing fairness in resource extraction than correcting developmental asymmetries between the majority and various ethnic communities; however, § 78(3) does state that equal development of the economies of the localities is a directive principle of state policy.

According to Laungaramsri (2003), ethnic relations between the Tai and non-Tai is based on the hill and valley distinction. Hill-dwelling peoples such as the Karen, Lawa, Thin and Khamu are native to the land while groups such as the Hmong and the Mien are more recent immigrants from southern China. In the northeast, the ethnic population is heterogeneous but is comprised mostly of Laos or Tai-Lo speaking people. In the south the predominant group is the Malay Muslims, inhabiting the provinces of Pattani, Yala, Narathiwat and Satun. Thailand also has Chinese and Indian minorities. In Thai discourse, non-dominant groups are defined as *chom klum noi*, or ethnic

minorities. Under official classification there are five groups: Chinese (*chao chin*), the hill tribe peoples (*chao khao*), Vietnamese immigrants (*chao yuan oppayop*), Thai Muslims (*chao Thai Muslim*) and others. This scheme does not account for all ethnic minorities.

The Thai government has employed some ethno-development schemes to assist minorities, with mixed results. In 2007, the Community Forest Bill was passed. It granted communities the right to manage forest land surrounding their settlements. In her description of the government's relationship with hill tribes in Northern Thailand, Gillogly (2008) asserts that initially state modernization efforts excluded the hill tribes, who were considered "backward," "problematic" and "dangerous." Consequently, the state sought administrative control over the areas. Security also became a major concern during the war in Indochina in the 1960s. To thwart potential insurgents entering from bordering countries, the Thai government Border Patrol Police established training programs and schools in the hills to aid in reconnaissance. From 1967-1973 the government undertook a policy of forced resettlement to force the nomadic tribes to settle permanently in villages. Minorities such as the Hmong revolted in the Red Meo Rebellion and were painted as communist conspirators. This led to the exercise of greater authority over the areas. Eventually, a policy of minority incorporation was adopted. After efforts at Buddhist conversion failed, the Department of Local Government attempted to register uplanders and lowlanders as Thai citizens. Programs to combat opium production were also instituted. Deforestation has also been an issue, although it remains unclear whether the tribes or Thai government is primarily to blame (Gillogly, 2008).

State investment in the north has been spotty. According to Leepreecha (2005) the state's policy of assimilation means that speaking ethnic languages in schools is banned and indigenous knowledge is not recognized in the school curriculum. The Dhammacarik Buddhism Project has been initiated to convert highland ethnic minorities to Buddhism and the registration system is designed to replace ethnic identities with Thai identity. However, the government has invested

heavily in infrastructure projects in the highland because of the lucrative tourism industry. The government forbids the growing of opium but does allow some growth as a tourist attraction so that tourists can see certain ethnic groups in their “authentic” environment. Thus, although the northern tribes may have benefitted in some way from the state’s investment in tourism, there have also been significant costs, as the government exploits native cultures for profit and plays ethnic groups against one another (Leepreecha, 2005). Ultimately, the results of ethno-development in Vietnam and Thailand have been questionable; however, the cases do show that state-implemented economic development is possible without an ECON/EMP-specific precommitment. Whether the beneficial outcomes for the LERN minorities in each case would have been significantly better is an open issue. It does stand to reason that the addition of a LERN-specific, ECON/EMP-specific precommitment would provide a more secure legal platform for the minorities, perhaps accelerating poverty reduction efforts and better managing the cultural assimilationist policies that can accompany ethno-development.

iii. EDU-specific precommitments

In the EDU domain there are six cases with LERN-specific affirmative action precommitments: India, Pakistan, Philippines, Vietnam, SA and Myanmar. As discussed above, art. 15, § 5 and art. 46 of the Indian Constitution provide for classical EDU preferences for SC and ST groups. Pakistan’s art. 37, § a embodies a similar classical, mandatory sentiment with EDU preferences for its “backward classes or areas.” The term “areas” implies a territorial precommitment overlay, as is expounded in art. 37, § f; the state shall “enable people of different areas, through education, training, agricultural and industrial development and other methods to participate fully in all forms of national activities...” Vietnam also combines EDU and territorial precommitments. In Vietnam, “[t]he State adopts the priority policy to ensure the educational development in mountainous areas, regions inhabited by ethnic minority people and regions encountering exceptional difficulties” (Viet. Const. art. 36, § 4). The language used (“priority”)

indicates a tacit precommitment with a clear territorial component. Under art. 22, § 3 of the Myanmar Constitution, the state shall assist “to promote socio-economic development including education, health, economy, transport and communication, so forth, of less-developed National races.” Finally, the SA Constitution evidences a classical, mandatory precommitment for LERN minorities in the EDU domain, albeit less directly than India or Pakistan. The SA state must make education “progressively available and accessible” through the use of “reasonable measures” (S.A. Const. art. 29, § 1, ¶ b). All have the right to education in their official language, taking into account equity, practicability and “the need to redress the results of past racially discriminatory laws and practices” (S.A. Const. art. 29, § 1, ¶ 2).

A comparison of EDU preferences in SA and Brazil might help to illustrate the roles of variables such as minority population size and colonial history play in whether constitution-makers choose to incorporate a LERN affirmative action precommitment, and, if so, what type. Gillebeau (1999) has compared the two cases in a cursory fashion, but neglected to incorporate constitutional analysis, examination of specific policies, or inspection of legislation. In his comparison of affirmative action in SA and the US, Lundy (1997) argues that the African National Congress (ANC) had a conception of affirmative action that was broader than the American conception because “it not only includes measures to redress past discrimination, but also requires public and private actors to build an equal society through redistribution and corrective policies” (Lundy, 1997, p. 365). Horwitz (1991) describes the situation leading up to the constitution-making process as comprised of a conflict and a meta-conflict over what precisely the conflict is about. He outlines twelve conceptions of South Africa. They include the official view; SA is divided into four racial groups – Whites, Coloureds, Indians and Africans – and all should participate in politics at the center with some power granted over their own affairs, perhaps territorially. However, in 1969 the ANC rejected the idea of separate political institutions for racial minorities. It was argued that, absent apartheid, a non-racial classical liberal democracy was possible. An alternative view is that SA is a colonial society

divided by race-based capitalism. Under this scenario, Africans are the sole legitimate inhabitants and an anti-colonial revolution is required to bring forth democracy. To achieve this, some degree of black consciousness or racial self-assertion may be required. Horwitz also presents consociational and modified consociational views; SA may have to be divided territorially between blacks and whites, or amongst all four racial groups, or may require some complex organizational structure to protect minorities. Others argue that regardless of race, a democracy based on majoritarian rule would suffice (Horwitz, 1991, pp. 5-9).

During the SA constitution-making process, the issue of affirmative action was a contentious one, with the ANC and the National Party taking opposite sides of the issue. Even after it was ultimately included in the constitution, implementation was done cautiously. The hiring of non-Whites in the public sector was undertaken robustly, and has set an example for the private sector. Indeed, affirmative action in SA is most commonly associated with hiring and promotion in the ECON/EMP domain. The cornerstone of affirmative action in SA has been the 1998 Employment Equity Act which requires the elimination of unfair discrimination in employment, as well as the use of positive measures to develop and retain and develop blacks, women and persons with disabilities. The SA government has made it clear that substantive equality is its policy (CRISE 2010, pp. 5-6). However, SA affirmative action in the EDU domain is less discussed. Lindsay (1997) argues that the education system was the primary institution used to reproduce the apartheid regime. Segregated schools were established by the 1905 School Boards Act, with white schools having better teachers, administrators and resources at both the lower and higher levels of education. At the universities, teacher's colleges and technical schools enrollment was overwhelmingly white. For example, in 1978 university enrollment figures 121,869 whites, 25,150 Africans, 10,661 Coloreds and 10,117 Indians/Asians (Lindsay, 1997, p. 324). In the view of Ramphela (1996), apartheid was effectively affirmative action for poor whites simply because they received preferential access to jobs, housing and education.

After the first democratic elections in 1994 affirmative action plans were implemented in accordance with the new constitution. Under the 1994 Reconstruction and Development Plan (RDP), the government was to develop proposed policy changes in critical areas such as human resources and education. The RDP makes it clear that affirmative action is its cornerstone; “[a]ffirmative action measures must be used to end discrimination on the grounds of race and gender, and to address the disparity of power between workers and management, and between urban and rural areas” (RDP, § 4.8.13). Concerning education, these measures must “entail a massive programme of education, training, retraining, adult basic education and recognition of prior learning, to overcome the legacy of apartheid...” (RDP § 4.8.13.1) The RDP was based on six basic principles: (1) an integrated and sustainable program to overcome the legacy of apartheid; (2) a people-driven process that harnesses the collective determination of all people; (3) peace and security for all with a national security force that reflects South African diversity; (4) nation-building through economic, political and social viability; (5) link reconstruction and development, along with a redistributionary focus, to effectuate infrastructure revitalization and (6) democratization of S.A. through fundamental policy changes that eliminate minority control and privilege (RDP §§ 1.3.1-1.3.7). The main purpose of the RDP is to “mobilise all our people and our country's resources toward the final eradication of apartheid and the building of a democratic, non-racial and non-sexist future” (RDP, § 1.1.2). The rationale for the plan is encapsulated by the following quote:

[o]ur history has been a bitter one dominated by colonialism, racism, apartheid, sexism and repressive labour policies. The result is that poverty and degradation exist side by side with modern cities and a developed mining, industrial and commercial infrastructure. Our income distribution is racially distorted and ranks as one of the most unequal in the world - lavish wealth and abject poverty characterise our society (RDP, § 1.2.2).

In accordance with the RDP, Pres. Nelson Mandela initiated the National Commission on Higher Education (NCHE). In 1996, the NCHE issued its final report, *A Framework for Transformation*. Subsequently, the 1996 *Green Paper on Higher Education Transformation* outlined critical policy areas and

the *Education White Paper 3: A Programme for Higher Education Transformation* which focused on diversity and redress in all levels of higher education.

By contrast, Brazil also has education affirmative action for LERN minorities, but lacks a LERN-specific, EDU-specific precommitment. Indians in Brazil receive territorial and other protections under Art. 231<sup>89</sup> and women receive preferences in the ECON/EMP domain under art. 7(XX). However, historically, Brazil has taken pride in being a “racial democracy” with overt discussions of race and racism being largely taboo. Martins, Medeiros & Nascimento (2004) argue that “[t]he racial democracy ideology tends not only to deprive the dominated population of its base for collective self-defense and self-uplifting but also to convince the ruling elite of its pristine innocence and fairness” (Martins et al., 2004, p. 790). Until the end of the Franco regime, state policy was to promote the idea of harmonious and problem-free race relations (dos Santos, 2006, p. 32). This myth was officially repudiated by Cardoso, who openly acknowledged racism. In a November 2005 speech, he declared that discrimination against blacks did exist. In 2003, Pres. Lula da Silva created the Special Secretariat on Policies to Promote Racial Equality, the continuing the Brazilian political discourse on race discrimination.

Htun (2004) explains the policy shift in Brazil as “a dialectic between social mobilization and presidential initiative, framed within unfolding international events” (Htun, 2004, p. 62). Martins et al. (2004) generally concur, asserting that the struggle for affirmative action began with mobilization from below, through various Afro-Brazilian organizations, and was later given momentum by international pressures. In 1944, Abdias do Nascimento created the Black Experimental Theater (TEN), primarily to combat the exclusion of blacks from Brazilian theater. TEN later spawned the Afro-Brazilian Democratic Committee in 1945. In its journal, *Quilombo*, TEN advocated to make

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<sup>89</sup> In Brazil, Indian lands must undergo a process of demarcation to precisely determine the boundaries of the Indian area. There are three types of Indian lands: (1) lands traditionally occupied by Indians, (2) reserved lands assigned to the Indians by the government, and (3) Indian-owned land acquired through the regular means of ownership. Brazilian courts have held that state action to reduce or alienate Indian lands, either by statute or contract, is unconstitutional (Barroso, 1994. p.-95).

race discrimination a crime, free primary school for all Brazilians and for subsidized entrance of black students into institutions of higher education. Although the military coup of 1964 suppressed activism, there was a resurgence in the 1970s, evidenced by meetings such as the sixth Pan-African Congress and the first, second and third meetings of the Congress of Black Culture. Democracy returned to Brazil in the 1980s and Nascimento was elected to the House of Deputies. He introduced legislation calling for compensatory measures in education, government and employment. He sought a 20% quota for blacks in federal, state and local civil service positions, as well as in the private sector. Additionally, he favored a 40% goal of government grants to be allotted to black students. These ideas were viewed as radical and would not be taken seriously until the 1990s. The efforts of black attorneys and the proliferation of statistical data detailing racial inequality were crucial (Martins et al., 2004).

In the aftermath of the 2001 World Conference against Racism in Durban, SA, Brazil began implementation of its affirmative action program. In 2001, the Ministry of Agrarian Development adopted compensatory, special and temporary measures to build racial equality in the countryside. Included in the proposal was a 20% for blacks in decision-making positions, a 20% for blacks in contracted services and a 20% for positions of public employment in the ministry. Three months later the Ministry of Justice followed suit. The following year, Presidential Decree No. 4.228 instituted a national affirmative action program within the federal administration. In 2002, legislation was passed providing for 20% quotas in all civil service entrance competitions, public and private universities, and race preference programs for prospective government contractors. The next year, legislation was passed mandating that Afro-Brazilian history be taught at all levels of education (Martins et al., 2004). In 2001, the state of Rio de Janeiro enacted affirmative action laws for university admissions. Fifty percent of seats were reserved for public high school graduates, most of whom were Afro-Brazilian. State legislators and a consortium of private schools challenged the policy in the Supreme Court of Brazil. Rio mooted the litigation by amending their policy to a 20%

quota for blacks, 20% for public school student, and 5% for students with disabilities and indigenous students (Hernandez, 2005, p. 699).

It is important to note that there is no federal affirmative action law in Brazil. Three bills were introduced during Lula's presidency to establish federal affirmative action programs. All were opposed by the Brazilian Social Democratic Party and the conservative Democrats. Opponents make three main arguments. First, they contend that to institute formal affirmative action would be to institute a racial classification system like that found in the US, ultimately causing the racialization of Brazilian society. Others argue that it would violate Brazil's equal protection clause. Lastly, detractors argue that because of race mixing, the implementation of the programs will be procedurally flawed (Junior, 2011; Rochetti, 2004). That said, many of Brazil's universities do have affirmative action programs. Lula created the Special Federal Secretariat for Policies Promoting Racial Equality as a cabinet level position. In 2003, the Secretariat issued a joint report with the Ministry of Education, the National Policy for the Promotion of Racial Equality. As a result, several universities implemented affirmative action programs. In 2004, the University of Brasilia approved a 20% admissions quota for blacks. Prospective admitees under this program are interviewed by a university panel to determine whether they are "black enough" to qualify. As of 2011, 71% of all public universities had some type of affirmative action programs. More than 57% of universities with affirmative action have programs aimed at black students and more than 51% for indigenous peoples (Junior, 2011).

This comparison of SA and Brazil shows that even without a domain-specific precommitment – here an EDU-specific precommitment – preferences can be implemented and upheld by courts. In the case of Brazil's education affirmative action, Hernandez (2005) points out that, unlike the US, Brazil's constitution contains a right to education under art. 6. Thus, as Hernandez explains,

[o]ne can logically equate [lack of affirmative action] to a denial of the constitutional right to education, inasmuch as the children are not provided 'the full development of the individual'

nor ‘preparation for the exercise of citizenship and qualification for work,’ as mandated in art. 205 of the Constitution, and are not provided with the ‘guarantee of standards of quality’ as required by art. 206 of the Constitution (Hernandez, 2005, p. 704).

Unlike the apparently sub-optimal outcomes obtained by Vietnam and Thailand in the ECON/EMP domain, Brazil’s LERN minority preferences seem to be reasonably robust – perhaps as robust as those in SA – considering its constitution contains no LERN-specific, EDU-specific precommitment. However, it remains to be seen whether policy outcomes are as optimal as they could be with the EDU-specific precommitment and whether the outcomes are stable over time.

iv. CULT-specific Precommitments

Finally, seven cases have CULT-specific precommitments. The provisions in this domain are the most difficult to code and references to territorial precommitments are usually required. Generally speaking, CULT precommitments use the terms “culture” or “customs,” or in some way demonstrate a privileging traditions and are in some way tied to territory or other precommitment issue domains. These provisions that can be safely categorized as CULT affirmative action precommitments because they prefer the customs, language, modes of economic activity and other LERN minority cultural components. For example, art. 22(a) of the Myanmar Constitution reads,

The Union shall assist: (a) to develop language, literature, fine arts and culture of the national races; (b) to promote solidarity, mutual amity and respect and mutual assistance among the national races; (c) to promote socio-economic development including education, health, economy, transport and communication, so forth, of less-developed National races.

The tacit terms “promote” and “assist” are used in an overall scheme that is social in nature, and that implies state assistance beyond mere non-discrimination. Similarly, in Brazil the precommitment is quite clear; “[t]he social organization, customs, languages, creeds and traditions of Indians are recognized, as well as their original rights to the lands they traditionally occupy. The Union has the responsibility to delineate these lands and to protect and ensure respect for all their property” (Braz. Const. art. 231). The constitution recognizes the role of land in the “physical and cultural reproduction” of the indigenous (Braz. Const. art. 231, § 1). The tacit term “protect” is used and the

link to a territorial precommitment indicates a preference. In addition, art. 215, § 1 may bolster the indigenous preference with what seems to be a tacit precommitment; “The National Government shall protect expressions of popular, indigenous and Afro-Brazilian cultures and those of other participant groups in the process of national civilization.” Finally, under art. 210, § 2 “[r]egular elementary education shall be given in the Portuguese language, also assuring to indigenous communities the use of their native languages and their own learning procedures.” Finally, art. 12, § 5 of the Philippines Constitution provides another example; “[t]he State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being.” Like the Brazilian case, the language is mandatory and the tacit term “protect” is used.

In the case of China, there is no CULT-specific precommitment; its cultural preference is linked explicitly with the territorial as well as the social lenses in a more direct way; “[t]he state assists areas inhabited by minority nationalities in accelerating their economic and cultural development according to the characteristics and needs of the various minority nationalities” (China Const. art. 4). Upon careful reading, we see that the state assists “areas,” not groups directly. Given that distinction, art. 4 is properly classified as a territorial, ethno-development provision rather than a LERN-specific, CULT-specific precommitment. The Vietnamese case is even more difficult to code. Besides the LERN-specific, ECON/EMP-specific precommitment at art. 5, § 4, art. 39, § 2 of the Vietnamese Constitution states that, “[p]riority is given to the programme of health care for highlanders and national minorities.” Article 36, § 4 articulates a similar priority policy in the EDU domain. When art. 5, § 4, art. 36, § 4 and art. 39, § 2 are read together with art. 5, § 3 we can see that the overall preferential scheme, including social and territorial preferences, seem to permit CULT LERN minority preferences. However, in this case, *in pari materia* interpretation must confront the plain meaning of art. 5, § 3 which requires that cultural recognition apply to all nationalities; “[e]very nationality has the right to use its own language and system of writing, to preserve its national

identity, and to promote its fine customs, habits, traditions and culture.” If “every” nationality is afforded the privilege, then LERN minorities do not enjoy any “preference” that other groups do not.

Although more numerous than precommitments in the other domains, the lack of classical precommitments in the CULT domain may be particularly noteworthy because of the politically symbiotic relationship between cultural assimilationism and the more “benign” manifestation of ethnic cleansing or genocide. The violence of genocide is not, strictly speaking, physical or bodily; however, its effects are insofar as the demonization of primordial civilizations results in forced land appropriation by the state and resettlement of peoples alienated from ancestral lands. Indigenous cultural preservation and territorial conservation are tools that can mitigate the detachment of LERN minorities from their land and ways of being, while simultaneously making sure that the state properly manages its nation- and state-building project in a manner that accords with the imperatives of political and economic modernity.

## II. Discussion

The above analysis of LERN-specific affirmative action precommitments reveals some important findings. The first is that the majority cases have some form of LERN minority preferential precommitment, whether domain-specific, non-domain-specific or both. This perhaps speaks to the choices constitution-makers make when confronted with the dueling imperatives of nationalism and multiculturalism. With specific relevance to post-WWII constitutions, constitution-makers face three distinct layers of pressures during the democratic inauguration or change. First, there is pressure from above. This pressure usually comes from western countries such as the victors of war or former colonial powers, or from multilateral regional or global institutions. These pressures can attempt to infuse liberal principles into new founding documents, and they can also advocate for minority rights protections as prescribed by various treaties and conventions. Second, there are pressures from below from LERN minorities to be included in the constitution-drafting

process so that equality provisions and/or preferences can be included in the constitution. Finally, there is also pressure from old regime elites who seek to perpetuate the previous power structures within the new democratic institutions so they may maintain as much power as possible. The constitutional outcome is essentially a consequence of how these varying manifestations of political power configure themselves at that particular political juncture and how the participants in the drafting are able to leverage their power to bargain effectively.

In the case of LERN precommitments, the crucial conflict is indeed among liberalism, multiculturalism and the role of the state. With the exception of five cases – the US, Indonesia, Argentina, ROK, and Brazil – all cases had some form of LERN-specific equality precommitment that at the very least, guarantees non-discrimination under the law. These data indicate that the LERN category is unique enough to warrant separate constitutional recognition beyond the typical non-group-specific equality precommitment that all cases have, sometimes numbering in the several. Thus, on their own, LERN-specific equality precommitments show a need for constitution-makers to break with liberal orthodoxy and to provide some categories of groups constitutional recognition not provided to other groups. The fact that no one domain had a majority of cases with precommitments suggests that liberal orthodoxy is predominant. However, for many cases we see that ultimately strict adherence to liberal democratic ideals becomes untenable and that they must be compromised if there is to be any state at all, nation- or otherwise. Furthermore, all cases except the US, Mexico, and SA have some form of social precommitment, either permitting or mandating redistribution of resources by the state within one or several domains. Like LERN-specific precommitments, these provisions demonstrate a departure from traditional liberal norms and institutions and impress upon the state and its citizens some recognition of group rights that is perhaps less than preferential but certain more than *de minimus*. Even cases with no LERN-specific precommitments like the US and Brazil have non-group-specific equality precommitments that permit LERN-based affirmative action in multiple domains. Indeed, the data here show that, as it

pertains to group rights, “liberal democracy” is merely an ideal-type, perhaps so ideal as to become an unworkable fallacy.

When we examine the data on preferential precommitments, the evidence for a constitutional departure from liberal individualism and toward group rights becomes clearer. As mentioned, the overwhelming number of cases have some form of social precommitment, and of the three cases with no discernible social precommitment, all have some sort of territorial or LERN-specific preference. Of the Fifteen cases with LERN-specific preferences, nine of the cases with domain-specific precommitments have precommitments in multiple issue domains. Even some cases with largely ethnically homogeneous populations have LERN-specific preferences. For example, both Bangladesh and China have majority ethnic groups that constitute well over 90% of the population, but both have LERN-specific precommitments. In Bangladesh, they take the form of a classical LERN-specific, non-domain-specific provision at art. 28(4), along with a classical civil service preference in the ECON/EMP domain. China’s minority preferences are territorial, incorporating semi-autonomy and ethno-development. Some cases with ethnically diverse populations have no LERN-specific precommitments. Although there appears to be some correlation between relative homogeneity and the presence of LERN-specific precommitments (the more diverse, the more likely the presence of a precommitment), the equation is not a simple one. Most notably, the case studies tend to show that minority group mobilization and other factors, rather than their absolute numbers, play a crucial role in whether and how their demands for recognition are responded to during constitution-making and re-making.

Overall, only seven cases had classical precommitments: India, Pakistan, Bangladesh, Ethiopia, SA, Columbia and Spain. The pattern among the first three cases has been discussed. The Indian constitution uses the term “reservations” in several provisions, while art. 37, § a of Pakistan Constitution uses the classical term “measures” along with the sporadic term “promote” and Bangladesh uses “special provision” in art. 28, § 4 and art. 29, § 3, para. a. In Columbia, art. 176 uses

the term “special circumscription” to ensure participation of “ethnic groups and the political minorities” in the Chamber of Representatives. Classical language is used again in art. 246 to describe the “special jurisdiction” accorded to certain indigenous groups. Finally, art. 3, § 3 of the Spanish Constitution represents the only classical precommitment in the CULT domain, “[t]he richness of the different linguistic modalities of Spain is a cultural heritage which shall be *especially* respected and protected” (emphasis added). This paucity of classical language could mean that constitution-makers prefer language derived from their own culture and historical circumstances. The historical specificity of linguistics and the socio-legal salience of particularized, site-specific terminology may outweigh any pull to apply classical language which may prove problematic or inappropriate in a given case-specific legal context. A prime example would be Nigeria’s “federal character.” Even the term “reservation,” which this study classifies as classical, originates from the Indian context of preferences for the SC/ST and OBC groups. Another explanation could be that constitution-makers seek flexibility in the interpretation and application of preferences and thus choose sporadic language. We know that neither classical nor sporadic, non-equality language is required for there to be a constitutionally-permitted LERN-specific preference – cases like the US and Brazil demonstrate this point. However, it would seem that, at least in the abstract, that classical language would be the most stable.

In analyzing the LERN-specific and territorial precommitments, it is also important to recognize that not all LERN groups are created equal. Almost universally, there is a distinct hierarchy of groups within the LERN category. These racial categorization regimes that are the progeny of colonialism, slavery and migration, and have been reflected in the amount and type of affirmative action precommitments conferred. In the case of Colombia we saw the differences in preferences accorded to the indigenous groups but not to blacks, specifically in the economic domain through a territorial precommitment. The “legitimacy” of the indigenous “ethnic” identity and the “manufactured” nature of blacks’ “racial” identity are clearly borne out. Afro-Columbians had to

undertake serious mobilization efforts in order to achieve legal recognition as a discriminated or marginalized group. This dynamic was noted in the Nigerian case as well, with the settler-indigene controversy. The privileging of indigenous groups over immigrant minorities is also apparent in Southeast Asian cases such as the Philippines. We also saw this phenomenon play out a different way in India in the controversy over applying reservations to the OBCs.

If we turn to domain-specific precommitments, we can see that in the POL domain, only three cases had electoral quotas for LERN minorities: India, Ethiopia and Columbia. This indicates that legislative seat reservations for LERN minorities is generally frowned upon. Myanmar appears to have legislative seat reservation for “national races with suitable population” (Myan. Const. art. 15) at the regional, state or self-administered levels, but their political participation is effectively limited to “national races affairs” (Myan. Const. art. 17, § c). The Nigerian LERN-specific, POL-specific precommitment pertains to the ethnic make-up of political parties’ executive committees, not to legislative seats themselves (Nig. Const. art. 223, § 1, para. b). Most of the political preferences that LERN minorities are granted come in the form of territorial grants of autonomy or indigenous conservation. This finding seems to underscore the national tension between political inclusion and autonomy.

The data show the same tension in the ECON/EMP domain, with most LERN minority economic preferences occurring as a result of territorial precommitments. To be sure, there are instances such as art. 46 of the Indian Constitution, art. 89(4) of the Ethiopian Constitution, art. 22, § c of the Myanmar Constitution and art. 37, § a of the Pakistani Constitution where there are mandatory, classical LERN-specific, ECON/EMP-specific precommitments which cover economic preferences writ large. There are also cases such as art. 16, § 4 of the Indian Constitution, art. 36 of the Pakistani Constitution, art. 29, § 3 of the Bangladeshi Constitution and arts. 171, § 5, and 208, § 4 and 217(3) of the Nigerian Constitution which have public sector precommitments. However, most of the political and economic preferences conferred upon LERN minority groups are in fact done so

through some form of territorial precommitment, whether through some degree of autonomy, ethno-development scheme or indigenous conservation plan. Fifteen cases have some form of territorial precommitment that in some way prefers indigenous groups. Twelve cases provide for some degree of autonomy, which gives the autonomous groups more authority over their political and economic affairs than groups residing in non-autonomous sub-national units. Four cases – China (art. 4), India (art. 38, § 2), Pakistan (art. 37, § f) and Columbia (trans. art. 55) – have ethno-development precommitments. Finally, four cases – Brazil (art. 231), Philippines (art. 13, § 6), Thailand (art. 67) and Columbia (arts. 246 and 330) – have conservation precommitments. These data tend to show that constitution-makers are more willing to give special political and economic recognition to LERN minorities vicariously and separately, through a territorial proxy, rather than through classical precommitments that effectuate preferences through goals or quotas. This may be because, practically speaking, in many countries LERN minorities reside together in a delineated geographical area. This makes it easy to confer preferences using a territorial vehicle. Another explanation is that LERN minorities may actually *demand* territorial-based preferences as opposed to more inclusionary preferences like legislative quotas. This explanation makes particular sense in the case of indigenous groups, but less so for immigrant groups. Thus, these data reinforce the conclusion that governments are indeed more willing to accommodate the demands of indigenous groups than immigrant LERN minorities.

When compared to the POL and ECON/EMP domains, the EDU and CULT domains had more precommitments, indicating that either they are considered to be more important, or that they are perceived as lesser included domains of territorial precommitments or the POL and ECON/EMP domains, and thus easier to accommodate. Of the eight CULT-specific, LERN-specific precommitments, only two were classical – SA and Spain. Many of the constitutional provisions that referred to indigenous or minority cultures did so in a non-preferential or non-discriminatory way, articulating the equal promotion of the minority culture and the national culture.

As with the POL domain, the overwhelming choice of tacit terms such as “promote,” “preserve” and “respect” may be explained by legal flexibility or cultural specificity. Also, territorial, conservation precommitments tend to include reference to cultural preservation, perhaps making a separate domain-specific precommitment redundant or irrelevant. When viewed in terms of nationalism theory, the linguistic ambiguity in the CULT precommitments makes sense – no matter how many preferences are afforded to minorities by the state the minority cultures must remain subsidiary to the interests of the overarching national project.

CHAPTER 9

CONCLUSION

I. SEX and LERN Target Groups Compared

Overall, the comparison of precommitment landscapes for LERN minorities and women yields mixed results. First, the prevalence of group-specific equality precommitments is similar for both categories.

**Table 9: SEX-specific and LERN-specific equality precommitments**

		<b>SEX-specific precommitment</b>	
		<b>Yes</b>	<b>No</b>
<b>LERN-specific precommitment</b>	<b>Yes</b>	China, India, Pakistan, Bangladesh, Nigeria, Russian Federation, Japan, Mexico, Philippines, Vietnam, Ethiopia, Germany, Egypt, Turkey, DRC, Iran, Thailand, Italy, SA, Myanmar, Ukraine, Colombia, Spain	France
	<b>No</b>	Brazil, ROK	US, Indonesia, Argentina

Twenty-four cases had LERN-specific equality precommitments and 25 cases had SEX-specific equality precommitments. Additionally, the total number of equality precommitments for LERN minorities and women is 58 and 66, respectively. Only the US, Indonesia and Argentina have no group-specific equality provisions. Almost all cases had equality provisions for both categories; France was the sole case to have only a LERN-specific equality provision, and Brazil and the ROK were the only cases to have only a SEX-specific equality provision. Thirteen of the cases with LERN-specific precommitments had more than one equality provision, while 20 of 24 cases had multiple provisions for women. It must be noted that this study does not sub-categorize equality precommitments by domain, as it does for preferential precommitments. However, at the very least, these data indicate that constitution-makers generally view minorities and women as being equally

entitled to equal protection, non-discrimination and equal opportunity. Thus, most states, regardless of geography, legal tradition, time of democratic transition, degree of democratization or ethnic make-up, agree that equal opportunity for LERN minorities and women is a floor to be aspired to. Unfortunately, there seems to be much less agreement on the height of the ceiling.

The relative parity between LERN minorities and women is also apparent for group-specific, non-domain-specific precommitments.

**Table 10: SEX-specific and LERN-specific, non-domain-specific precommitments**

		<b>SEX-specific precommitment</b>	
		<b>Yes</b>	<b>No</b>
<b>LERN-specific precommitment</b>	<b>Yes</b>	India, Bangladesh, DRC	Nigeria, Russian Federation, Vietnam, Italy
	<b>No</b>	Pakistan, Ethiopia, Germany, Turkey, ROK, Argentina	China, US, Indonesia, Brazil, Japan, Mexico, Philippines, Egypt, Iran, Thailand, France, SA, Myanmar, Ukraine, Colombia, Spain

For both categories, most cases have some sort of affirmative action precommitment including both group-specific, non-domain-specific precommitments. There are a total of 16 group-specific, non-domain-specific precommitments; nine are classical and seven are tacit. Furthermore, ten are mandatory and six are permissive. Four of the seven cases with LERN-specific, non-domain-specific precommitments have the classical type (India, Bangladesh, Nigeria, Italy) and five have mandatory provisions (Nigeria, Russian Federation, Vietnam, DRC, Italy). For the women, seven of nine cases with SEX-specific, non-domain-specific precommitments have classical (India, Pakistan, Bangladesh, Ethiopia, Turkey, DRC, Argentina) and five are mandatory (Ethiopia, Germany, Turkey, DRC, ROK). Ten cases have either a LERN- or SEX-specific, non-domain-specific precommitment. Three cases – India, Bangladesh and the DRC – have group-specific, non-domain-specific

precommitments for LERN minorities and women. Most cases have no group-specific, non-domain-specific precommitmen for either group. When viewed in their entirety, these data indicate that, although there is relative parity between LERN minorities and women, group-specific, non-domain specific provisions are simply not overwhelmingly desirable by constitution-makers for either category. And when they are included in constitutions, only slightly more often than not do framers choose the more robust classical, mandatory language over the weaker tacit, permissive language. The possible reasons for these choices have already been discussed. Suffice it to say, as it concerns the comparison between the two categories, neither category has a clear advantage in the number of cases, the number of provisions or the type of precommitment.

Parity among women and LERN categories continues with the group-specific, POL-specific precommitments.

**Table 11: SEX-specific and LERN-specific, POL-specific precommitments**

		<b>SEX-specific precommitment</b>	
		<b>Yes</b>	<b>No</b>
<b>LERN-specific precommitment</b>	<b>Yes</b>	India	Nigeria, Ethiopia, Myanmar, Colombia
	<b>No</b>	Pakistan, Bangladesh, Egypt, France, Argentina	China, US, Indonesia, Brazil, Russian Federation, Japan, Mexico, Philippines, Vietnam, Germany, Turkey, DRC, Iran, Thailand, Italy, SA, ROK, Ukraine, Spain

In the POL domain, there were five cases for both women and LERN minorities. Both the LERN and SEX target groups had 15 provisions. Most provisions were classical and the provisions were overwhelmingly mandatory. As indicated above, the overwhelming majority of the POL-specific provisions concern elections. The lone exception is Art. 223(b) of the Nigerian Constitution which concerns the application of the federal character principle in

the appointment of political party executive board members. India, Pakistan, Bangladesh and Ethiopia have explicit quotas; however, neither target group was significantly more likely to receive them. This finding may mean that, regardless of target group, electoral quotas are generally frowned upon by constitution-makers. It could also mean that whether a quota is the optimal vehicle for ensuring substantive equality in federal, state or local elections is a decision best to legislatures, other sub-national decision-making bodies or political parties.

Alternatively, the omission of specific quotas from a constitution could be seen as too rigid, and, if socio-political circumstances change far more difficult to amend than legislation. As the German and Indian cases illustrated, quotas for women and LERN minorities, respectively, often do not go over well with the electorate and are thus avoided for political reasons. The fact that only ten total cases had a POL-specific precommitment at all can lead to several possible conclusions. The first is that electoral imbalances for minorities and women are simply not important at all. Second, such issue may be important, but not important enough to warrant serious constitutional attention, given all of the issues that must be resolved during democratic transitions. Third, any POL-specific preferences, particularly quotas, may be viewed as fundamentally anti-democratic because the right of voters to the representative of their choice should not be infringed and entrenched power structures should not be threatened. Thus, as it may contravene one of the cornerstones of the republican form of government, this explanation would counsel against group-specific, POL-specific affirmative action precommitments of any kind.

Unlike the POL domain, women seem to enjoy a distinct advantage in ECON/EMP-specific precommitments.

**Table 12: SEX-specific and LERN-specific, ECON/EMP-specific precommitments**

		<b>SEX-specific precommitment</b>	
		<b>Yes</b>	<b>No</b>
<b>LERN-specific precommitment</b>	<b>Yes</b>	Pakistan, Ethiopia, Myanmar	India, Bangladesh, Nigeria, SA
	<b>No</b>	China, Brazil, Mexico, Philippines, Germany, Turkey, Iran, Thailand, Italy, ROK, Ukraine, Colombia, Argentina	US, Indonesia, Russian Federation, Japan, Vietnam, Egypt, DRC, France, Spain

In total, seven cases had LERN-specific, ECON/EMP-specific precommitments, while 16 cases had SEX-specific precommitments. The LERN category had a total of 17 provisions, 8 of them classical and 12 of them mandatory. Women had a total of 20 provisions, five of them classical and 18 of them mandatory. The types of preferences in each category differ markedly. Most of the LERN-specific preferences concern broad economic preferences or civil service appointments, while most of the women-specific provisions concern maternity protections. This discrepancy could be attributed to the durability of male chauvinism and gender roles that cast women as “weaker” and in need of protection by the state. Furthermore, women should not be granted constitutional civil service preferences because these are positions of authority and prestige and are best suited for men. This line of reasoning might accord with the trajectory of history, but it remains inadequate simply because it denies the political agency of women as illustrated by the ROK and Turkish cases. Curiously, art. 32, § 4 of the ROK Constitution and art. 50 of the Turkish Constitution use the tacit term “protect,” which for women could be construed as paternalistic language. Therefore, although maternal precommitments may in some way exhibit remnants of a stubborn, resilient patriarchy, they also represent the culmination of decades of women’s mobilization toward more substantive equality. In the end, this analysis may be case specific.

A companion explanation may be that civil service preferences are a nationalist tool used to effectuate ethnic assimilation, and for assuaging the inclusionary demands of a restive minority through what is, in effect, a political and economic redistributionary scheme. Nigeria is the most obvious example. If civil service preferences are indeed devised for this purpose, then it would make little sense to apply them to women because, no matter how disruptive women's movements may become, rarely if ever do they threaten the territorial or institutional integrity of the state itself. Conversely, uprisings by LERN minorities can, and perhaps that is why the more "robust" civil service preferences are reserved for the LERN category. That being said, and although not articulated specifically, the LERN-specific, civil service preferences can include appointments and promotions for LERN minority women. As previously noted, China's art. 48 is an exception; it does provide for preferences for women in the civil service. The obvious explanation is that socialism mandates gender equality. Indeed, Gao & Zheng make it clear that the key to the progress was affirmative action as initiated by the party and the state. "The government established regulations to guarantee women's representatives in government organizations. More importantly, the Central Organization Department enacted a series of policies on women's political participation and initiated regular programmes to train and select women" (Gao & Zheng, 2008, p. 7). Vietnam, also socialist, has civil service preferences for women as well, but under a non-group-specific, non-domain-specific provision (Viet. Const. art. 63, § 4). India does not have civil service preferences for women.

The data also show that neither target group had ECON/EMP-specific precommitments that applied explicitly to private sector goals or quotas. Some of the broader provisions, such as art. 46 of the Indian Constitution, art. 7, § XX of the Brazilian

Constitution, art. 89, § 4 of the Ethiopian Constitution, art. 32, § 4 of the ROK Constitution and art. 22, § c of the Myanmar Constitution, could be read to give the state the authority to compel private enterprises to implement preferential programs for LERN minorities and women. However, even though all five cases have social precommitments, with all except South Korea being mandatory, none has a provision specifically mentioning private enterprise. Some women-specific provisions do offer women workplace protections, but hiring and promotion are not mentioned. “Private institutions” are mentioned in art. 35, § 3 of the Ethiopian Constitution, but it is a SEX-specific, non-domain-specific provision. For both LERN minorities and women, this omission of private enterprises from ECON/EMP-specific precommitments seems to demonstrate a balance between a state that must programmatically acknowledge group rights and the imperatives of social/economic justice, while simultaneously taking care not to trespass so deeply into the free market that the growth of industry is impeded and the economic growth of the state as a whole is impaired.

In the EDU domain, the disparity between women and LERN minorities is clear.

**Table 13: SEX-specific and LERN-specific, EDU-specific precommitments**

		<u>SEX-specific precommitment</u>	
		<u>Yes</u>	<u>No</u>
<b>LERN-specific precommitment</b>	<b>Yes</b>	-	-
	<b>No</b>	India, Pakistan, Philippines, SA, Myanmar	China, US, Indonesia, Brazil, Bangladesh, Nigeria, Russian Federation, Japan, Mexico, Vietnam, Ethiopia, Germany, Egypt, Turkey, DRC, Iran, Thailand, France, Italy, ROK, Ukraine, Colombia, Spain, Argentina

Five cases have precommitments, all in the LERN category. One reasonable conclusion is that education for girls is not seen as very important, at least not as important as education for LERN minorities, even though both minorities and women have historically

suffered from discrimination at all levels of education. The LERN precommitments implicitly permit education preferences for LERN minority girls and women, but the absence of a women-specific reference intimates that girls' education is not a priority for constitution-makers. If we look at SA, we can see that the ECON/EMP preferences for LERN are relatively weak, but SA has strong legislation for minority preferences in both the public and private sectors. However, because SA has a non-group-specific, non-domain-specific provision at art. 9, § 2, these preferences have also been extended to women through equal employment and affirmative action legislation passed under the 1994 Gender Policy Framework. Could this mean that LERN-specific, EDU-specific preferences could also be extended to women? It could in theory, but the lack of a constitutional precommitment might make implementation more troublesome legally. All in all, the data presented here show that constitution-makers are less likely to include EDU-specific preferences for women than LERN minorities.

There is also a disparity in the CULT domain.

**Table 14: SEX-specific and LERN-specific, CULT-specific precommitments**

		<b>SEX-specific precommitment</b>	
		<b>Yes</b>	<b>No</b>
<b>LERN-specific precommitment</b>	<b>Yes</b>	-	Brazil, Philippines, SA, Myanmar, Ukraine, Colombia, Spain
	<b>No</b>	Pakistan, Egypt, DRC, Iran	China, India, US, Indonesia, Bangladesh, Nigeria, Russian Federation, Japan, Mexico, Vietnam, Ethiopia, Germany, Turkey, Thailand, France, Italy, ROK, Argentina

Seven cases have LERN-specific, CULT-specific preferences and only four cases have SEX-specific, CULT-specific preferences. Although seven cases represent only slightly

less than one-quarter of the sample, to some extent it does show state willingness to acknowledge the importance of LERN minority culture as distinct and worthy of special attention. Indeed, the same indigenous customs that once were vilified and derided as primitive and anti-modern become appreciated as integral to, rather than inimical to, the national project. However, for women the social customs that subordinate them persist. In the case of women, the lack of precommitments could be explained by the limits of state action; states simply are loathe to intervene in someone's domestic, interpersonal familial affairs in a manner that disrupts or balances deep, historical power asymmetries. Under this view, the right to privacy – a bulwark of liberalism – trumps any state obligation to protect women from spousal abuse or other discrimination that may occur in the household; however, it does not prevent the state from perpetuating, reinforcing or enhancing patriarchal policies that harm women's rights. The arguments made by Tucker, MacKinnon and others support this notion. Additionally, and as previously indicated, patriarchal remnants do persist. However, the cases with women-specific, CULT-specific precommitments are comprehensive. Article 14 of the DRC Constitution has already been discussed, but art. 21 of the Iranian Constitution provides another example. In pertinent part, it states,

The government must ensure the rights of women in all respects, in conformity with Islamic criteria, and accomplish the following goals:

- (1) create a favorable environment for the growth of woman's personality and the restoration of her rights, both the material and intellectual;
- (2) the protection of mothers, particularly during pregnancy and childbearing, and the protection of children without guardians;
- (3) establishing competent courts to protect and preserve the family;
- (4) the provision of special insurance for widows, and aged women and women without support....

Provisions such as these are quite scarce, a scarcity that highlights either constitution-makers disregard for such preferences or their unwillingness to implement them for fear of political backlash from a conservative populace.

## II. Final Conclusions

Ultimately, when we examine the precommitment data in the context of the case histories presented above, three main conclusions can be drawn. First, liberal individualism remains central to the constitution-making process. However, constitutional acknowledgement of group rights is a rather ubiquitous exception. On certain occasions, it seems as if the imperative for state integrity and institutional durability supersedes any exogenous or endogenous push toward automatic adherence to liberal individualist norms. Most fundamentally, this conclusion is reasonable because almost every case has some form of social precommitment that recognizes the state as an explicitly social or socialist state, or maintains the state's obligation to ensure some form of social security or equanimity in wealth and resource distribution.

When the prevalence of social precommitments is viewed in light of the fact that almost every case had some LERN-specific or SEX-specific affirmative action provision – with many cases having more than one – it is clear that for deeply divided societies, as well as some that are not so deeply divided, liberal individualism in constitution-making has become more of a flexible consideration than a strict directive. In the LERN case, it would seem that in Brown's characterization of ethnic relations in the Asian context as liberal civic nationalism vs. collective civic nationalism, the latter has more weight. In the context of women, insofar as doctrinal liberalism also dictates against group rights for women, liberal

gendered parochialism seems to be giving ground to more collectivist notions of gender mainstreaming and the slow but noticeable erosion of male supremacy.

Second, LERN minorities tend to fare better overall than women when it comes to preferential constitutional precommitments. This may stem from the fact that LERN minorities have the potential to be more politically disruptive, employing tactics such as violent protest, armed rebellion and sustained independence movements to achieve their goals. These tactics are deeply destabilizing for any nationalist project because they can threaten territorial integrity, degrade public approval of the new regime and lead to the wasting of precious and scant economic resources in the effort to quell the movement. Territorial precommitments also play an important role here. In many instances, the demands of certain LERN minorities can be met with grants of some degree of autonomy, ethno-development or conservation, rather than with inclusive preferential devices such as electoral or civil service quotas. Unlike women, LERN minorities are not homogenous; thus, different solutions may be effective for different groups. Indigenous groups, which tend to reside in a defined space, may be satisfied by declarations of semi-autonomy or ethno-development schemes. Conversely, women are not territorially defined and, although divisions such as ethnicity, class and rural-urban do exist, they lack the political salience of indigenous-immigrant or other intra-LERN group social stratification categories. Furthermore, women's issues tend not to destabilize the state and, thus, may be regarded as less immediate.

Third, even though a preferential disparity between the categories exists, historical evidence from the cases presented here suggests that endogenous and exogenous political pressures matter when it comes to LERN minorities' or women's chances of creating and

exploiting democratic openings and convincing constitution-makers to include affirmative action provisions in constitutions. Endogenous pressures, in the form of grassroots mobilization, domestic political coalition building, litigation, the election of minority and women law-makers, organized and sustained protest, and sometimes outright violence permit subordinated social groups to take advantage of political opportunity structures to have constitutions rewritten or amended. This pattern played out when women sought greater electoral representation as well as when indigenous groups sought political and economic autonomy. Exogenous forces, such as international conventions, legal borrowing, NGOs, and even economic sanctions or incentives, are also important to realizing institutional legal change for subordinated groups during political transition. When these two forces operate in concert, minority groups stand the best chance of achieving a constitutional precommitment to affirmative action. Exogenous pressures seem to be more significant for women, while endogenous pressures seem more significant for LERN minorities.

### III. Policy Prescriptions

Based on the results of this study, constitution-drafters interested in incorporating SEX-specific affirmative action precommitments should adopt a holistic, synergistic approach by using a variety of provisions that can be read *in pari material* to provide women the most robust legal preferences. Specifically, the drafters should include: (1) a women-specific equality precommitment, (2) a social precommitment, (3) a women-specific, non-domain-specific affirmative action precommitment and (4) women-specific domain-specific affirmative action precommitments for the four domains examined in this study. The combination of these four elements would provide the strongest legal foundation for moving toward an end to sex discrimination through special measures legislation. Drafters should be cognizant that some domains of discrimination are “stickier” than others and thus require more attention from constitution drafters and legislators. In the POL domain, if quotas are desired, this should be made clear. The type of quota - whether party-list, reserved seat or other - should also be made clear. Additional details can be left to legislation and/or party rules. For the ECON/EMP domain, maternity provisions, following the Mexican example, should be included. Wage provisions, in a manner that expands upon the Brazilian example, are also integral. In EDU, the Vietnamese example is good, but the constitutionality of quotas in private and public educational institutions should be made clear. Finally, for most countries the CULT domain is the most sensitive. As mentioned, above, the Ethiopian example can be expanded upon and enhanced through legislation and the creation of appropriate institutional mechanisms.

Constitution-drafters interested in memorializing LERN-specific affirmative action precommitments should do as was recommended for the women. They should adopt a holistic, synergistic approach by using a variety of provisions that can be read *in pari material* to provide LERN minorities the most robust legal preferences. The drafters should take care to include: (1) a LERN-specific equality precommitment, (2) a social precommitment, (3) a LERN-specific, non-domain-specific affirmative action precommitment and (4) a LERN-specific, domain-specific affirmative

action precommitments for the domain in which the preference is sought. The combination of these four elements would provide the most comprehensive constitutional foundation for supporting preferential legislation for LERN minorities. As with the SEX category, drafters should be cognizant that some domains of discrimination are “stickier” than others and thus require more attention. In the POL domain, if quotas are desired, this should be made clear. The type of quota should also be made clear. For the ECON/EMP domain, whether a provision should/may be applied to the public and or private sectors should be clearly articulated. In EDU, the SA example is instructive, but clarity as to the constitutionality of quotas, and for which groups and institutions, must be made certain. Finally, for the CULT domain, drafters may want to employ classical language that makes the intent to confer special treatment, rather than simply non-discriminatory treatment, clear.

#### IV. Ideas for Future Research

The findings and conclusion presented in this dissertation open many avenues for future research. The sample of cases could easily be expanded beyond 30. Expansion may permit greater insight and allow for consideration of more variables that influence whether and which affirmative action precommitments are implemented. A greater sample size might also help in answering certain fundamental questions. For example, do constitutional precommitments to affirmative action “matter”? This dissertation was primarily concerned with clarifying and cataloguing affirmative action precommitments and devoted less attention to precommitment effectiveness. A more methodologically rigorous study of precommitment effectiveness could reveal how important they actually are. A basic research design could simply add data to the data presented in Chapters 7 and 8, such as (1) national legislation for all cases in the sample, organized by target group and issue domain; (2) sub-national legislation for all cases in the sample, organized by target group and issue domain, (3) national case law on affirmative action. With this additional data, along with buttressing

historical materials, it could be determined whether cases with affirmative action precommitments are more likely to have affirmative action legislation at the national and sub-national levels, whether the type of precommitment determines the type/amount of legislation, or whether there is “issue bleeding” – whether precommitments in one domain or for one target group make legislation more likely to be passed for others. Certain of these queries may be best addressed through large N and small N comparisons of two or three cases.

Future research could also examine precommitments for other groups such as persons with disabilities or religious minorities. As has been mentioned, there is some overlap between the LERN category and religion. However, elucidating religion as a separate category could be useful, particularly in countries with multiple religious minorities. A comparison of such cases would permit intra- and inter-group findings. Additionally, many constitutions contain precommitments for persons with disabilities. A comparison of precommitments for LERN minorities, religious minorities, women and persons with disabilities could provide deeper insight into how societies accord rights and preferences to different minority groups.

It might also be useful to determine how certain groups take advantage of opportunity structures during constitutional openings and succeed in having affirmative action precommitments included. A few cases were treated in Chapter 7 and 8; however, a larger sample may provide greater insight into precisely which endogenous and exogenous variables must be present and interact for specific groups to achieve a constitutional precommitment during constitutionmaking. Finally, what are we to make of cases that have precommitments for both categories but use different language to articulate them? For

example, the DRC's LERN-specific, non-domain-specific precommitment uses tacit, ("protection," "promotion"), mandatory language while its women-specific, non-domain-specific precommitment uses classical ("measures"), mandatory language. Explanations for these differences in language selection can be social, political, temporal or perhaps even coincidental. Regardless of the processes at work, understanding them is an interesting avenue of inquiry.

Another avenue of inquiry is the path dependent nature of affirmative action precommitments. Specifically, if an affirmative action precommitment is not included in an initial constitution, what variables operate to make constitutional amendment more or less likely? Are these variables different for different target groups? How would we account for institutional variations in amendment processes?

APPENDIX A  
METHODOLOGY

I. Introduction

This research project uses a two-pronged qualitative approach to understanding constitutional precommitments to affirmative action. First, the study develops a basic typology of affirmative action constitutional precommitments based on the definition of affirmative action proposed herein – a state mandated or permitted group preference. Then, the various types and sub-types of precommitments are identified using constitutional textual analysis and comparative historical analysis, with significant guidance from the comparative constitutional law research program. Textual provisions from the constitutions from the cases in the sample are presented and analyzed for both illustrative and loosely comparative purposes to provide examples of each affirmative action type.

Second, after the precommitment types and sub-types are identified, delineated and articulated, their application for two target groups – LERN minorities and women – and for four issue domains – economy/employment (ECON/EMP), political (POL), education (EDU) and culture (CULT) – are evaluated for frequency within the sample of constitutions. Next, using comparative historical institutional analysis, cases are compared and contrasted through process tracing to assist in understanding potential patterns in precommitment genesis, implementation, expansion and modulation. Tables are used to display graphically overall prevalence of particular affirmative action precommitment types and sub-types by country, target group and issue domain. Finally, tentative conclusions concerning the most salient variables that influence the comparative prevalence of affirmative action precommitments across target groups and issue domains are drawn based on the numerical data, legal histories and political contexts.

## II. Comparative Constitutional Law

At the heart of this project is the comparison of constitutions. Hirschl (2014) contends that there has been a “global transformation” – the ubiquitous emergence of constitutional systems – that “has brought about an ever-expanding interest among scholars, judges, practitioners and policymakers in the constitutional law and institutions of other countries, and in the transnational migrational of constitutional ideas, more generally” (Hirschl, 2014, p. 2). However, he is forced to concede that “as a method and a project [comparative constitutional law] remains under-theorized and blurry” (Hirschl, 2014, p. 3). He elaborates by observing,

[s]ince its birth, comparative constitutional law struggled with questions of identity. There is considerable confusion about its aims and purposes, and even about its subjects – is it about constitutional systems, constitutional jurisprudence, constitutional courts, or constitutional government and politics? It also remains unclear whether comparative constitutional law is or ought to be treated as a subfield of constitutional law, or an altogether independent area of inquiry (Hirschl, 2014, p. 4).

Hirschl enumerates three primary reasons for comparative constitutional inquiry: (1) necessity – for empires or large political entities to govern diverse nations or minorities seeking to preserve their status by opening new areas of law; (2) inquisitiveness – for intellectual curiosity, perhaps motivated by a need to understand one’s own constitution; and (3) politics – for promoting a concrete political agenda (Hirschl, 2014, p. 148). He argues that the field is comprised of four different types of scholarship. The first is the single-case study. In this type, the author is usually familiar with the case and selects it with no particular regard to method. Purposes for section include highlighting the constitutional idiosyncrasies of a particular case or providing reference material to students and scholars. Second, contributors to the field may use analogy distinction and contrast to find solutions to a given constitutional challenge. While the first category is not strictly speaking comparative, the second type does involve comparison for the potential purpose of emulation in newly democratizing societies. Commentaries on inter-court borrowing as a means of establishing a global legal discourse tend to populate the category. The third type emphasizes the broad similarity of constitutional challenges across cases. It focuses on key liberal democratic concepts as separation

of powers, statutory interpretation and equal protection. This type contributes greatly to concept formation and consolidation and forms the basis of most comparative constitutional law textbooks. In the vein of the second type, the third type also implicates inter-court borrowing, facilitating normative and juridical analyses concerning positive and negative borrowing. Hirschl refers to this approach as “concept thickening through multiple description” (Hirschl, 2005, p. 130). Fourth, and finally, some studies move beyond thick description and concept formation to theory-building and causal inference. This exercise requires three major steps: (1) hypothesis testing involving causal links among well-defined variables; (2) confirmation or disconfirmation of the hypothesis through rigorous data collection, and analysis; and (3) generation of conclusions.<sup>90</sup>

From a theoretical perspective, Magnarella (1994) posits that personal philosophies and theories of societal dynamics influence comparison. Relevant dynamics include: the sociocultural, economic, and political history of the constituent population; the goals, agendas, and strategies of the society's politically elite; the role of the military within the political and economic system; the society's religious and political ideologies, norms, and values; and the relationship among the society's technology, demography, resources, economy, and external but impinging sociopolitical powers. In Magnarella's view, “every sociocultural system has its peculiar law that results from a unique mix of historic and contemporary social, cultural, economic, demographic, environmental, and political forces. An accurate understanding of constitutions or legal texts requires a knowledge of all these

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<sup>90</sup> Tushnet (1999) identifies the field of comparative constitutional law as fertile for rigorous study. He offers a systematic approach to this enterprise, organized in three possible approaches. First, a functional approach could help identify those functions that are common to all governments. These functions, however, must not be specified to broadly or too narrowly. An alternative to functionalism is the expressivist approach. Tushnet describes the expressivist model as emerging from a state's particular history and character. In the expressivist view, a constitution tells a story about a society; “constitutions emerge out of each nation's distinctive history and express its distinctive character” (Tushnet, 1999, p. 1269). That character, according to Tushnet, must “always [be] subject to renegotiation and revision” (Tushnet, 1999, p. 1308). Finally, Tushnet suggests the bricolage approach, “an interpretive theory that sees insistence that the Constitution is a highly rationalized document as only one, historically contingent view of the Constitution” (Tushnet, 1999, p. 1308).

forces” (Magnarella, 1994, p. 514). Any comparative constitutional law theoretical framework must be concerned with both etiology (causal forces and efficient cause explanations) and teleology (motivational forces and final cause explanations). “A society’s peculiar history, the way its boundaries were drawn, and the extent to which its pre-state population constituted rival factions or shared a common identity as a people, have important bearings on the character of its governance and law” (Mangarella, 1994, p. 515).

In Fontana’s (2011) view, comparative constitutional law had particular prominence immediately after WWII, but suffered a precipitous drop in interest and use subsequently. During what Fontana refers to as the Rise Era – from 1945-1972 – comparative constitutional law was an accepted part of legal scholarship. Prominent articles were published in the *Harvard Law Review* and *Yale Law Journal*, well-known law professors and jurists gave lectures and law schools offered comparative-themed courses focusing on foreign law. There was a significant degree of inter-state dialogue among legal professionals, with American scholars advising other countries on their constitution-making processes. American scholars were fascinated with events overseas. Justices Frankfurter, Jackson and Warren were all interested in the subject. Part of the interest was motivated by a cultural and legal imperialism married to a sense of American exceptionalism following the victory in WWII. Thus, the Rise Era can properly be characterized as an opportunity to export its constitutional ideals to other countries, while importing very little from foreign “negative” constitutional experiences (Fontana, 2011, pp. 14-22).

However, from 1972-1999 interest in the topic waned quite dramatically. Attention turned away from international issues and became more focused on domestic litigation. The new generation of law professors had little foreign experiences and were culled primarily from federal clerkships at the circuit and Supreme Court levels. This shift had an effect on the law students as well as the types of scholarship published in law journals. As Fontana notes, there were essentially no substantial articles about comparative constitutional law written by prominent American constitutional scholars

during the Fall Era. The fall of comparative constitutional law was also a function of the rise of international law. Elites in the American legal profession became interested in international law because they could use it to bolster domestic law arguments made in federal courts. In Fontana's view, the move away from comparative constitutional law has severely limited the types of arguments made under American constitutional law, thus fundamentally hampering the process of judicial review. With specific reference to race-conscious affirmative action programs, Fontana opines,

[r]egardless of whether courts should be referencing comparative constitutional sources, there are many good reasons to think that scholarship about constitutional law – so much affected by these middle range concerns – could consider comparative sources across all different types of issues. Since nearly ninety percent of the countries in the world now have some form of constitutional review, comparative constitutional law potentially offers enormous amounts of factual information, information that is particularly relevant because constitutional scholars make arguments based on facts (Fontana, 2011, pp. 33-34).

Or as Jansen (2006) explains:

To be sure, it may be difficult to understand a foreign legal system, because legal rules and legal texts are typically deeply rooted within a specific economic, political, moral, and cultural background, which can often only be explained from a historical perspective. Thus, the comparative lawyer, as some have put it, must be ‘culturally fluent’ in another legal language. This is necessary not only for understanding foreign norms and legal texts, but also for identifying parallel rules or parts of the law. What is more, even in a foreign proposition is perfectly understood, it may be difficult to translate into one’s own language. This is especially the case with law which constitutes a partly autonomous reality created by the norms, doctrine, and concepts of a legal system that do not necessarily find exact counterparts in another.” (Jansen, 2006, pp. 306-307).

Some scholars are more skeptical about the benefits of inter-state legal comparisons. Lucas (2010) argues that in the case of the US constitutional comparison must be undertaken with caution. He compares the role of the judiciary as conceived of in the US Constitution, the German Basic Law, and the Canadian Charter of Rights and Freedoms and concludes that the Constitution is exceptional in its lack of judicial constraints. Lucas believes that the American constitutional architecture does not rest on the same intellectual foundations as the rest of the constitutionalized world. Were judges to rely on foreign law they may interpret those laws without proper context, and the result may be an unintended expansion of constitutional rights. This could exacerbate pre-existing rifts in American society. Furthermore, incorporating foreign law without the accompanying safeguards could lead to the entrenchment of judicial policy-making. Because Supreme Court decisions can only be overridden by a subsequent decision or constitutional amendment, justices must be restrained in their decision-making. Ultimately, “[t]he fusion of American constitutional structure with comparative constitutional law risks creating a hybrid form of judicial review where justices can employ aggressive interpretations with little possibility of correction” (Lucas, 2010, p. 2005).

What Lucas alludes to is the idea “legal particularism” makes comparative constitutionalism a very dubious enterprise in the minds of some jurists. As Choudry (1999) notes, “in its strongest formulation, legal particularism asserts that constitutions are important aspects of national identity. Comparative jurisprudence is of no assistance at all, precisely because it comes from outside a given

legal system” (Choudry, 1999, p. 830). He identifies Alford, Fletcher, and Schauer as adherents to the legal particularism school. These and similar scholars privilege differences between legal systems – in such areas as rights, duties, liberties and powers – and ignore similarities, dismissing them as superficial even when constitutional terminology and vocabulary are the same. Particularists argue that because reference to extra-constitutional, indigenous sources is crucial for constitutional interpretation, the comparative effort becomes more cultural anthropology than legal analysis. However, as Law (2005) demonstrates, there does exist a “generic constitutional theory” that engages issues such as legitimate sources of law, methods of proper argumentation, and how the judicial branch is to interact with other branches of government. It is the international legal borrowing, an act common among constitutional courts that helps create generic legal doctrine. Consultation of foreign materials and consequent legal borrowing do not themselves predict doctrinal convergence. Additional factors such as the extent to which constitutional language and history are shared by different jurisdictions, the recurring practical challenges of governance that courts must confront, the influence of legal scholarship, the homogenizing tendencies of federal and supranational structures, and the desire of courts with overlapping jurisdictions to avoid conflict are also determinative (Law, 2005).

Ultimately, we are experiencing doctrinal convergence – what Yeh & Chang (2008) refer to as transnational constitutionalism – and this process is likely to continue. The authors attribute its development and expansion to economic globalization and the imperatives of global market management. Trans-national constitutions or quasi-constitutional arrangements such as the failed EU Constitutional Treaty are noteworthy. Although it was rejected, the proposed constitution included standard constitutional components such as federalism, judicial review and a bill of rights. International agreements like the WTO, the UN Charter and NAFTA are also examples of international constitution-making. Norms such as human rights are not only recognized in international agreements, but also in domestic constitutions and legislation as derivations of evolving

and expanding standards of rights protections (Yeh & Chang, 2008, pp. 92-95). Also of importance is increased transnational judicial dialogue, as evidenced by domestic judicial reference to international norms, judicial reference to foreign laws, and reference made by international tribunals to international regimes or decisions by other international tribunals.

Law agrees, describing the effect of judicial dialogue on transnational constitutionalism in functional terms. International judicial communication, constitutional borrowing is also prevalent and an almost ubiquitous set of generic constitutional concerns support this movement toward constitutional homogenization. Law believes that this movement is largely organic, with little or no conscious coordination among judges. When confronted with complex legal issues, constitutional adjudicators will opt to follow generic law for three basic reasons. First, judges tend to copy each other because (1) it is the path of least resistance and (2) originality in decision-making is not rewarded. Second, there is what Law refers to as the “natural inertia to borrowing” (Law, 2005, p. 726). Courts will inevitably look to foreign courts when confronted with the same legal concepts or issues. The prevalence of federal, supra-national and international law creates a complexity that makes finding solutions in generic law attractive. Finally, as will be discussed greater detail below, the predominance of constitutionalism as a form of state organization has contributed to constitutional convergence. For Yeh & Chang, the result is a “common set of constitutional languages” that can facilitate international transactions, such as the negotiation of contracts (Yeh & Chang, 2008, p. 98).

What Yeh & Chang refer to as transnational constitutionalism and Law refers to as generic constitutional theory, McEldowney (2010) characterizes as the “hybridization” of constitutional law. Hybridization entails “transposing ideas and concepts from different legal systems, partly as a part of modernization, but also as a consequence of globalization (McEldowney, 2010, p. 328). He points to contract law as an early example of the assimilation and merger of legal influences, and then cites the Japanese legal system as an example of a hybrid system. Japan’s indigenous legal order reflects Chinese imperial imposition the second major influence is Japan’s Meiji period.

This study adopts the position that there indeed exists some form of “generic” constitutional law, or that modern-day constitutional law has in many important respects become “transnational” or “hybridized,” thus permitting cross-country comparison. Furthermore, in agreement with Hirschl, comparing constitutions is a valuable enterprise. The general position of Yeh & Chang, Lucas and McEldowney – that transnational legal comparison is possible, inevitable and potentially valuable – is especially resonant as it concerns rather ubiquitous issues such as minority rights and group preferences. The concerns of particularists like Choudry are well taken. However, if their core aversion to constitutional comparison is extended to its logical conclusion then how can any two legal systems ever be compared. In their attempt to marginalize legal similarity in favor of difference, what they ultimately accomplish is the creation of some manufactured, disingenuous notion that there exists some pure, unadulterated version of domestic law, and that it must be preserved at all costs from the hybridization or mongrelization that accompanies constitutional comparison. Thus, their critique seems to be less about the idiosyncracies of legal interpretation and more about the ideology of constitutional nationalism.

Critics like Tushnet (2004) questions the value of comparing affirmative action laws. He argues generally that “we must be aware of which the institutional and doctrinal contexts limit the relevance of comparative information” and “direct application of another system’s solution seems unlikely to succeed” (Tushnet, 2004, p. 662). For him, the idea that constitutional comparison “may bring to mind possibilities that would otherwise be overlooked, or may allow us to frame new questions” is questionable (Tushnet, 2004, p. 662). Furthermore, learning about other constitutional systems is “costly” and “it is not entirely clear that looking elsewhere is actually a productive way of coming up with new approaches to existing problems” (Tushnet, 2004, p. 662-663). To explain his claims, Tushnet compares affirmative action law in India and the US, arguing that the concept of the “creamy layer” in Indian affirmative action jurisprudence “cannot inform United States constitutional law to the very large extent that the idea is bound up with compensatory or distributive justice or

group-oriented justifications” (Tushnet, 2004, p. 659). In addition, the US Supreme Court requires a finding of intent to justify an affirmative action program, not simply disparate impact (Tushnet, 2004, p. 659).

Tushnet’s arguments against comparing affirmative action law fails for several reasons. First, the relative importance of transnational legal comparison, with affirmative action or any other are of law, depends largely on the perspective of the person evaluating relevance. If the evaluator is a legal academic whose chief concern is simply to identify, parse and understand a particular line of cases then foreign law becomes irrelevant. However, if the evaluator is an advocate – or one of the “minority groups” described by Hirschl who engages in comparative constitutional law by necessity – and is interested in changing the course of jurisprudence and introducing new concepts into legal doctrine for the purposes of effectuating equality and fairness, then foreign approaches to similar issues is important because they can be valuable sources of novel arguments. This disconnect illustrates a fundamental dichotomy between doctrine and practice, and the oftentimes opposing interests of those who focus on what is and those who focus on what should be.

Tushnet’s critique also seems to privilege legal doctrine as such, and not as it relates to politics more broadly. He seems to rely on the implied supposition that domestic legal doctrine is developed and operates in a vacuum or closed system. Jurists are of course not immune from extrajudicial political influences, whether endogenous or exogenous in origin. Parallel institutional influences, from the executive or legislative branches, routinely influence judicial decision-making, particularly on the most contentious issues. Even political agents such as corporate interest groups (both domestic and international), labor unions, other grassroots movements, and even public opinion can prod judges to make certain decisions by pressing claims derived from preferences formulated by transnational comparison of the political issues that concern them. This dynamic typifies the indirect influence of foreign institutions in formulating domestic legal doctrine. Law, like

all other institutions, is not static, but dynamic, changeable and imminently susceptible to foreign political influence.

A third observation of Tushnet's critique has to do with the unknowability of the origination of concepts or ideas. The US, for example, is a hybrid nation, and the development of American political institutions is owed to the influence of a variety of "foreign" legal influences imported from a myriad of cultures and traditions. Ideas that were once foreign are today considered domestic, even the basic liberal ideas that form the foundation of the US Constitution. Indeed, institutional hybridization, legal or otherwise, is the norm rather than the exception. The question of whether transnational legal comparison is in fact a legitimate, productive enterprise should not be answered by dogmatic predisposition or by the unreasonable segregation of law and politics, but must be a thoughtful conclusion drawn after thorough investigation of the issues and cases the researcher seeks to compare. The ultimate determination becomes a function of evaluating the degree or type cultural specificity, being open and honest about the limitations of comparison and being cautious about overstating any conclusions drawn.

### III. A Historical Institutional Approach

The second methodological prong of this study employs a comparison historical institutionalist. Thelen & Steinmo (1992) characterize institutionalists as being "interested in the whole range of state and societal institutions that shape how political actors define their interests and that structure their relations of power to other groups" (Thelen & Steinmo, 1992, p. 2). Institutions "constrain and refract" politics but are never the sole cause (Thelen & Steinmo, 1992, p. 3). "Institutional analyses do not deny the broad political forces that animate various theories of politics.... Instead, they point to the ways that institutions structure those battles and in doing so, influence their outcomes" (Thelen & Steinmo, 1992, p. 3). Institutionalists tend to focus on intermediate-level factors like party systems or unions, as well as macro-level phenomena such as class structure. Micro-level variables such as grass roots mobilized groups can also be included.

Thelen & Steinmo contend that rather than succumb to the lure of institutional determinism, institutions must be viewed as dynamic in at least four ways. First, it must be understood that previously latent institutions may suddenly become politically salient. Second, changes in balances of power can create a situation in which old institutions are put in the control of new actors who may seek to pursue new goals. Third, exogenous phenomena may compel old actors to pursue new goals. Fourth, the institutions themselves may change, forcing political actors to adjust their strategies (Thelen & Steinmo, 1992, p. 16-17). All in all, “there is nothing automatic, self-perpetuating, or self-reinforcing about institutional arrangements. Rather, a dynamic component is built in; where institutions represent compromises or relatively durable though still contested settlements based on specific coalitional dynamics, they are always vulnerable to shifts” (Mahoney & Thelen, 2010, p. 8). The complexity of compliance, actor’s cognitive limits, the implicit nature of institutions’ assumptions, the difficulty of rule enforcement are all important factors that influence institutional shifting (Mahoney & Thelen, 2010, p. 11-13).

Historical institutionalists use case studies to generate theories or to illustrate certain ideas. George & Bennett (2005) define the case study approach as “the detailed examination of an aspect of a historical episode to develop or test historical explanations that may be generalizable to other events” (George & Bennett, 2005, p. 5). The case study method has several advantages over statistical approaches. First, case studies “allow a researcher to achieve high levels of conceptual validity, or to identify and measure the indicators that best represent the theoretical concepts the researcher intends to measure” (George & Bennett, 2005, p. 19). Compared to statistical analysis, case studies allow for conceptual refinement, rather than aggregating a set of data points that may be overly dissimilar.

Second, the case study approach permits the discovery of new variables and hypotheses through analysis of deviant cases or outliers (George & Bennett, 2005, p. 20). Third, case studies explore causal mechanisms. George & Bennett define causal mechanisms as “ultimately

unobservable physical, social, or psychological processes through which agents with causal capacities operate, but only in specific contexts or conditions, to transfer energy, information, or matter to other entities” (George & Bennett, 2005, p. 137). Finally, case studies accommodate causal relationships such as equifinality and path dependency (George & Bennett, 2005, p. 22).

Although the benefits of the case study method are numerous, there are limitations. George & Bennett identify several of them, chief among them being selection bias. Selection bias occurs when there are systematic errors in the case selection process. Such biases can include selection along the dependent variable of a population of cases, or deliberately selecting cases that share a particular outcome (George & Bennett, 2005, p. 23). Researchers must also be aware of cognitive biases in favor of preferred hypotheses and avoid limiting the scope of their sample so as to limit findings and generalizability. And, as George & Bennett point out, it should also be borne in mind that case study analysis is good at determining whether or how a particular variable matters (necessity or sufficiency), but is less appropriate for determining how much certain variables matter (George & Bennett, 2005, p. 25).

This study adopts a case study approach that is comparative in nature. For Mahoney & Rueschmeyer (2003) comparative historical analysis is well-suited for researchers who seek the answers to “big questions.” In their view, comparative historical analysts “are frequently able to derive lessons from past experiences that speak to the concerns of the present” and “can yield more meaningful advice concerning contemporary choices and possibilities than studies that aim for universal truths but cannot grasp critical historical details” (Mahoney & Rueschmeyer, 2003, p. 9). Mahoney & Rueschmeyer comparative historical analysis embodies three important features. First comparative historical analysis is concerned with “explanation and the identification of causal configurations that produce major outcomes of interest” (Mahoney & Rueschmeyer, 2003, p. 11). The authors refer to a methodological eclecticism used by comparative historical researchers which allows them to address the problems at hand (Mahoney & Rueschmeyer, 2003, p. 12).

Second, there is an emphasis with the unfolding of processes over time (Mahoney & Rueschmeyer, 2003, p. 12). The central concept here is path dependence, defined by Pierson (2004) as “dynamic processes involving positive feedback, which generate multiple possible outcomes depending on the particular sequence in which events unfold” or a phenomenon in which “outcomes in the early stages of a sequence feed on themselves, and once possible outcomes become increasingly unreachable over time” (Pierson, 2004, p. 20-21). For Pierson, attention to processes is important for three reasons: (1) these processes are important parts of the social world, (2) the investigation of the causes and consequences of positive feedback is an interesting avenue of inquiry and (3) self-reinforcing, path dependent dynamics are important in understanding temporal processes (Pierson, 2002, p. 21-22).

Finally, comparative historical inquiry systematically compares and contrasts cases. As Mahoney & Rueschmeyer explain, “by employing a small number of cases, comparative historical researchers can comfortably move back and forth between theory and history in many iterations of analysis as they formulate new concepts, discover novel explanations, and refine preexisting theoretical explanations in light of detailed case evidence” (Mahoney & Rueschmeyer, 2003, p. 13).

#### IV. Research Questions

This study will examine following research questions:

- (1) Can a general classification scheme for affirmative action precommitments be created?
- (2) If so, what types and/or sub-types of affirmative action precommitments should be included?
- (3) Can the prevalence of certain types and sub-types be determined, both within and across cases?
- (4) Can any correlations be found between types, subtypes and issue domains of affirmative action precommitments and the presence or type of LERN groups?
- (5) Can any correlation be found between types, sub-types and issue domains of affirmative action precommitments and the presence of women?
- (6) Are there any differences in the prevalence of certain types, sub-types and issue domains of affirmative action precommitments used for LERN minority groups as opposed women?
- (7) Are there any differences between the women and LERN minority groups as to how affirmative action precommitments are obtained?

## V. Case Selection

A total of thirty cases were selected for this study, although the case of the UK was not formally considered because it has no formal constitution. Ordinarily, cases would be randomly selected to control for selection bias. However, were that method applied here there would be no guarantee that sufficient cases would have the level of LERN diversity needed for intra- and inter-group comparison. The best way to ensure adequate diversity was to select the cases with the highest total populations, based on estimates from the 2009 CIA World Factbook.

## VI. Type and Sub-type Selection

Types and subtypes were selected through careful analysis of the text of constitutions of the cases in the sample, in light of the proposed definition of affirmative action and with an eye toward specific language used in the US, European and international contexts that can reasonably be concluded to indicate a group preference for LERN minorities and women. From this analysis the four basic types, sub-types and issue domains were formulated. Although there is clearly conceptual and practical overlap, generally speaking categories are conceived of as mutually exclusive. Thus, there are no precommitments that are classified as both classical and tacit. If a constitutional provision contains language that would qualify it for inclusion as both classical and tacit, the classical language takes precedence. If a provision can be categorized as both classical or social, the social language takes precedence.

For example, under art. 19(2) of the Bangladesh constitution; “[t]he state shall adopt effective measures to remove social and economic inequality between man and man and to ensure the equitable distribution of wealth among citizens, and of opportunities in order to obtain a uniform level of economic development throughout the Republic.” Under the coding scheme used in this study, the use of the term “measures” could qualify this provision for inclusion as a “classical” precommitment. However, because of the references to the removal of social inequality and the achievement of an equitable distribution of wealth, this provision is classified as “social.”

Additional examples are found in arts. 13(1) and (2) of the Philippines constitution. Under art. 13(1) “[t]he Congress shall give the highest priority to the enactment of measures that protect and enhance the right of all people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.” Here, both the classical term “measures” and the tacit term “protect” are used, making this a “classical” precommitment, while the social language clearly makes it a “social” precommitment. Additionally, that provision refers to “all people” and does not read so as to confer a preference on a particular group. In the end, the Bangladesh example, the “social” classification takes precedence. Article 13(2) states, “[t]he promotion of social justice shall include to commitment to create economic opportunities based on freedom of initiative and self-reliance.” “Promotion” is a “tacit” term used in what is clearly a “social” context. Again, because of the overwhelmingly ‘social’ language the “social” classification controls.

## VII. Data Collection

After the cases were selected, Hein Online’s World Constitutions Illustrated was used to find the most recent version of each country’s constitution. It should be noted that all of the constitutions used were English translations from the original languages. Reliance on translated documents, legal or otherwise, can be problematic. To combat any potential misinterpretation in assessing affirmative action precommitments, this research relies substantially on secondary source materials, as is discussed below. That said, the constitutions themselves were necessarily the most important primary sources used in this research. Each of the constitutions was reviewed thoroughly to determine which provisions qualified as an affirmative action precommitment according to the “state-mandated or permitted group preference” definition. This operation was performed for all 30 constitutions. Once these data had been collected, they were then evaluated to determine general categories or types into which each precommitment could be classified.

Overall, data analysis was two-pronged. First, each constitutional provision was evaluated for potential inclusion as an affirmative action precommitment. Each general category had its own criteria for inclusion, which were applied to each constitutional provision. Generally speaking, the assignment of any specific constitutional provision to a category of affirmative action was dictated by one or more of four factors: (1) the plain language of the provision itself, (2) the language of the provision when considered *in pari material* with other constitutional provisions, (3) comparison of constitutional language to similar language used in other constitutions and (4) the actual application of the precommitment, taking into account social, political and legal episodes of implementation. Additional secondary source materials – including previous constitutions and political histories of previous and current constitutions – were consulted. Each determination of whether a provision qualified as an affirmative action precommitment, and, if so, what type or sub-type, was made individually. If a provision was borderline, it was rejected.

#### VIII. Target Group Selection

Although the typology proposed here should apply to affirmative action precommitments for any group, this project focuses on precommitments for LERN minorities and women. Very few previous studies have engaged in any serious comparative analysis of these two groups, and to the author's knowledge, none have done so using large N constitutional textual analysis. This comparison is important for several reasons: (1) it can show whether affirmative action precommitments are more prevalent for LERN minorities or women overall; (2) it can show whether affirmative action precommitments are more prevalent for LERN minorities or women within specific geographic regions; (3) it can highlight how constitution-makers perceive certain groups' worthiness to receive group preferences; (4) it can show what factors prove material in determining whether each group is able to exploit political opportunity structures and obtain constitutional preferences; (5) it can show how preferences vary within groups, e.g. preferences for indigenous peoples vs. blacks in Latin America.

Target group selection was also motivated by the intellectual curiosity of the researcher. The SEX target group refers almost exclusively to women. The LERN target group is a composite of four overlapping and intersecting social-political identity monikers: linguistic, ethnic, racial and national. The purpose of this dissertation is not to present a treatise on the nature of these four group identifiers. The distinction is largely linguistic and necessarily contextual. For the purposes of this study, the four groups were collapsed into a composite group because collapsing the groups is analytically advantageous and makes comparison of precommitment across cases possible. Otherwise, the potential for meaningful cross-case comparison is diminished by virtue of being trapped in a linguistic quagmire. What is important is not so much the particular cultural-linguistic designation attached to a certain minority group, but the fact that LERN groups share a conceptual nexus in being the targets of historic oppression perpetrated by or condoned by the state. As such, LERN minorities need not be numerical minorities, such as in the case of blacks in South Africa. In terms of determining whether a particular constitutional provision qualified as a group-specific affirmative action precommitment, secondary source materials such as those described above were crucial. It should be noted that religious minorities were not included in the LERN group. This is primarily because many of the constitutions made distinctions between protections and preferences for religious minorities and LERN groups.

APPENDIX B

LERN specific, SEX-specific social and territorial precommitments

	Equality		Social	Territorial	Group-Specific, Non-Domain-Specific		Group-Specific, Domain-Specific							
	LERN	SEX			LERN	SEX	POL		ECON/EMP		EDU		CULT	
							LERN	SEX	LERN	SEX	LERN	SEX	LERN	SEX
<b>China</b>	Art. 4	Art. 48	Arts. 1, 15	Arts. 4 (S, M, A, ED); 115 (A), 122 (M, A, ED)	-	-	-	-	-	Art. 48 (T, M)	-	-	-	-
<b>India</b>	Arts. 15(1); 15(2)(a), (b); 16(2); 17; 19(5); 23(2); 30(2)	Arts. 15(1); 16(2)	Art. 38(1) (M); 42 <sup>nd</sup> Amend.	Arts. 38(2) (M, ED); 244 (M, A); Fifth Schedule (5) (P, A)	Art. 15(4) (Cl, P)	Art. 15(3) (Cl, P)	Arts. 243(D) (1) (Cl, M, E, Q); 243(I) (Cl, M, E, Q); 330(1), (2) (Cl, M, E, Q); 331(T, P, E), 332(1), (2), (3) (Cl, M, E, Q)	Arts. 243(D)(3), (4) (Cl, M, E, Q); 243(I)(2), (3) (Cl, M, E, Q)	Arts. 16(4) (Cl, P, CS); 46 (Cl, M); 336(1) (Cl, M, CS, Q, N)	-	Arts. 15(5)(Cl, P); 46 (Cl, M); 337 (T, M, Q, N)	-	-	-

<b>U.S.</b>	-	-	-	Art. IV(3) ( <i>P, A</i> )	-	-	-	-	-	-	-	-	-	-
<b>Indo-Nesia</b>	-	-	Arts. 33(4) ( <i>M</i> ), 34(1), (2) ( <i>M</i> )	-	-	-	-	-	-	-	-	-	-	-
<b>Brazil</b>	-	Arts. 5(I); 7(XXX); 215	Arts. 3(III) ( <i>M</i> ); 6 ( <i>M</i> ); 170(vii) ( <i>M</i> ); 193 ( <i>M</i> ), 194 ( <i>M</i> )	Art. 231 ( <i>M</i> , <i>Cons</i> )	-	-	-	-	-	Art. 7(XX) ( <i>T, M</i> )	-	-	Arts. 219(2) ( <i>T, M</i> ); 215(1) ( <i>T, M</i> );	-
<b>Paki- stan</b>	Arts. 26(1); 27(1); 33; 38(a), (d)	Arts. 25(2); 27(1); 34; 38(a), (d)	Art. 38(a)-(e) ( <i>M</i> )	Arts. 37(f) ( <i>M, ED</i> ); 247(3) ( <i>P, SA</i> ); 247(7) ( <i>P, A</i> )	-	Arts. 25(3) ( <i>Cl, P</i> ); 34 ( <i>T, P</i> )	-	Arts. 32 ( <i>Cl, M, E, LG</i> ); 51(1), (3) ( <i>Cl, M, E, FG, Q</i> ); 59(1)(c) ( <i>Cl, M, E, FG, Q</i> ), 106(1) ( <i>Cl, M</i> ,	Arts. 27(1) ( <i>Cl, P, CS</i> ); 36 ( <i>T, M, CS</i> ), 37(a) ( <i>Cl, M</i> )	Art. 37(e) ( <i>T, M, Mat</i> )	Art. 37(a) ( <i>Cl, M</i> )	-	Art. 28 ( <i>T, P</i> )	-

								<i>E, SG,</i> <i>Q</i>						
<b>Bang- ladesh</b>	Arts. 28(1), (3); 29(2)	Arts. 28(1)- (3); 29(2)	Arts. 8(1); 10 ( <i>M</i> ); 19(2) ( <i>Cl, M</i> )	-	Art. 28(4) ( <i>Cl, P</i> )	Art. 28(4) ( <i>Cl, P</i> )	-	Art. 65(3) ( <i>Cl, M,</i> <i>E, FG,</i> <i>Q</i> )	Art. 29(3)(a) ( <i>Cl, P,</i> <i>CS</i> )	-	-	-	-	-
<b>Nigeria</b>	Arts. 15(2); 42(a), (b); 222(b)	Arts. 15(2); 42(1); 222(b)	Arts. 16(1)(b) ( <i>M</i> ); 16(2)(A- (D) ( <i>M</i> )	-	Arts. 14(3), ( <i>Cl, M</i> ); 14(4) ( <i>T, M</i> )	-	Art. 223(b) ( <i>C, M,</i> <i>PP</i> )	-	Arts. 14(3) ( <i>Cl, M</i> ), 14(4) ( <i>T, M,</i> <i>CS</i> ); 171(5) ( <i>Cl, M,</i> <i>CS,</i> <i>FG</i> ); 208(4) ( <i>T, M,</i> <i>CS,</i> <i>SG</i> ); 217(3) ( <i>Cl, M,</i> <i>CS,</i> <i>FG</i> )	-	-	-	-	-
<b>Russian Federation</b>	Arts. 19(2), (3); 72(1)(b)	Arts. 19(2), (3); 46(1)	Art. 7(1), (2) ( <i>M</i> )	Arts. 65, 66 ( <i>P, A</i> )	Art. 69 ( <i>T, M</i> )	-	-	-	-	-	-	-	-	-
<b>Japan</b>	Arts. 14; 44	Arts. 14; 44	Art. 25 ( <i>M</i> )	-	-	-	-	-	-	-	-	-	-	-

<b>Mexico</b>	Arts. 25; 123(A)(VII)	Arts. 3.1(I)(c); 123(A)V II	-	Art. 2 ( <i>A</i> )	-	-	-	-	-	Art. 123(A)( V) ( <i>T</i> , <i>M</i> , <i>Mat</i> ); 123(B)( XI)(c) ( <i>T</i> , <i>M</i> , <i>Mat</i> )	-	-	-	-
<b>Philippines</b>	Art. 2(14)	Art. 2(14)	Arts. 2(9), (10) ( <i>M</i> ); 12(1) ( <i>P</i> ); 13(1) ( <i>M</i> )	Arts. 13(6) ( <i>M</i> , <i>Cons</i> ); 10(1) ( <i>M</i> , <i>A</i> ); 10(15) ( <i>M</i> , <i>A</i> ); 10 (20) ( <i>M</i> , <i>A</i> )	-	-	-	-	-	Art. 13(14)( <i>T</i> , <i>M</i> , <i>Mat</i> )	Art. 10(20)( 7) ( <i>T</i> , <i>M</i> )	-	Art. 12(5) ( <i>T</i> , <i>M</i> )	-
<b>Vietnam</b>	Art. 5(2)	Arts. 26(1), (2), (3); 36(1), (2)	Arts. 2(1), (2) ( <i>M</i> ); 50 ( <i>M</i> ); (51)(1) ( <i>M</i> )	-	Art. 5(4) ( <i>T</i> , <i>M</i> )	-	-	-	-	-	-	-	-	-
<b>Ethiopia</b>	Arts. 5(1) 25; 34, 38; 39, 88(2)	Arts. 25; 34; 38; 89(7)	Art. 89(2) ( <i>M</i> )	-	-	Art. 35(3) ( <i>Cl</i> , <i>M</i> )	Arts. 54(3) ( <i>Cl</i> , <i>M</i> , <i>E</i> , <i>FG</i> , <i>Q</i> ); 61(2) ( <i>T</i> , <i>M</i> ,	-	Art. 89(4) ( <i>Cl</i> , <i>M</i> )	Art. 35(5(a)) ( <i>T</i> , <i>M</i> , <i>Mat</i> )	-	-	-	-

														<i>E, FG, Q)</i>
<b>Germany</b>	Art. 3(3)	Arts. 3(2), (3)	Arts. 15 (P); 20(1) (M)	-	-	Art. 3(2) (T, M)	-	-	-	Art. 12a(1) (T, P, Neg)	-	-	-	-
<b>Egypt</b>	Arts. 48, 53	Arts. 11, 53	Arts. 8; 13-19; 27				Art. 11 (M)(Cl)				Art. 48			Art. 11 (T, M, DV)
<b>Turkey</b>	Arts. 10	Arts. 10; 41	Arts. 2 (S, M); 5 (S, M)	-	-	Art. 10 (Cl, M)	-	-	-	Art. 50 (Cl, M)	-	-	-	-
<b>DRC</b>	Arts. 5; 14; 26; 45	Arts. 5; 14; 26; 45	Art. 58 (M)	-	Art. 51 (T, M)	Art. 14 (Cl, M)	-	-	-	-	-	-	-	Art. 14 (Cl, M)
<b>Iran</b>	Art. 19	Art. 20	Art. 3(12) (M)	-	-	-	-	-	-	Art. 21 (T, M, Mat)	-	-	-	Art. 21(1) -(4) (T, M)
<b>Thailand</b>	Secs. 5, 30	Secs. 5; 30; 80(1)	Sec. 84(6) (M)	Secs. 66 (S, M, Cons); 67 (M, Cons)	-	-	-	-	-	Sec. 84(7) (T, M)	-	-	-	-
<b>France</b>	Art. 1	-	Art. 1 (M)	Tit. 12 (M, A)	-	-	-	Art. 1 (T, M, E, FG)	-	-	-	-	-	-
<b>UK</b>														

<b>Italy</b>	Arts. 3(1)	Arts. 3(1); 29(2); 37(1)	Arts. 3(2) ( <i>M</i> )	Art. 116 ( <i>M</i> , <i>A</i> )	Art. 6 ( <i>Cl</i> , <i>M</i> )	-	-	-	-	Art. 37(1) ( <i>T</i> , <i>M</i> , <i>Mat</i> )	-	-	-	-
<b>South Africa</b>	Art. 9(3)	Arts. 9(3)-(5)	-	-	-	-	-	-	Art. 25(6)- (8) ( <i>Cl</i> , <i>M</i> )	-	Art. 29 (2)( <i>T</i> , <i>M</i> )	-	Art. 6(2) ( <i>Cl</i> , <i>M</i> )	-
<b>ROK</b>	-	Arts. 11; 36(1)	Art. 119 ( <i>P</i> )	-	-	Art. 34(3) ( <i>T</i> , <i>M</i> )	-	-	-	Arts. 32(4) ( <i>Cl</i> , <i>M</i> ); 36(2) ( <i>T</i> , <i>M</i> , <i>Mat</i> )	-	-	-	-
<b>Myan- mar</b>	Arts. 348; 352; 368	Arts. 348; 350-352; 368	Art. 22(c) ( <i>M</i> )	Art. 51(f)- (h) ( <i>M</i> , <i>A</i> )	-	-	Arts. 15 ( <i>T</i> , <i>M</i> , <i>E</i> , <i>SG</i> ); 17(c) ( <i>T</i> , <i>M</i> , <i>E</i> , <i>SG</i> ); 161(b), (c) ( <i>T</i> , <i>M</i> , <i>E</i> , <i>SG</i> )	-	Art. 22(c) ( <i>T</i> , <i>M</i> )	Art. 26(B) ( <i>T</i> , <i>M</i> , <i>Mat</i> ); 32(a) ( <i>T</i> , <i>M</i> , <i>Mat</i> )	Art. 22(c) ( <i>T</i> , <i>M</i> )	-	Art. 22(a) ( <i>T</i> , <i>M</i> )	-
<b>Ukraine</b>	Arts. 11; 24; 53	Arts. 24; 51	Art. 1 ( <i>M</i> )	-	-	-	-	-	-	Arts. 24 ( <i>Cl</i> , <i>M</i> , <i>Mat</i> ); 43 ( <i>T</i> , <i>M</i> , <i>Neg</i> )	-	-	-	-

<b>Colombia</b>	Art. 70	Arts. 13; 42; 43	Art. 1 (M)	Arts. 246 (C, M, Cons); 329 (M, A), 330 (M, A, Cons); TA 55 (M, Cons, ED)	-	-	Art. 176 (Cl, P, E, FG)	-	-	Art. 43 (Cl, M, Mat)	-	-	TA 55 (T, M, Cons, ED)	-
<b>Spain</b>	Sec. 14	Secs. 32	Secs. 1(1) (M); 40(1) (M)	Secs. 143 (P, A); 148 (M, A); 156 (M, A)	-	-	-	-	-	-	-	-	Sec. 3(3) (Cl, M)	-
<b>Argentina</b>	-	-	-	-	-	Art. 75(23) (Cl, P)	-	Arts. 37 (Cl, M, E, FG); TP (Second) (Cl, M, E, FG)	-	Art. 75(23) (Cl, P, Mat)	-	-	-	-

**Key: Classical (Cl); Tacit (T); M (Mandatory); Permissive (P); Autonomy (A); Ethno-development (ED); Conservation (Cons); Elections (E); Political Parties (PP); Local Government (LG); State Government (SG); Federal Government (FG); Civil Service (CS); Quota (Q); Negative Preference (N); Maternity (M); Domestic Violence (DV)**

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