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What is a State Constitution?

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REPLY

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For some time now, judges and scholars have been debating the proper methods for interpreting state constitutions. The inquiry has typically proceeded along the familiar lines of federal constitutional analysis: I have before me the (state) constitution—what do I do now? How do I go about making sense of it? Posing the question in this way, however, conceals as much as it reveals, for to call something a "constitution" in the first place—to apply that particular label to a document—is not so much to begin the analysis as to end it.

We know what a "constitution" is; it is, among other things, a framework for self-governance consisting of a set of written instructions issued by a sovereign people to their governmental agents. To know this much is to know a great deal indeed about how to interpret such a document. Like the terms "contract," "will," or "statute," the term "constitution" signifies a conventional legal category. To assign a document to a specific category is precisely to decide that it is a certain kind of document with certain properties that fix and constrain the modes of legal analysis appropriate to its interpretation.

In *The Failed Discourse of State Constitutionalism*,[1] I argued that the efforts of state courts to construe state constitutions using traditional modes of constitutional analysis have yielded extremely poor results.[2] I suggested that the reason for this failure resides not in any inadequacy in traditional constitutional analysis, but in its misapplication to state constitutions.[3] This is because state constitutions by and large do not fit comfortably within our standard definition of "constitutions." Typically, state constitutions do not seem to have resulted from reasoned deliberation on issues of self-governance, or to express the fundamental

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

2. *Id.* at 778-805.

3. *Id.* at 812-32.

values or unique character of distinct polities. Lacking these qualities, state constitutions, to put it bluntly, are not "constitutions" as we understand the term. But if they are not constitutions, what are they, and how should we interpret them?

The participants in this Roundtable have offered a variety of responses to these difficult questions.[4] None of them, however, pursues the matter far enough, so what I want to do here is build on their work by tentatively sketching a framework in which to think about the nature of state constitutions. The key prop in this structure turns out to be, unsurprisingly, our system of federalism, which grants the states independent power to pursue their own visions of good self-government.

Focusing on federalism illuminates two important features of state constitutional law as it is practiced today. First, to the extent that state constitutional law is irrelevant in the contemporary United States—and I believe it is largely irrelevant, although it need not remain so—federalism paradoxically makes it irrelevant by design. Second, notions of federalism help explain the poor condition of contemporary state constitutional discourse, and lay bare the poignant dilemma state courts face: in order to preserve their role in the federal order, state courts must talk about state constitutions as though they were "real" constitutions, even during periods of federal constitutional ascendancy when state constitutions may not look, and certainly do not function, like the genuine article.

I. THE CRITIQUE OF STATE CONSTITUTIONAL DISCOURSE

To put these issues in perspective, it may be helpful to begin with a brief summary of my earlier critique of state constitutional discourse. The centerpiece of that critique was a study of every state constitutional ruling issued in 1990 by the highest courts of seven states.[5] My review of these decisions revealed that these courts (1) turned only infrequently and grudgingly to their state constitutions, (2) failed to specify whether their decisions rested on state or federal constitutional grounds, (3) frequently followed in "lockstep" with federal rulings on similar issues,

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4. Others are also working on the same issues. A valuable analysis, for example, can be found in G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169 (1992).

5. Gardner, *supra* note 1, at 778-805.

and (4) failed to identify or rely upon any state constitutional history that might help contextualize differences between the federal and state constitutions.[6] What these findings show, I argued, is that state constitutional discourse is impoverished; that is, state courts have failed to develop a language in which it is possible to debate intelligibly the meaning of the state constitution. This is a significant defect, not only because it directly contradicts the predictions of scholars and judges associated with the New Federalism movement,[7] but, more importantly, because the function of constitutional law is precisely to serve as a forum for debating the meaning of the constitution.[8]

What accounts for the failure of state constitutional law to fulfill its most central function? In my view, state courts do not talk intelligibly about state constitutions because they simply cannot—because to talk about state constitutions *as though they were constitutions* is to talk in a way that rings false, that makes no sense. The culprit here, it seems to me, is the conceptual framework imposed by the doctrine of state constitutionalism. According to this doctrine, the people of a state constitute a distinct, self-governing polity, with their own set of fundamental values and their own unique character, and the state constitution is a direct expression of this distinctiveness.[9]

The state constitutionalism framework does not hold up well upon examination of actual state constitutions and constitutional law. Most state constitutions, for example, are filled with trivial and occasionally silly provisions.[10] Some states change constitutions frequently—Louisiana has done so eleven times—and others have altered their present constitutions by literally hundreds of amendments.[11] These factors undermine any sense of a state constitution as a deliberate, considered expression of fundamental values; moreover, to the extent that state constitutions can be said to reveal the character of the polity, the character so revealed is hardly the sober and reflective one contemplated by constitutionalism.

More fundamentally, the notion that constitutional differences reflect differences in the character and fundamental values of the peoples of the various states is one that cannot survive a realistic appraisal of

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6. *Id.* at 780-94.
7. *Id.* at 771-78.
8. *Id.* at 767-70.
9. *Id.* at 812-18.
10. *Id.* at 818-19.
11. *Id.* at 819-20.

contemporary American life. Americans are so alike from state to state, move so freely around the country, and inhabit such a culturally homogenizing environment, that any true character differences that may have existed between the states in the past have surely disappeared. Consciously or not, Americans now define themselves, and articulate and debate their identity, on a national level.[12] To maintain the contrary is, as Paul Kahn has so felicitously put it, to indulge "a romantic longing for vibrant local communities."[13]

The foregoing critique of state constitutional discourse focuses on what state constitutions are not—they are not vital expressions of the fundamental values of distinct polities, nor are they reflections of the unique character of the peoples of the states. But it is easy to say what state constitutions are not; the harder task is saying what they are, and it is to that task that the participants in this Roundtable have turned their attention.

II. ALTERNATIVES TO TRADITIONAL STATE CONSTITUTIONALISM

A. Hans Linde: State Constitutions Are "Just Law"

Justice Hans Linde agrees that state constitutions are not constitutions in the strong sense of the term. The diversity of state constitutional provisions and bills of rights, he says, contradicts any "universalist illusions"[14] that state constitutions embody truly

12. *Id.* at 823-30. Some do not find this argument persuasive. David Schuman has argued that it does not apply to Oregon, whose constitution does contain "significant peculiarities of text revealing local character," and which can be understood as "inform[ed] . . . with local values and traditions." David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 278 (1992). I don't live in Oregon, but from this distance I can't quite see what he's talking about. For example, back East we have read quite a bit lately about significant grassroots efforts around Oregon to enact legal proscriptions against homosexuals. *E.g.*, Jeffrey Schmalz, *The 1992 Elections: The States—The Gay Issues*, N. Y. TIMES, Nov. 5, 1992, at B8; *Oregon Lawmakers Ban Local Votes on Gay Bias*, N. Y. TIMES, July 30, 1993, at A10. These do not seem like the actions of a state populace imbued with the tolerant frontier spirit of rugged individualism that Schuman has elsewhere described. *See* David Schuman, *Advocacy of State Constitutional Law Cases: A Report From the Provinces*, 2 EMERGING ISSUES IN ST. CONST. L. 275, 285 (1989). On the contrary, it seems like just another manifestation of a national trend among the religious right.

13. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1147 (1993) [hereinafter *Interpretation and Authority*].

14. Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927, 932 (1993) [hereinafter *State Constitutions*].

fundamental values.[15] State constitutions are not epic social texts; they have "no 'Founders'; no Federalist Papers; no equivalence of constitution and nationhood; no singularity."[16] Indeed, the residents of a state cannot really be termed a "people" in the constitutionalist sense because "our state boundaries do not follow ethnic, linguistic, or religious lines."[17] A state itself is thus not a distinct polity, but merely a "territorially defined legal system"[18]—an artificial rather than an organic entity.

Fair enough, but if a state constitution is not really a constitution, what is it? Linde's wholly unsatisfying answer is that "state constitutions are law," and that courts "become responsible for it [the state constitution] as for any other law."[19] This response ducks the real question: what kind of law is a state constitution, and what, in consequence, is the right way to interpret it? Linde is willing to go so far as to argue, quite convincingly, that state constitutional law is not a form of common law; because it is a text, "made by others than the judges,"[20] a state constitution is therefore a form of positive law.[21] But the question remains: what kind of positive law is a state constitution?

Here, Linde's analysis simply runs out. "Why," he asks rhetorically, "should independent [positive] state constitutional law" reflect "variations in the states' contemporary 'character' any more than independent tort law or taxation or land use systems?"[22] The answer is that state constitutional law is not tort law or tax law or land use law. State constitutional law is constitutional law, or claims to be, and to claim that something is constitutional law is to claim for it certain attributes—for example, that it constitutes and reflects the character of the sovereign people who created the constitution.

What Linde seems to miss is that neither "law," nor even "positive law," is something apart from the manner of its interpretation. Part of what makes something "positive law," that justifies the attachment of the label, is our independent conclusion that the law in question should be interpreted in certain ways and not in others. That is why Linde's

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15. *Id.* at 931.

16. Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 197 (1984) [hereinafter *E Pluribus*].

17. *State Constitutions*, *supra* note 14, at 954.

18. *Id.* at 932.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 931.

charge to the academy to help judges in the enterprise of "apply[ing] and enforc[ing] the actual guarantees that a state's charter provides"[23] is not aided by telling judges that their state constitutions are some form of "law" or "positive law." The paradigm of positive law is a statute. Should a state constitution be interpreted like a statute? Perhaps, but a state constitution is not a statute—it is a state constitution; it is not enacted by a legislature, but ratified by the populace of a state. Surely that has implications for how we should treat state constitutions; and if it does not, we need to know why not in order to interpret these strange documents properly.

I suspect that Linde does not supply what he himself calls for because he is ultimately ambivalent about the "constitutionality" of state constitutions. He argues forcefully, both here and in previous writings, that state constitutions should be interpreted according to what is now commonly called the "primacy" approach.[24] According to this approach, judges should interpret state constitutions independently of the federal constitution, and should do so in a principled way that takes account of the text, history, structure, and underlying values of the document. This is the classic method of constitutional interpretation,[25] and Linde is clearly urging judges to treat state constitutions like constitutions. But why should they? If it is true, as Linde argues with equal force, that state constitutions are only pseudo-constitutions, why should judges approach them like constitutions? What, for example, is wrong with judges beginning their analysis of state constitutions by copying federal doctrine? This might well be inappropriate for a "real" constitution like the federal one, but for a document that is merely some bizarre form of positive law—why not?[26] In any event, Linde's ambivalence prevents him from confronting the basic problem: how courts should interpret state constitutions depends on what state constitutions are. Unfortunately, that is just what he declines to specify.

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23. *State Constitutions*, *supra* note 14, at 956.

24. *Id.* at 929; *E Pluribus*, *supra* note 16, at 178-81; Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 380, 392 (1980).

25. For an overview of the methods of constitutional interpretation, see PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 1-108 (1991).

26. Indeed, I shall offer in Part IV a justification of sorts for just the type of lockstep analysis that Linde decries. *See infra* notes 76-99 and accompanying text.

B. James Pope: The "Mixed" State Constitution

Professor James Pope has no such reservations; he tells us in no uncertain terms what state constitutions are. On his account, most state constitutions consist of two distinct types of provisions: those that are "*constitutional*" in the traditional, Marshallian sense of "heroic origins . . . high purpose . . . structural elegance . . . and the aspiration 'to endure for ages to come'";[27] and those provisions that are merely "constitutional" in that they lack constitutional majesty and take up "details like age minimums for public officials."[28] A state constitution, then, is a set of genuinely constitutional provisions mixed with a bunch of what are essentially statutory provisions that have found their way, often regrettably, into the text. This approach not only commits to a normative account of the nature of state constitutions, but has the additional virtue of giving concrete guidance to judges seeking to interpret state constitutions. *Constitutional* provisions, Pope explains, should be interpreted like constitutions, and "merely constitutional" provisions should be interpreted like statutes.[29] Although this prescription, as Pope points out, by no means solves the problems that judges might encounter when interpreting either constitutions or statutes, it at least leads them onto familiar fields of judicial analysis.

Pope's project here is clear: he wants to "save" state constitutions by redefining them. The state constitution is not to be understood as everything between the title and the signatures; rather, it is to include only those provisions, however few in number, that make up the "*constitutional* core."[30] These are the provisions that possess the dignity that constitutionalism demands—the ones enacted by the people of the state acting in that perspicuously sovereign and reflective mode that we associate with constitution-making.[31]

Pope's analysis has an undeniable appeal. It would allow us to continue thinking of state constitutions (properly defined) as the considered instructions of the sovereign people of the state. This would not only preserve the doctrine of state constitutionalism, but would

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27. James G. Pope, *An Approach to State Constitutional Interpretation*, 24 RUTGERS L.J. 985, 985 (1993) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819)).

28. *Id.* at 986.

29. *Id.* at 1004.

30. *Id.* at 1002.

31. *Id.* at 988-89.

persuasively explain the examples cited by Pope—Jacksonian democratic reforms, the institution of direct democracy, free education[32]—that seem to amount to "real" constitution-making on the state level. Although I believe Pope's observations are partly true,[33] I think that his theory suffers from a fatal flaw: he has assumed the very question in issue—namely, whether a state constitution is a constitution, or as Pope would put it, a *constitution.*

Pope argues that constitutions deserving of the name are distinguished by two criteria: breadth of principle, and enactment by the people.[34] While these could well be necessary conditions for the creation of something that we would recognize as a constitution, it seems to me that they are not sufficient. What makes something a constitution is not its content or its pedigree, but the current attitude of the people toward it. The key is function: if the people treat a document as constitutive of their society, if they accept its authority and role, if they view it as a legitimate and authoritative source for the resolution of important social questions, then and only then is the document a "constitution" as we understand the term.

The problem with state constitutions is that they are not commonly thought of in this way. Either they are not thought of at all, or, as Professor Williams has pointed out, they are too often thought of as mere tools in the game of big money influence over the public policy apparatus.[35] The Massachusetts Constitution provides an apt example. Here is a document that looks like a constitution, contains broad and inspiring principles, and at the time of its adoption in 1780 was presumably the object of enough public attention to satisfy Pope's requirement of popular enactment.[36] Yet today, the document is all but ignored not only by the people of the state, but by the Massachusetts Supreme Judicial Court as well.[37] What throws doubt on the constitutional status of the Massachusetts Constitution is not its failure to meet Pope's criteria, but the fact that it seems to serve no particular function. Indeed, if the United States Constitution were to lose the

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32. *Id.* at 991-94.

33. I shall say more about this in Part IV; *see infra* notes 76-99 and accompanying text.

34. *Id.* at 988.

35. Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 175 (1983); *see also* Pope, *supra* note 27, at 1005.

36. Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911 *passim* (1993).

37. Gardner, *supra* note 1, at 785-86, 788-89, 793.

public prestige it now enjoys and to cease serving as a national focal point for debates on social values, it would no longer be a constitution in the Marshallian sense no matter what its nominal authority as a source of governmental power.[38]

C. *Paul Kahn: State Constitutions As Local Articulations of National Values*

What we need to make sense of state constitutions is a more dramatic break with traditional notions of state constitutionalism. Professor Paul Kahn offers just such a vision. According to Kahn, each state constitution is, in large part, an effort to realize within the particular community the common ideal of constitutional governance.[39] For Kahn, the "common object" of state constitutional law is "American constitutionalism," and each state court "has the authority to put into place, within its community, its unique interpretation of that common

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38. I have an additional reservation about Pope's account even on its own terms. Pope suggests that courts take up the task of distinguishing between "*constitutional*" and "constitutional" provisions. Pope, *supra* note 27, at 994-95; *see also* Schuman, *supra* note 12, at 277-78 ("courts in most instances should have no difficulty distinguishing between fundamental constitutive provisions and other, statute-like provisions which happen to be located in a document styled a 'constitution'"). It seems to me exceptionally risky to confer on courts the power to decide which provisions in a constitution are "really" constitutional and which are not. The purpose of a written constitution is to serve as a set of constraining instructions to government officials, instructions which they are not free to abrogate or defy. Allowing state courts to decide which provisions are binding in the strong constitutional sense seems to undermine the primary purpose of having a constitution.

Moreover, such a process could easily subvert popular attempts to implement real constitutional change by institutionalizing a conservative judicial bias against unusual or innovative constitutional provisions. This is because Pope's criteria rest ultimately (as they must) on a normative vision of constitutional substance. Pope claims to have finessed this problem by denying that the "subject matter" of constitutional provisions is a proper criterion for distinguishing "*constitutional*" from "constitutional" provisions. Pope, *supra* note 27, at 994. But I doubt that courts can easily bracket the subject matter of constitutional provisions from their other features. For instance, Pope claims that full-blown constitutional provisions are characterized by breadth of principle. But it is hardly self-evident when a principle is broad or narrow. More importantly, should some future form of constitutional innovation result in the adoption of constitutional provisions that seem narrow according to prevailing standards of constitutional-principle-breadth, courts could inadvertently thwart the innovations, even if they represent sincerely and strongly held popular beliefs about the way in which popular self-government should be conducted.

39. *Interpretation and Authority*, *supra* note 13, at 1160; *see also* Paul W. Kahn, *Two Communities: Professional and Political*, 24 RUTGERS L.J. 957, 957-58 (1993) [hereinafter *Two Communities*].

object."[40] On this view, state constitutions are not expressions of the distinctive fundamental values or character traits of a set of heterogeneously sovereign peoples. Rather, state constitutions are simply local articulations of national values; they express not our differences, but our fundamental commonality and our mutual commitment to a shared national project.[41]

I think Kahn is right in an important way—I shall make clear how in Part IV—and in taking this position he has advanced the debate over state constitutional law several steps in the right direction. The problem with his presentation, however, is that it is incomplete. In saying that state constitutions are local articulations of national values, Kahn has provided a good external description of state constitutions; but what is needed is a *justification* for this conclusion, a justification internal to the practice of state constitutional adjudication. Kahn correctly points out that interpretive authority in our legal system is pluralized among state and federal courts,[42] but he never says *why* this is the case. It is not enough to tell judges that they have interpretive authority; they need to know how to use it, and in order to know this, they must know why they have it. Only by providing a more complete account of the interpretational authority of state courts will theorists succeed in responding to Justice Linde's legitimate plea to assist state judges in applying and enforcing the terms of the state constitution.[43]

At this point, however, Kahn's argument takes a strange turn: the type of account I have just described is precisely what Kahn denies that theorists can or should provide. Theory, he says, is merely a strategy of power.[44] The job of the theorist is to "contest power through

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40. *Interpretation and Authority*, *supra* note 13, at 1148.

41. Professor Barry Latzer expresses a similar view, but I think his position collapses into Kahn's. Latzer contends that state constitutions are part of a "vast American constitutional dialectic [which] is an ongoing and vibrant debate about American values *and* how best to achieve them." Barry Latzer, *A Critique of Gardner's Failed Discourse*, 24 RUTGERS L.J. 1009, 1017 (1993). But Latzer seems to attribute divergences between the state and federal constitutions primarily to disagreements over how best to implement what he seems to view as a stable and uncontroversial core of American values. *Id.* at 1014-16. I think that the distinction between constitutional values and their means of implementation is not nearly so clear and uncontested as Latzer implies. Values and their means of implementation affect each other; certainly a stingy implementation of a constitutional value can be seen as repudiating the value itself, just as a generous implementation can be understood to reflect a substantively more expansive value. I thus prefer Kahn's more general formulation.

42. *Interpretation and Authority*, *supra* note 13, at 1166-67.

43. *State Constitutions*, *supra* note 14, at 935-46, 951.

44. *Two Communities*, *supra* note 39, at 965-70.

discourse,"[45] and for the theorist to deploy theory to explain or justify the use of state power not only shows him to be coopted by the state, but casts him as a veritable "agent[] of state power."[46] Kahn's argument presents a serious challenge to the premises that inform the entire debate over state constitutional law (as well as federal constitutional law). Because I think Kahn's challenge is one that should be taken seriously, and because doing so will help illuminate the nature of my own project, I shall digress in the next section to address briefly Kahn's view of the nature of constitutional theory.

III. THE REQUIREMENTS OF THEORY

Kahn's critique implicates issues of constitutional interpretation and theory that are far too complex to address completely here. I shall attempt to sketch only the outlines of a response. My position, in brief, is that Kahn is led to an unduly despairing view of the possibilities of constitutional theory by a misunderstanding of the aims of discourse-based theories of community, by an exaggeration of the significance of the distinction between speech and action, and by a failure to recognize the distinction between interpretations backed by authority on the one hand, and authoritative interpretations on the other.

A. Kahn's Account

Kahn offers an exceedingly bleak portrait of the legal system: courts are little more than predators, lawyers and theorists form an ineffectual priesthood trying vainly to placate the rapacious courts, and the general public is no better than a victim, dependent on the power of lawyers for protection and hating them for it. What leads Kahn to such a depressing point of view? To retrace his steps, we must go back to some of his prior work, on which his article in these pages builds.

Kahn's point of entry into the debate on state constitutionalism is contemporary constitutional theory, specifically the kind of discourse-based theory of community on which I relied to critique state constitutional discourse. He sees these theories as natural and perhaps inevitable outgrowths of modern constitutional theorists' unsuccessful attempts to reconcile individual autonomy and majoritarianism.[47] In

45. *Id.* at 968.
46. *Id.* at 970.
47. PAUL W. KAHN, LEGITIMACY AND HISTORY 135, 170, 171 (1992).

Kahn's view, communitarian theories seek to effect such a reconciliation by grounding the authority of the courts in a theory of interpretation.[48] Like its predecessors, however, this effort also fails,[49] leaving judicial authority ungrounded. When judicial authority is ungrounded, lawyers and theorists become mere strategists desperately trying to contain free-ranging judicial power.[50] But these efforts, too, must fail because the puny tools that lawyers and theorists have at their command—legal arguments and theories, that is, mere speech—cannot possibly restrain the very real, raw power exercised by courts as instruments of state authority.[51]

B. Discourse-Based Theories of Community

Although this account is coherent, it suffers from several flaws. First, I think Kahn is mistaken about the aims of discourse-based theories of community. They are not, as he claims, attempts to legitimize judicial power by grounding judicial authority in a theory of interpretation. Such a project would be doomed to failure at the outset because it would be incoherent. I must confess that I have some difficulty figuring out what it might mean to "ground" political authority in a theory of interpretation; political authority must by definition be grounded, if a theoretical grounding is needed, in some notion of politics. To claim that political authority finds its justification in a community of discourse would be to claim, in essence, "We talk, therefore we have authority." But this is an illogical leap. Such a claim

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48. *Two Communities*, *supra* note 39, at 969; KAHN, *supra* note 47, at 209.

49. KAHN, *supra* note 47, at 171-209, 222-23.

50. *Two Communities*, *supra* note 39, at 969.

51. *Id.* at 965. In the most general way, Kahn's account is deterministic—"it's all about power"—and, like other deterministic views, it is useful for some purposes but not for others. For example, deterministic theories are very good at staving off guilt and despair; if you know that everything is foreordained then you need not feel accountable for the repercussions of your actions, nor need you fret about the apparent randomness of life. What such theories cannot do, however, is provide reasons for action. When I am hungry for lunch and cannot decide whether to order pastrami or corned beef, it does me no good to know that whatever choice I make will have been preordained—I still must choose. Similarly, in this context, Kahn's account is not particularly useful for most of the purposes which a court, lawyer or legal theorist might want to pursue. It does courts and lawyers no good to know that their actions are all part of some grand power struggle; that information provides them with no way to decide how to act in situations that call for applications of power.

For a deft attack on deterministic theories, see ISAIAH BERLIN, *Historical Inevitability*, *in* FOUR ESSAYS ON LIBERTY 41 (1969).

could be true only in the trivial sense that every community of discourse inescapably defines the terms in which its members understand the world. Such "authority" is not the same as political authority and has no implications for its exercise within the community.

The real purpose of discourse-based theories of community, it seems to me, is to demonstrate the contingency of forms of social organization, thereby deprivileging contingent truths and freeing critique.[52] Although this project is based on an assumption that it is good for a political order to be subject to the freest possible critique, and that more critique is better than less, it by no means follows that all critique is equally good or valuable. Criticism—discourse, talk—is valued not for its own sake, but for its substance. That is, the freeing of critique does not free it from its burden of persuasion. This means that critique must be substantive, and must therefore rest on some foundation other than itself. In our society, successful substantive social critique must typically rely on some kind of normative claim invoking justice, morality, politics, science, or some other belief system whose authority has been established independent of the mere existence of the critique or discourse itself. In other words, the authority of discourse is derivative: to be powerful, discourse must be *persuasive* discourse; critique must be *good* critique.[53]

It is true, of course, that discourse theories are inconclusive in that they postulate no particular content to a community's discourse. But Kahn is mistaken when he takes this inconclusiveness to mean that discourse theories leave judicial authority ungrounded. Not so. Discourse theories simply provide that judicial authority is grounded in any community in whatever way the community has chosen to ground it. In a post-Enlightenment society like ours, that usually means a theory of political legitimacy; and in most of the western world a theory of political legitimacy usually means a theory of consent. That is why I was careful to define constitutionalism as a theory of political legitimacy based on popular sovereignty,[54] and why the account of state constitutions I propose to develop in Part IV will rely on federalism, a concept that comes with a distinguished pedigree of independently established political legitimacy.

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52. *See, e.g.*, Robert W. Gordon, *New Developments in Legal Theory*, *in* THE POLITICS OF LAW 414, 420-21 (David Kairys ed., 1990).

53. This is the lesson of hermeneutics. *See generally* HANS-GEORG GADAMER, TRUTH AND METHOD (Joel Weinsheimer & Donald G. Marshall rev. trans, 2d ed. 1989).

54. Gardner, *supra* note 1, at 814-15.

C. Authority and Interpretation

Kahn also makes far too much of the distinction between authority and interpretation; that is, between speech and action. It is true in an important sense that a punch in the nose trumps an argument, but this is not quite as significant as Kahn suggests because authority is itself a social construct.[55] Actions may exist beyond words, but to be understood, actions must be interpreted, and such interpretation occurs through language. While the exercise of authority, as Kahn points out, is "different from the discourse itself,"[56] the exercise of state authority is nonetheless imbedded in, and largely created by, interpretation. What is to count as authority? When has it been exercised? By whom? To answer these questions requires interpretation. If my neighbor applies for a zoning ordinance to open a pig farm, the town grants it, and I am subjected to unhealthful, noxious odors, have I been subjected to "authority"? If so, is it the authority of the state or the authority of my neighbor?

Only interpretation makes possible even the seemingly brute conclusion that one has been subjected to violence. In his book *Is There a Text in This Class?*, Stanley Fish quotes a wonderful passage from a story by William Golding about a struggle between two prehistoric tribes:

> The man turned sideways in the bushes and looked at Lok along his shoulder. A stick rose upright and there was a lump of bone in the middle. Lok peered at the stick and the lump of bone and the small eyes in the bone things over the face. Suddenly Lok understood that the man was holding the stick out to him but neither he nor Lok could reach across the river. He would have laughed were it not for the echo of screaming in his head. The stick began to grow shorter at both ends. Then it shot out to full length again. The dead tree by Lok's ear acquired a voice. "Clop." His ears twitched and he turned to the tree. By his face there had grown a twig.[57]

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55. Stanley Fish has argued that "interpretation is always a form of authority, since it is an extension of the prestige and power of an institution; and authority is a form of interpretation, since it is in its operations an application or 'reading' of the principles embodied in that same institution." STANLEY FISH, DOING WHAT COMES NATURALLY 135 (1989). As a result, "it is not possible to distinguish between them as activities essentially different in kind." *Id.*

56. *Two Communities*, *supra* note 39, at 965.

57. WILLIAM GOLDING, THE INHERITORS 360, *quoted in* STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 80-81 (1980).

What this passage describes is one prehistoric person shooting an arrow at another. But the "victim" of what *we* "know" to be an attack is incapable of interpreting it that way because he lacks the conceptual categories available to one who is familiar with the technology and conventional military uses of bows and arrows.

The same point can be made about Kahn's example of the citizen who is called upon to die for his country. According to Kahn, "[t]he true meaning of citizenship is not constituted by discourse, but by a kind of speechlessness. Citizenship entails an implicit recognition that there can come a moment when the state may call for the sacrifice of your life and . . . [t]here will be nothing further to say—only the act."[58] But how can the "true meaning of citizenship" be constituted other than through discourse? Surely the state's call must be interpreted: Am I a citizen? Is the state's claim to my life legitimate? Is it just? Shall I obey? And even when the citizen complies, the act of self-sacrifice does not exist beyond interpretation: the act has meaning only if it can be understood by those who remain behind, and they can understand the act only by engaging in a discourse that makes possible its interpretation.

Speech, then, is more powerful than Kahn admits. Indeed, its power in the legal system is so great that it has become an invisible background condition that Kahn all but overlooks. For example, Kahn says that interpretation "is the only power that lawyers and scholars have,"[59] but that's not really true. Lawyers could just as easily try to win their cases by violence; they could leap over the bench and twist the judges' arms behind their backs until they signed the relevant orders. Why don't lawyers do that? Is it only because the state has more bailiffs and guards and guns at its disposal? The state has these resources, but surely the fear of superior force is not the *only* reason that lawyers attempt to win cases with arguments rather than force. The reason speech is effective in court is because courts themselves recognize speech to be powerful. In a courtroom, truth is seen as superior to force, superior, even, to judicial power itself; as Kahn himself has pointed out, truth is sometimes seen as the very source of judicial power.[60]

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58. *Two Communities*, *supra* note 39, at 967.

59. *Id.* at 969.

60. KAHN, *supra* note 47, at ch. 3-4; *see also* Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1900-05 (1987) (describing potential power of language in legal settings).

D. Authoritative Interpretations

Kahn's sharp distinction between interpretation and authority is further undermined by another factor, which I shall call "authoritative interpretation." An authoritative interpretation is simply a socially binding interpretation issued by a body, like a court, with the socially recognized power to issue binding interpretations. The concept of authoritative interpretation is central to my notion of constitutional discourse, and to a certain extent underlies my entire critique,[61] so it is worth elaborating briefly.

Kahn is deeply suspicious of authoritative interpretations, which, in this context, means judicial rulings. Following in the footsteps of Robert Cover,[62] he is concerned about the role of courts in bringing about "the end of speech"[63]—that moment when the cacophony of contesting nomoetic interpretations is silenced by judicial invocation of the crushing power of the state. Judges, he reminds us, "are not just another claimant to a 'correct' interpretation of law."[64] What distinguishes them from other claimants is their access to the power of the state and their use of violence to enforce their views.

It is easy to see how Kahn moves from this point to his conclusion that courts are nothing more than bullies. Courts are no better or worse than anybody else, he argues, and neither are their interpretations;[65] the only difference between us and judges is that the judges have somehow got hold of the power to make their opinions stick. But this account, it seems to me, does not do full justice to the complex role played by courts in our society. The setting in which judging occurs makes the interpretations of courts qualitatively different from the interpretations of other actors; the voice of a court is not "just another voice" backed up by force.

The exercise of judicial power in our society is politically legitimate; that is, it is socially accepted and recognized as proper. But the conferral by a society of political legitimacy upon an institution also confers a sort

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61. Gardner, *supra* note 1, at 767-70, 815-16. I have further elaborated this concept in James A. Gardner, *The Ambiguity of Legal Dreams: A Communitarian Defense of Judicial Restraint*, 71 N.C. L. REV. 805 (1993).

62. Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815 (1986); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

63. *Two Communities*, *supra* note 39, at 967.

64. *Id.* at 968.

65. *Interpretation and Authority*, *supra* note 13, at 1164-65.

of legitimacy on its interpretations—they are recognized not merely as the pragmatically necessary end of a political process, but as authoritative interpretations; they are understood, in other words, as *correct*. Thus, the conferral of political legitimacy has more than political repercussions; it has interpretive repercussions as well. Judicial decisions have authority not simply as acts of power, but as interpretations.

This feature of authoritative interpretation sets up a dynamic interaction between the society which confers legitimacy, and the legitimated interpreting body—here, the court—whereby the body's interpretations influence the self-conception of society. In other words, the process whereby various groups within society generate interpretations of the law—what Cover called the "jurisgenerative" process[66]—does not take place in some kind of pristine setting independent of actual judicial interpretations. Rather, judicial interpretations help constitute the conditions under which jurisgenesis takes place, and in fact occupy a special role in constituting these conditions precisely because society understands judicial power to be legitimate and authoritative.[67] To oversimplify somewhat, members of society are predisposed (though never required, of course) to say: "If the court ruled that we hold such-and-such values, then, by golly, we must hold them." Indeed, for an authoritative institution like a court to make such a ruling is part of what it means for a *society* to hold certain values.

If evidence is needed for the existence of such an interaction, we need only look to the numerous reasons that our society has invented to justify viewing judicial decisions as the best possible interpretations of the law. Courts will reach the best interpretations, we are wont to say, because of their expertise in the law, or their insulation from the political process, or even the personal wisdom of the judges (this latter reason seems to have less force in the cynical present than in the recent past). In another kind of society, people might look to the age, past achievements, lineage or divine inspiration of the final decision maker to

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66. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983).

67. Sarat and Kearns make a similar point in Austin Sarat & Thomas R. Kearns, *Making Peace With Violence: Robert Cover on Law and Legal Theory*, *in* LAW'S VIOLENCE 211, 246-249 (Austin Sarat & Thomas R. Kearns eds., 1992). *See also* Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992) (describing ways in which the Supreme Court uses rhetorical appeals to national identity to try to influence that identity).

explain why his or her authoritative interpretations will be the best available. The point remains the same: the establishment by a society of a final, politically legitimate interpretive authority is not merely a political act, but an interpretive one as well.

This is the real sense, it seems to me, in which, as Robert Cover argued,[68] courts "kill" social interpretations. They do so not merely by silencing these interpretations through the exercise of superior force, but by doing something far more devastating: courts decisively defeat such interpretations by demonstrating *authoritatively* that they are wrong. Again, we need not look far for evidence of this process. Many different groups—women, gays and African-Americans, for example—are engaged today in intense struggles over the content of their "official" description. It seems highly doubtful that they would devote such energy to urging a favored official interpretation in courts and legislatures if self-interpretation, or the interpretation of private individuals, were as valuable to them as the official interpretation. Convincing a court to reach a particular interpretation is far more effective as a step to establishing a social truth than convincing a private citizen, or even many private citizens, of the same interpretation.

Finally, the notion of authoritative interpretation helps explain why Kahn is wrong to view lawyers as a kind of priesthood engaged in a professional discourse wholly unrelated to the larger political discourse.[69] Courts are political actors, and their ultimate audience is not lawyers, but the society on whom their continuing legitimacy depends. Courts, lawyers and citizens are all engaged in different ways in the pursuit of truth. This is why the much more common contemporary criticism of legal discourse is not that it is too distinct from political discourse, but that it is too intimately influenced by socio-political contingencies.[70]

E. Kahn's Theory of State Constitutions

These considerations lead me to conclude, contrary to Kahn, that theorists should not deploy theory "strategically." Nor do theorists become tools of state power by failing to resist it at every turn. The line between theory and advocacy is surely contested, but theory understood as strategy is simply bad theory. To say that theory is best understood

68. *See supra* note 66.
69. *Two Communities*, *supra* note 39, at 963.
70. This is, for example, the main thrust of the Critical Legal Studies movement.

as strategy is to say that theory does not make a sincere claim to truth. But legal theorists who wish to influence the actions of courts, something that Kahn urges them to do,[71] must address courts in terms that courts recognize as powerful—that is, truthful.

Kahn has offered a theory of state constitutions according to which state constitutions are local articulations of national values.[72] He suggests that his theory is strategic because it merely represents his exhortation to state courts to use their power to counter the hegemony of federal courts in the arena of constitutional law.[73] But what actually makes Kahn's theory strategic is his failure to support it with any kind of recognizable justification.[74] Maybe courts should interpret state

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71. *Two Communities*, *supra* note 39, at 965-70.

72. This view also forms the basis for Kahn's theory of state constitutional interpretation. Because state constitutions are local articulations of national values, courts interpreting state constitutions should not confine themselves to the use of "unique state sources," but should look to national values and the terms of the national debate as well. *Interpretation and Authority*, *supra* note 13, at 1153-56, 1165-67.

73. *E.g.*, *Interpretation and Authority*, *supra* note 13, at 1166 ("A state court interpreting American constitutionalism is . . . a powerful counterforce to federal court interpretation of the United States Constitution."); *Two Communities*, *supra* note 39, at 967-68, 968 (a state court "may be willing to use its authority to confront the institutions of national political authority and to contest the meaning of American political life").

74. The positions of Professors Burt Neuborne and Earl Maltz suffer from a similar defect. Neuborne, here as well as in his previous writings, argues that state courts should protect individual rights. Burt Neuborne, *A Brief Response to Failed Discourse*, 24 RUTGERS L.J. 971 (1993) [hereinafter *Brief Response*]; Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989). But why should they do so? Neuborne's answer seems to amount simply to the assertion that they should, or that it would be good in some kind of unexplained, self-evident way for them to do so. This is what gives his arguments the kind of instrumental character that has so often been criticized in the debate over state constitutional law. *See, e.g.*, Earl M. Maltz, *The Political Dynamic of the "New Judicial Federalism,"* 2 EMERGING ISSUES IN ST. CONST. L. 233 (1989); G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 845-46 (1991).

Earl Maltz's views are more complex, but ultimately suffer from a similar lack of *legal* justification. In particular, what his writings on state constitutional law omit is any concept of constitutional interpretation as a legal practice. For Maltz, state courts exist in a politically self-conscious world in which they act for instrumental reasons that transcend their institutional setting. Thus, state courts engaged in judicial review must "decide whether to displace" legislatively adopted rules, Earl M. Maltz, *James Gardner and the Idea of State Constitutionalism*, 24 RUTGERS L.J. 1019, 1023 (1993), whether "to be activist," Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS 98, 100 (1988), and what "type of judicial review [to] employ[]." Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1000 (1985). They make these decisions not incidentally in the course of doing their best to interpret the constitution, but deliberately. Indeed, Maltz's state courts seem not to interpret the constitution at all, but rather to engage in certain kinds of judicial behavior the propriety of which is to be

constitutions as local articulations of national values—but *why*? Why is this the *truth* of what state constitutions are?

In fact, there are sound reasons for rejecting such a view. Kahn's theory does not explain why we have state constitutions in the first place. After all, state courts interpret national values when they interpret the *federal constitution*.[75] If that is all state courts should do when they interpret state constitutions, then state constitutions are simply redundant. Surely we should prefer the traditional theory of state constitutionalism, which at least contemplates a non-redundant role for state courts and constitutions.

On the other hand, when state courts interpret the Constitution they do so as lower courts, whereas they have the final say when construing their own state constitutions. The relevant difference for Kahn, then, is not in the nature of the interpretive act, but in its authority. Yet this is a strange situation. It is one thing to authorize many bodies to interpret the same text, but quite another to grant *final* interpretive authority over the same text to more than one body. This seems like a prescription for anarchy; why would any rational system of governance pluralize interpretive authority in this way? This, it seems to me, is the key question that must be answered by any successful theory of state constitutional law, and it is the question to which I now turn.

IV. FEDERALISM AND THE PLURALITY OF INTERPRETIVE AUTHORITY

A. The Federalism Framework

The doctrine of state constitutionalism invites us to think of federalism as a system based on, indeed required by, the natural right of all self-identified societies—in this case the states—to govern themselves as they see fit. This is the classic theory of the Declaration of Independence.[76] But there is another, more promising way to think

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measured not by standards internal to the judicial practice of constitutional interpretation, but by a kind of social utilitarian calculus. Maltz, *The Dark Side*, *supra*, at 1002-16. This type of reasoning may be perfectly appropriate and useful to political science, but it fails to provide the kind of reasons for action required by actors in the legal system.

75. The power of state courts to construe the federal constitution has been settled since Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

76. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). This account is made all the more appealing by the historical circumstances of the nation's founding. As Gordon Wood writes in his contribution to this issue, "by the time of Independence a man's

about federalism: as a purely instrumental means of protecting the liberty of *all* Americans from invasions by government. This is the theory of *The Federalist* No. 51.[77]

In No. 51, Madison defends the constitutional principle of separation of powers. Tyranny, he says, is the concentration of all governmental powers in the same hands.[78] To protect the liberties of the people from the dangers of tyranny, the Constitution not only divides governmental power, but does so in a way that provides each branch of government with the power and incentive to struggle against the others; "[a]mbition," he says, "must be made to counteract ambition."[79] But the nation's decision to make the United States into a compound, federal republic provides it with an additional advantage:

> In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[80]

On this view, federalism is a governmental structure that is not so much compelled by the rights of the peoples of the states as it is deliberately created by the people of the nation to protect their liberties.

Erecting such a system required, naturally enough, that states be given sufficient power to make them a real, rather than merely a nominal, check on the exercise of federal power. This requirement has been amply fulfilled: the states truly possess the independent power to bring down the entire system if necessary, power that has been exercised to its full extent only once in our history, during the Civil War. To an extent that is easy for us to take for granted, the Framers' creation of a federal system was a breathtaking act of faith—faith that the states would see that it was in their best interest not to use their great powers to destroy the nation, but to remain a part of it; faith, indeed, that

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'country' was still his colony or state. . . . The states were the political entities that Americans in 1776 most cared about." Wood, *supra* note 36, at 911.

77. THE FEDERALIST No. 51 (James Madison).

78. THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

79. THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

80. *Id.* at 323.

remaining a part of the nation would always be in the ultimate best interests of every American living in every state.

B. The Exercise of State Power

The mere granting of power to the states is not, of course, sufficient by itself to achieve the Framers' goal of protecting American liberties. Presumably, state power must be exercised in particular ways if federalism is to work as intended. How then ought state power to be exercised to best fulfill federalism's goal of securing liberty?

To begin with, it is clear that state power cannot protect liberty if it is exercised arbitrarily. In the Lockean tradition we have inherited,[81] being subjected to arbitrary government power is the very antithesis of liberty.[82] This notion is reflected today in the contemporary constitutional doctrine of substantive due process, which screens government actions for arbitrariness by requiring every official action to satisfy at least some minimal standard of rationality.[83] It follows that, to protect liberty, state power must be exercised for a legitimate purpose. What might these purposes be?

The exercise of state power helps to protect liberty through: (1) the direct achievement of good self-government within those areas in which state governments have power to act; and, (2) the identification and direct protection of the rights of state citizens, to the extent permitted by the Constitution. But these are simply the goals that we ordinarily expect any government to pursue; they are certainly not peculiar to a system of federalism. From the perspective of federalism itself, the most important way in which states use their powers to protect liberty is (3) indirectly, simply by doing (1) and (2)—by engaging in the everyday processes of good government. That is, the exercise of state power in pursuit of the goals that any government, including the national government, seeks to achieve is what makes the states potentially

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81. I have spelled out in some detail the extent to which I think the United States Constitution must be understood as derived from the Enlightenment tradition exemplified by Locke in James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 192-213 (1990).

82. Locke viewed arbitrary government as a form of political slavery forbidden by natural law. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 17, 22-24, 135-137, 159-168 (Thomas P. Peardon ed., 1952) (1690).

83. *E.g.*, Concrete Pipe and Prods. v. Construction Laborers Pension Trust, __ U.S. __, 113 S. Ct. 2264, 2289 (1993); Pacific States Basket Co. v. White, 296 U.S. 176 (1935).

effective counterweights to national power. The "double security" described by Madison does not arise so much from some complicated scheme of complementary powers as it does from a conceptually simple arrangement whereby the state and national governments independently police some of the same turf.

This is the sense, incidentally, in which I think Kahn is right to say that state constitutions are local articulations of national values.[84] When they act, states are necessarily implementing a local vision of good government and liberty—that is to say, values—and there is no particular reason to think that the vision states pursue is substantively different from the vision pursued on the national level by the federal government. In a federal system, the mix of state and national governance merely creates two different avenues by which the same polity can achieve the same results.

We have seen so far that the purpose of federalism is the protection of liberty, and that the states exercise their responsibility for protecting liberty within the federal system through their everyday efforts to govern in a manner consistent with the requirements of liberty. We may now ask: what specific *actions* must a state take to fulfill its role in the federal system? The answer, at least some of the time, is: none. The state's responsibility is to protect liberty, but if liberty is not threatened, if it is adequately protected by other actors and by the national government in particular, a state need do nothing at all. Put another way, what makes the state an effective counterweight to federal power is its *potential* to step in and exercise its own power independently in order to curb federal abuses. State power ought never to be exercised for its own sake—that is, arbitrarily—so a state's duty to protect liberty need not compel it to act. If a state has any minimum affirmative obligation under federalism, it is to monitor the actions of the federal government and assure their consistency with the state's view of what liberty and good self-governance require. If the state's monitoring suggests to it that the people's liberties are being adequately protected by the national government, then the state may fulfill its obligation to protect liberty by doing nothing.

If this account of state power is correct, one conclusion that follows directly is that a state should never pursue a policy of differentiation for its own sake; that is, the state should never exercise its own power differently from the way the national government has exercised national

84. *See supra* notes 39-46 and accompanying text.

power simply to assert some kind of distinct power or identity. Such a policy amounts to governance for the purpose of asserting power rather than governance for the purpose of achieving good self-government and preserving liberty; it confuses the means with the end. Those who appear to suggest such a strategy—Kahn,[85] Neuborne,[86] perhaps even Justice Brennan[87]—are doubtless better understood as urging states to "correct" exercises of national power, not for the sake of asserting state power, but for the sake of better protecting the people's liberties where the protection of liberty has been measured against some independent, and usually unarticulated, normative baseline. Let me put this another way by anticipating a conclusion to which I shall return shortly: there is nothing intrinsically wrong with lockstep state constitutional law. If a state thinks that the national government is adequately protecting the relevant liberties, the doctrine of federalism provides that the state need not and should not do anything different; so long as the state maintains the ability to break step should the need arise, lockstep constitutional analysis is entirely consistent with the role prescribed for state power by federalism.

C. What Is a State?

For federalism to work, a state must develop and pursue, sometimes through action and sometimes through inaction, a substantive vision of good government and liberty. But what exactly is the nature of the state that generates these views? What, to put the matter bluntly, is a state? The somewhat surprising answer is: it depends. In a federal system, states need not be eternal, unchanging political societies; rather, the system contemplates far more fluid entities whose essential nature may change significantly from time to time.

Under the influence of the doctrine of state constitutionalism, we tend to think of the American states as what might be called "Lockean sovereigns"; that is, they are the governmental agents of independent societies exercising their natural right to self-governance.[88] But states need not be full-blown Lockean sovereigns for federalism to work properly. As an instrumental means for protecting liberty, federalism

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85. *See Two Communities*, *supra* note 39.

86. *See Brief Response*, *supra* note 74.

87. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

88. *See* Gardner, *supra* note 81, at 200-05.

can function perfectly well even if the states are something less majestic than state constitutionalism might suggest. All that is necessary for federalism to protect liberty effectively is that states be granted a certain measure of power and that they be able to use it; the nature of the state entity itself is irrelevant.

Indeed, the Framers expressly contemplated that the nature of the states would not be fixed, but would instead vary with the changing attitudes of the people. In *The Federalist* No. 46, Madison, after remarking that Americans place their faith and trust primarily in their state governments, observes:

> If . . . the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due . . . .[89]

Thus, Madison suggests that the locus of popular trust will ebb and flow; the protection of liberty will be self-regulating as the people shift their trust, and with it the focus of their identity as Americans, from one champion to the other.

It seems certain that at various times in our history, particularly during the founding period, Americans identified more strongly with their state government than they did with the national government.[90] This, I believe, is what accounts for the appeal of James Pope's theory of state constitutions.[91] It is hard to deny, and should not be denied, that some instances of state constitution making are best understood as the result of just the kind of deliberation and social self-identification that we associate with genuinely constitutive societal politics. Today, however, the states are not Lockean sovereigns. The people of the nation seem now to feel that their confidence is better placed in the national government, and the United States has therefore become the focus of American identity. Whatever they may have been in the past, the American states today define adventitious groupings of American citizens, a "populace" rather than a "people." On the other hand, nothing in theory prevents the focus of American identity from shifting

89. THE FEDERALIST No. 46, at 295 (James Madison) (Clinton Rossiter ed., 1961).
90. *See* Wood, *supra* note 36, at 911.
91. *See supra* notes 27-38 and accompanying text.

back to the states;[92] federalism contemplates and functions effectively in either scenario.

D. What Is a State Constitution?

Just as the nature of a state varies according to the attitudes of the people, so too does the nature of a state constitution. When the people identify so strongly with their states that the states can only be understood as genuine societies in the Lockean sense, then their constitutions will be the charters of such societies and will by definition be "constitutional" in the way that state constitutionalism provides. When the states take on a lesser status due to the shift of identity from the states to the nation, as at present, then state constitutions will be something correspondingly less as well.[93]

Indeed, it is not going too far to say that at times like the present, when American identity focuses on the nation rather than the states, federalism makes state constitutional law irrelevant by design. This is not to say that federalism demands that state constitutional law retire permanently from the legal stage. On the contrary, federalism requires state power to be permanently available as a potential corrective to federal abuses. But when the people prefer to put their "confidence" in the national and not the state government, federalism suggests that the principal role of states is to wait patiently in reserve for that moment, should it ever come, when the people's confidence tilts back their way.

This account also helps explain why it is advantageous for states always to have constitutions that seem on their face "constitutional," at least in so far as they contain provisions dealing with fundamental rights. Even if the state constitution is not at any given moment functioning like a constitution, circumstances could quickly change if

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92. I say "in theory" because it seems to me that the conditions of modern life—a global economy, a global environment, the scale of modern warfare, etc.—make it highly unlikely that Americans will revert to a genuine state-centered identity. On the other hand, as recent events throughout the world have shown (e.g., the breakups of Yugoslavia and Czechoslovakia), people are sometimes willing to sacrifice the advantages of integrated nationhood for the benefits of a regionalized sense of identity.

93. To be sure, such changes occur within a constrained range. For example, the Guaranty Clause of the United States Constitution, U.S. CONST. art. IV, § 4, and the process of popular ratification seem to compel the conclusion that a state constitution must at all times be understood as a means by which the state populace exercises ultimate positive control over the organs of state government. Even subject to this limitation, a state constitution need not be a "real" constitution at any given moment for federalism to work.

the people turn away from the national government and toward the states. If they do, it will be to the state's advantage to have a charter document already in place capable of functioning like a constitution—capable, that is, of bearing the full weight of societal identity.

E. Interpreting State Constitutions

We arrive finally at the ultimate question: in light of federalism and the nature of states and state constitutions, how ought state courts go about interpreting state constitutions? Before turning to my own provisional response, I want to flag a preliminary issue that may complicate the analysis: whether judicial review means the same thing under a state constitution as it does under the Constitution. As Justice Linde has pointed out, state courts differ from federal courts in that they typically "share directly in governance," at least in the areas of common law and equity, in ways that their federal counterparts do not.[94] This raises the possibility that state courts might legitimately take a more active role than federal courts in elaborating constitutional principles. After all, nothing in the United States Constitution requires a state to have a written constitution in the first place, and if a state lacked a written constitution the courts would presumably take an active role in creating an unwritten one, as they have in England.[95] Even where states have adopted written constitutions, as all have done, it is at least conceivable that judicial review in state courts might be less constrained than in the federal courts by factors like the intentions of the constitution's framers; perhaps state courts might legitimately rely on their own views of sound public policy, as they often do in developing the common law. I shall not attempt to resolve this issue here, but shall simply assume for purposes of discussion that these factors do not make a significant difference.

In the account I have given, state constitutions can serve federalism in two different ways depending on the attitudes of the people: they can be "active," functioning as genuinely constitutive documents for distinct state societies, or they can be "dormant," serving as a reserve means of

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94. *State Constitutions*, *supra* note 14, at 952. This difference seems to flow at least in part from the fact that state courts tend to be courts of general jurisdiction, whereas federal courts are courts of limited jurisdiction. Aldinger v. Howard, 427 U.S. 1, 15 (1976); Scott v. Sanford, 60 U.S. 393, 401-02 (1857).

95. *But see* U.S. CONST. art. IV, § 4. Perhaps the Guaranty Clause would require state courts to identify an unwritten constitution.

protecting the liberty of a society the locus of whose identity and faith in government is national. This raises a preliminary question of a different sort: are there two distinct ways to interpret state constitutions, one when they are active and the other when they are dormant? I think not.

The "activation" of a state constitution, it seems to me, is something that just happens by itself. It is not a self-conscious decision of governance, but a conclusion to be inferred from acts of self-governance taken by the state in pursuit of the goals state power aims to achieve. A court could never know when it would be appropriate to activate the state constitution because it would have to know whether the state citizenry has come to identify itself more with the state than with the nation. But a court could never know this in advance because the condition of state constitutional activation or dormancy depends, at least in part, on what actions the court itself takes. All the court can know at any given moment is whether some particular action by the national government comports with the state's conception of liberty and good self-government. Put another way, whether a state constitution is active or dormant is a determination external to the practice of judging.

This suggests that there is only one way to interpret a state constitution, and that is to treat it at all times like a real constitution. Both the federal and state constitutions are only shells; in order to become genuinely constitutional they must be filled with the stuff of constitutionality, a quality that is supplied by the people rather than the document. Still, the receptacle must be capable of holding what it is designed to hold. State constitutions may now be in a condition of dormancy, but to treat them consequently as something less than real constitutions, to approach them without the reverence to which constitutions are conventionally entitled and thereby to diminish them, might well do them significant and perhaps irreparable harm. Should circumstances change and the people once again "become more partial"[96] to the state than federal government, the people might find themselves without an instrument capable of doing the work that a constitution is required to do.

This, I believe, is why state courts talk about state constitutions in such strange ways; it is why, to bring the critique full circle, state constitutional discourse suffers from so many problems. State courts are caught in an uncomfortable dilemma. On the one hand, state courts must talk about state constitutions as though they were constitutions in

96. *See supra* note 89 and accompanying text.

the fullest sense. In order to fulfill their responsibilities in a federal system, state courts must keep their constitutions in good working order just in case the courts must deploy the constitutions to counter federal encroachments on people's liberties. On the other hand, state constitutions are not currently serving as real constitutions—that function is presently served by the Constitution—so the full-blown rhetoric of constitutionalism sounds inappropriate when applied to state constitutions at this particular historical moment. At best, the disparity between the rhetoric and the reality of state constitutionalism puts state judges in the uncomfortable position of giving a bravura performance for an indifferent audience. At worst, the disparity may cause state courts to tone down their constitutional rhetoric, or even to avoid it altogether whenever possible—that is, they may refer to their state constitutions only infrequently, grudgingly, and vaguely.

While this tension cannot be made to disappear, we can at least put it in perspective by reconceptualizing state constitutions: we should understand them less as "constitutions" than as documents ordering the states' potential to counter national power in a federal system. From this perspective, some of the interpretive practices for which state courts have been roundly criticized are much more acceptable. In particular, there is nothing wrong with state courts looking to federal constitutional law, adopting the terms of debate used by federal courts, reacting to or disagreeing with federal rulings on the merits, and even engaging in the despised "lockstep" analysis. All of these practices are means by which state courts, operating from within a scheme of federalism, can protect the liberties of American citizens by monitoring the treatment accorded those liberties by the national government.

This account finds support in the texts of state constitutions themselves. One of the often overlooked curiosities of state constitutions is the apparently deliberate redundancy of state constitutional bills of rights. Many state constitutional provisions are word for word identical with their federal counterparts.[97] If we followed the traditional, Marshallian canons of constitutional construction, we would be driven to the conclusion that the state provisions must be

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97. For example, at least ten state constitutions use precisely the same phrase ("establishment of religion") as the Establishment Clause of the United States Constitution. U.S. CONST. amend. I. *See, e.g.*, ALASKA CONST. art. I, § 4; CAL. CONST. art. I, § 4; FLA. CONST. art. I, § 3; HAW. CONST. art. I, § 4; IOWA CONST. art. I, § 3; LA. CONST. art. I, § 8; MD. CONST., DECLARATION OF RIGHTS art. 36; MONT. CONST. art. II, § 5; S.C. CONST. art. I, § 2; UTAH CONST. art. I, § 4.

construed differently from the federal ones in order to avoid reading important provisions of the state constitutions as redundant and therefore meaningless.[98] Yet a reading of state constitutional provisions mechanically construing them as different from their federal counterparts is a poor reading—just as poor, in fact, as a reading mechanically construing them as identical.

This shows the pitfalls of thinking about state constitutions in traditional constitutional terms. The framework of federalism I have outlined offers a better explanation for this kind of constitutional redundancy: state constitutions duplicate federal constitutional provisions to institutionalize a monitoring process whereby state courts "shadow" federal court rulings. That is, an identical state constitutional provision invites (and perhaps compels) state courts to consider the rulings of the federal courts on the same subject and to come to an independent judgment on the merits. In so doing, state courts perform the liberty-protective functions assigned to them by federalism: they monitor the actions of the national government, and if necessary intervene.

Of course, as I have already indicated, a state court's charge to monitor federal rulings is not a charge to disagree with them; if the state court thinks the federal ruling adequately protects the liberty at stake then federalism provides it with no cause to diverge from the national approach. Evidently, in the great majority of state constitutional cases, state courts seem satisfied with the degree of protection extended by federal rulings.[99] Finally, it is worth stressing once again that no amount of divergent state constitutional jurisprudence can transform a pseudo-constitution into a real one, or convert a populace into a people; those are things that can be accomplished only by the citizenry, not by the courts.

CONCLUSION

With the doctrine of state constitutionalism, we have inherited a conception of states and state constitutions that does not adequately describe contemporary political reality. This disparity has impaired our ability to speak usefully about state constitutions. To move beyond this impasse we must reconsider precisely what state constitutions are.

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98. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

99. *See* Gardner, *supra* note 1, at 778-805.

The conceptual stalemate can be broken by considering state power from the perspective of federalism. In *The Federalist*, Madison sets out a theory of federalism in which state power is created not in virtue of the right to self-governance of independent state societies, but as a purely instrumental means of protecting the liberty of the nation's citizens. The dual system of state and national governments is thus less a framework for recognizing distinctive choices made by distinct polities than a mechanism for providing the same polity with different avenues by which to implement its conception of good self-government.

The role of state power in this account is to serve as a potential counterweight to federal invasions of the people's liberty. The way states fill this role is determined in the first instance not by federalism itself, but by the attitudes of the people, who can be expected to shift their allegiance and self-identification between the state and federal levels as they see fit. In times like the present, when American identity focuses far more on the nation than the states, the states can perform their liberty-protective duties under federalism merely by monitoring federal actions; no particular state actions are necessarily prescribed. When state constitutions are understood not as "constitutions," but as documents ordering the state's potential to counter federal power, then there is nothing intrinsically wrong with state courts construing their state constitutions by looking to and adopting the corresponding federal analyses or terms of debate, or even following in lockstep with federal rulings.

Nevertheless, although replacing state constitutionalism with an instrumental version of federalism can help state courts justify many of their current interpretive practices, it cannot provide them with a completely satisfying state constitutional discourse. State courts, on this view, must talk about state constitutions as though they were "real" constitutions in order to preserve them in case the state constitution is ever "activated" by a shift in the people's trust and self-identification back to the state level. Until then, state courts seem compelled to talk about state constitutions that do not exist, however much they may have existed in the past and may again exist in the future. Federalism thus both generates and explains, but does not alleviate, the current unpersuasiveness of much state constitutional discourse.