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DISCOURSE AND DIFFERENCE — A REPLY TO PARNES AND COGAN

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In *The Failed Discourse of State Constitutionalism*,¹ I argued that state constitutional discourse, as revealed in the decisions of state high courts, is largely unintelligible. I attributed this unintelligibility to a striking discordance between theory and reality. The theory of state constitutionalism directs state courts to treat state constitutions as fundamental, constitutive expressions of the character of the people of the states. In practice, however, state constitutions cannot carry this heavy burden, in part because an underlying assumption of state constitutionalism is false: Americans now identify so strongly with national values and institutions that state lines simply do not demarcate truly distinct peoples with truly distinct ways of life. I further argued that a genuine state constitutionalism based on genuine character differences among state polities might pose potential dangers to the coherence and stability of national identity. I concluded by suggesting that new conventions of state constitutional interpretation are needed to restore intelligibility to state constitutional decision making.

Professor Jeffrey Parness² and Dean Neil Cogan³ have weighed in with thoughtful responses to my thesis. Parness questions the validity of my analysis for state constitutional provisions that define and allocate governmental power. Cogan disputes the validity of my entire approach, including all my important assumptions and conclusions. While each author has said far more than I can adequately reply to in this limited space, I will try to address some of their more important points.

I

Professor Parness' thesis seems to be the following. State constitutions deal extensively with the structure of state government,⁴ and exhibit a "rich divergence" of approaches toward the structuring of their

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1. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

2. Jeffrey A. Parness, *Failed or Uneven Discourse?: Governmental Structure and State Constitutions*, 5 ST. THOMAS L. REV. 155 (1992).

3. Neil H. Cogan, *In Praise of Diverse Discourse*, 5 ST. THOMAS L. REV. 173 (1992).

4. Parness, *supra* note 2, at 156-57.

respective governmental branches.⁵ One example of this diversity is the many different ways in which state constitutions define "the allocation and use of judicial power."⁶ A more thorough examination of state court decisions construing these structural provisions than the one I undertook would show that state constitutional discourse on these aspects of "governmental identity" has been mostly "successful."⁷ Moreover, the success of this discourse at defining differences from state to state does not "endanger nationhood."⁸

In couching his argument as he has, Parness has tried to meet my thesis on its own grounds. Unfortunately, although he has adopted my terminology, he has simultaneously subverted it by attaching meanings to words like "identity" and "discourse" that are incompatible with my analysis.

For Parness, differences in the structure of state governments reveal differences in "governmental identity."⁹ This usage reduces the concept of identity to a tautological inference arising from the fact of constitutional differences. The type of identity that concerns me, however, is not the "identity" of the state's *government* as defined by its "attributes"¹⁰ and constitutional powers, but the identity of the state's *people* as it is revealed in the constitution. Parness has thus confused the identity of the creators with the qualities of their creation.

Parness' definition of "discourse" seems to flow directly from his definition of identity. Apparently, what Parness means by discourse is simply "talk," a definition far broader than mine,¹¹ and one that cannot do the same kind of work. Parness seems to argue that the identification of differences among state constitutional judicial articles is evidence of "much successful discourse" in this area.¹² But the mere men-

5. *Id.* at 157.

6. *Id.* at 158.

7. *Id.* at 167, 168. At worst, according to Parness, such discourse has been "uneven." *Id.* at 168.

8. *Id.* at 156.

9. *Id.* at 167; *see also id.* at 169 ("identity of state government").

10. *Id.* at 169.

11. Gardner, *supra* note 1, at 767-68.

12. Parness, *supra* note 2, at 167. Parness says that his "review of state judicial articles" shows the existence of successful state constitutional discourse. *Id.* Given that his review cites only state constitutional provisions (and a few law review articles), but no cases, *id.*, nn. 15-59, he could mean that the mere *existence* of constitutional differences is a form of constitutional discourse. If so, I am not sure why he would consider the constitutional text itself to be a participant in the discourse, although this is an intriguing notion. I suspect that it would be difficult to sustain this proposition against a collapse into the more traditional view that the text "participates" in the debate only insofar as it is the expression of its drafters.

tion of constitutional differences is not the type of discourse that evidences a robust state constitutionalism. Constitutional discourse is not about the identification and acknowledgement of constitutional differences, but the interpretation of those differences through a process of intelligible debate. Parness' notion of constitutional discourse is therefore much too generous in that it allows him to find evidence of "successful" discourse wherever he finds any kind of talk at all about state constitutions. It also frees him to offer conventions of state constitutional interpretation¹³ without supporting them with any analysis of what a state constitution is or what a court is doing when it interprets one.

Despite the divergence of our approaches, Parness nevertheless indirectly raises an important point. Parness argues that constitutional differences in the allocation of judicial power do not threaten nationhood. I agree, but for a different reason. From the perspective of character, the difference between a constitution that, for example, spells out the names and jurisdictions of lower courts¹⁴ and one that does not, is trivial; no one would seriously argue that the kind of constitutional decisions Parness covers in his survey reveal differences in the characters of the polities that made them.

Parness has thus put his finger on an entire class of provisions, common to every state constitution and to the federal Constitution, that simply are not conventionally understood to reflect the character of the people who created them. His discussion therefore implicitly challenges the notion that a constitution, or at least those portions of a constitution that do not deal directly with the definition and protection of individual rights, must be viewed as an expression of the character of the people who live under it. While Parness' observations show the need for further study of the conventions of constitutionalism and their significance, I think it is possible to sketch a provisional response along the following lines.

Parness highlights the difference between constitutional provisions that establish and define the separation of governmental powers, and those that protect individual rights.¹⁵ His argument suggests that only the latter should be understood to define the character of the polity. But this should not be all that surprising because the separation of powers and the direct protection of individual rights rest on distinct theories of constitutionalism.

13. *Id.* at 170-72.

14. *Id.* at 158-59.

15. *Id.* at 156.

The separation of governmental powers and the adoption of bills of rights are both means of protecting individual liberties through constitutional restraints on governmental action, but they work in different ways. For the Framers, the establishment of a workable, long-lasting constitutional government was primarily a scientific problem.¹⁶ The people had their liberties, to be sure,¹⁷ but the real problem was one of political engineering: how could a government be designed that would keep those liberties secure against the historically documented tendencies of governments to invade the liberties of their subjects?¹⁸ According to Madison, the separation of powers solves this problem by setting each branch of government against the others: "Ambition [is] made to counteract ambition,"¹⁹ which prevents any governmental entity from accumulating the power necessary to invade the people's liberties.²⁰ Under this theory, however, the people's liberties need not be specified; the separation of powers will protect any and all such liberties from infringement no matter what their content.²¹

A bill of rights also protects liberties, but it does so through the very different means of specifically defining the liberties that the people derive from natural law,²² and decreeing directly that such liberties shall not be infringed by government. A bill of rights thus necessarily names what the separation of powers protects. In so doing, it inescapably describes the people according to their fundamental rights and characteristics, thereby giving content to who and what they are.

As a result, it can hardly be expected that the conventions of constitutionalism would attach to constitutional differences in the definition of governmental structure the same kind of significance for character that they attach to constitutional differences in the direct protection of individual liberties. The former types of differences seem to reflect at most a sort of engineering disagreement among students of governmental design over the best way to implement a system of separated powers. Because it would be implausible to view such differences

16. THE FEDERALIST, No. 9 (Hamilton); MORTON WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION (1987); DAVID E. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST (1984).

17. DECLARATION OF INDEPENDENCE, ¶ 2.

18. THE FEDERALIST No. 10 (Madison).

19. *Id.*, No. 51 (Madison).

20. *Id.*, Nos. 47, 48 (Madison).

21. Indeed, Hamilton warned against the adoption of a bill of rights precisely because it would give some content to notions of personal liberty, raising the improper inference that the people have only those liberties specifically enumerated. THE FEDERALIST, No. 78 (Hamilton).

22. DECLARATION OF INDEPENDENCE, ¶ 2.

as reflecting fundamental differences of character, divergences of this sort would not, as Parness points out, threaten a shared national identity.

On the other hand, I do not think that the character-defining conventions of constitutionalism have nothing at all to say about constitutional provisions implementing a separation of governmental power, at least when such provisions are viewed as a package. A people who choose to separate the powers of their government, it might be said, are a people who not only believe that they have certain liberties worth protecting against governmental intrusions, but have faith in the power of the political "sciences" to provide solutions to the problems associated with self-governance. This analysis leaves open the possibility that a truly significant difference in the constitutional structure of government — for example, the difference between a constitution that separates power into three branches and one that vests all power in a single branch — could be interpreted as a sign of fundamental differences in the characters of the people who live under such constitutions.

II

Dean Cogan's article is a full-bore defense of New Federalism orthodoxy. The orthodox view he advances goes something like this. State constitutional law is coming along beautifully. The evidence for this lies in a growing body of decisions, some by certain courts and others dealing with certain constitutional issues, in which state courts analyze and rely upon their state constitutions. If some state constitutional decisions seem unintelligible, we shouldn't worry. The real story is not that some state constitutional decision making is of poor quality, but that any of it is of high quality. Despite the fact that state constitutions have been around for more than two centuries, state constitutional law has been so overshadowed by federal constitutional law for so long that its emergence in any form is a significant achievement. Finally, because it is still a very young discipline, state constitutional law must be judged according to suitably lenient standards.

This view is certainly coherent; I just happen to think it's wrong, and have offered an alternative. Which of these alternatives is more appealing depends very much on whether one thinks there is any problem with state constitutional discourse. I tried to show the existence of such a problem by undertaking a reasonably systematic study of state constitutional decisions. In so doing, I deliberately attempted to avoid the sort of self-congratulatory truffle-hunting, so prevalent in New Federalism literature, in which a few noteworthy decisions among the mass of desultory ones are sniffed out and displayed as evidence of

great jurisprudential success. Much of Cogan's article is devoted to defending the truffle-hunting kind of analysis.

Cogan begins by arguing that my method of surveying the 1990 state constitutional decisions of seven states is "flawed,"²³ by which he means that it produces a distorted picture of the actual condition of state constitutional law. Cogan advances more reasons for his conclusion than I can conveniently respond to here, but a few are worth mentioning.

First, Cogan takes me to task for omitting from my study "leading jurisdictions such as Florida, New Jersey and Oregon"; indeed, he argues that it is illegitimate to criticize state constitutional law without examining these jurisdictions.²⁴ To the contrary, I think it is Cogan's criticism that is illegitimate: in Cogan's view, no study can be complete without considering the cases that support Cogan's view. I tried to approach the question in a more detached way, designing my study around a set of neutral criteria.²⁵

Second, Cogan argues that it is misleading to base evaluations of a state's constitutional law on its entire corpus of constitutional rulings within any given period. Rather, he says, constitutional law, whether state or federal, must be evaluated by "discrete topics and issues"²⁶ because that is how it develops. Because few states have developed mature discourses in more than a few discrete areas, a legitimate study must confine itself to these lines of cases.

Even apart from its obvious tendency to stack the deck in favor of the conclusions he hopes to reach, Cogan's suggestion must be rejected. In the first place, I think he is just plain wrong. Of course constitutional law, like any other body of law, develops unevenly according to which issues are more frequently adjudicated. But that is not the only way it develops. Rulings under one provision inevitably spread beyond their original boundaries to influence rulings under other provisions. The United States Supreme Court's rulings concerning the Tenth Amendment influence its Commerce Clause jurisprudence;²⁷ its readings of the Appointments Clause²⁸ and Presentment Clause²⁹ shape

23. Cogan, *supra* note 3, at 173.

24. *Id.* at 176-77.

25. Gardner, *supra* note 1, at 779 n.64.

26. Cogan, *supra* note 3, at 175.

27. *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *United States v. Darby*, 312 U.S. 100 (1941); *New York v. United States*, 112 S. Ct. 2408 (1992).

28. *Morrison v. Olson*, 487 U.S. 654 (1988).

29. *INS v. Chadha*, 462 U.S. 919 (1983).

its separation of powers jurisprudence, thereby influencing its reading of judicial power under Article III;³⁰ its substantive due process rulings affect the way it resolves equal protection rulings dealing with fundamental rights.³¹

This type of substantive cross-fertilization, however, is only a small piece of the picture. The most important form of cross-fertilization is the development of coherent ways of talking about and interpreting a constitution that can be applied without regard to the specific issue at hand. Theories of interpretation, such as originalism, and methodologies for resolving conflicting constitutional values, such as balancing or strict scrutiny, cut across issue lines. It is this interaction between decisions in many different areas that makes federal constitutional law rich and complex; it is what makes it a discourse.

Cogan paints a very different picture of constitutional adjudication as a set of discrete lines of cases, each moving independently from its starting point without any kind of interaction. If constitutional law really worked in this way, then the lack of prior decisions on any given issue would require the development of a "new" discourse to deal with each new issue. But that is clearly not the case. There are many provisions of the United States Constitution that the United States Supreme Court has construed only sparsely or not at all. But the dearth of decisions hardly means that we have no idea about what these clauses might mean, or that they are somehow mysterious and impenetrable until judicially construed. On the contrary, the Court's constitutional rulings comprise a body of constitutional jurisprudence that make possible the intelligible interpretation of any clause in the Constitution; there simply is no provision that truly lies beyond meaningful interpretation.

I have addressed Cogan's methodological criticisms at such length because I think they point up a serious problem with Cogan's vision of constitutional discourse. Like Parness, Cogan seems to think that it is meaningless to speak of a single constitutional discourse; one can speak only of discourse on a specific subject. Cogan's direct criticism of my assumptions about discourse³² reflect this misconception. As I use the term, discourse refers to a language in which the participants in a practice can intelligibly carry on the practice and debate its point.³³ Cogan argues that federal constitutional discourse is really comprised of multi-

30. *Mistretta v. United States*, 488 U.S. 361 (1989).

31. *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); *Plyler v. Doe*, 457 U.S. 202 (1982).

32. Cogan, *supra* note 3, at 189-90.

33. Gardner, *supra* note 1, at 767-768.

ple discourses,³⁴ but I think he has confused the language itself with the particular things that people talk about in the language and the things they say. The Court may interpret Article I in one case and Article II in another, but these are not two wholly unrelated conversations. Justice Scalia may have a different voice from Chief Justice Rehnquist, but they are both speaking the same language and are intelligible to each other, as well as to the rest of the bench and bar; that is what makes them both participants in the same discourse.

Furthermore, the reason that state constitutional discourse is unintelligible is not the multiplicity of voices within the discourse — that would be a sign of health — but the fact that the participants seem baffled to the point of paralysis as to the point of the discourse in which they are engaged. In the contemporary United States, it is no longer clear that the point of state constitutional interpretation is to debate and define the distinctive characters of the people of the various states.

On this issue, Cogan's position displays many of the same inconsistencies as the judicial decisions he defends. Cogan pays lip service to the distinctiveness of contemporary state identities when he claims, for example, that Texans have "no problem whatsoever" with holding a "dual identity," state and national.³⁵ But just what is the nature of the state aspect of this "dual identity"? Cogan tells us in the same breath that he himself has lived in four states.³⁶ Does this mean that in the course of his moving around Dean Cogan has adopted successively four distinct state identities? If a state identity is something that can be shucked off and replaced four times, it can hardly be a very deep or meaningful type of self-identification. Perhaps Cogan means to say that he personally, in virtue of his frequent relocations, has no real state identity, but that other, more "authentic" state residents do. If so, then Cogan had better prepare himself for a society in which increasing mobility and social homogenization create more and more people with his kind of thin state identity and fewer and fewer with what he seems to view as the "real" kind.

A similar tension in Cogan's position arises from his unwillingness to confront its implications. Cogan basically wants it both ways: he wants state constitutions to be reflections of distinct state characters, but he does not want a multiplicity of distinct state characters to have

34. Cogan, *supra* note 3, at 185.

35. *Id.*

36. *Id.*

any implications for national identity. Cogan thus claims, as state courts do, that state constitutions protect "fundamental" liberties.³⁷ But fundamental to whom, and in what way? If a constitutionally protected liberty is fundamental on account of its character-defining quality, then constitutional differences in the protection of such liberties by definition reveal differences in the characters of the people of the various states. But surely a state polity's understanding of itself as fundamentally different from the polities of other states or of the nation can, under the right circumstances, threaten the stability of the national identity.

Cogan gets a good chuckle out of this notion, ridiculing the possibility that constitutional differences could lead to "the kind of inhumanity present in the former Yugoslavia."³⁸ Cogan's bemusement is misdirected for three reasons. First, I do not claim that constitutional differences in and of themselves pose any kind of danger; problems can materialize only if those constitutional differences are then interpreted as reflections of deeper differences on the level of group identity.³⁹ Second, destabilization need not take the form of barbaric violence; it is proceeding in Quebec, for example, by a process of debate and constitutional amendment. Third, Cogan himself provides evidence for my position when he suggests that a visitor to Texas could be beaten merely for wearing a Washington Redskins T-shirt.⁴⁰ I don't know if I would call this "ethnic cleansing," but I think Cogan ought to be more disturbed than he seems at the prospect of routinely violent local responses to expressions of different regional allegiances.⁴¹

Since Cogan is such a Texas enthusiast, it is appropriate to conclude with a Texas case. In *Davenport v. Garcia*,⁴² the Texas Supreme Court ruled that the Texas Constitution's free speech clause provides the state's citizenry with more extensive protection against prior restraints than the First Amendment of the United States Constitution provides to citizens of the nation. The majority justified this conclusion by reference to "a long-standing commitment in Texas to

37. *Id.* at 187.

38. *Id.*

39. I set out my views on group identity more completely in James A. Gardner, *The Ambiguity of Legal Dreams: A Communitarian Defense of Judicial Restraint*, 71 N.C. L. REV. — (1993) (forthcoming).

40. Cogan, *supra* note 3, at 186.

41. I don't know if I'm entirely convinced that a football-centered rivalry ought to be taken as evidence of a distinct state identity, but that is how Cogan seems to present it. He is certainly in a better position than I to evaluate the significance that Texans attach to such things.

42. 834 S.W.2d 4 (Tex. 1992).

freedom of expression as well as a determination that state constitutional guarantees be given full meaning to protect our citizens."⁴³ Three Justices, however, directly rejected the majority's account: "The people of a state speak through their state constitution, the argument runs, and that voice should rule in the state and be heard in the nation. This argument, though true in some respects, is mostly a rhetorical appeal to state pride."⁴⁴ The majority and the concurring Justices went on to trade some rather sharp words.

This exchange shows that the kinds of claims the *Davenport* majority makes about the significance of the state's constitution and its role in defining a unique state character, claims with which I assume Professor Cogan would agree, ring hollow not only in my ears but in the ears of three members of the state's highest court. To the concurring Justices, attempts to identify a constitutionally distinct state character are merely "rhetorical" and lacking in real bite. Nor is this debate one of "metaphor" and "nuance";⁴⁵ it develops, over the course of the two opinions, into what is plainly the judicial equivalent of a brawl.⁴⁶ If this kind of dissension exists on the highest court of what is, in Cogan's view, the most partisan state in the land, surely it cannot be inappropriate to suggest that our conventions of state constitutional interpretation need some serious rethinking.

43. *Id.* at 19.

44. *Id.* at 42 (Hecht, J., concurring).

45. Cogan, *supra* note 3, at 189.

46. I suppose there is some small comfort to be gleaned from the fact that you don't have to be from out of state to get beat up in Texas.