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State Constitutional Theory and Its Prospects

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STATE CONSTITUTIONAL THEORY AND ITS PROSPECTS

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State constitutions create the legal frameworks in which many of the basic regulatory decisions affecting American citizens' lives are made. Yet, the institutional processes and decisionmaking structures affecting, and affected by, state constitutions in modern American law are scarcely studied by constitutional lawyers. Accordingly, there is precious little discussion in the literature on constitutional theory and interpretation about state constitutions as separate objects of inquiry. To be sure, there was a brief burst of normative attention on state constitutions two decades ago. The occasion for this attention was the avowedly strategic effort led by Justice William Brennan twenty years ago to highlight the value of plumbing the states for individual rights protections in the face of conservative retrenchment.[1]

With hindsight, though, the revolution in state constitutional theory touted by prominent state jurists,[2] by liberal law professors despairing of the Reagan-Bush era,[3] and of Justice Brennan himself,[4] has not lasted. Notwithstanding the highly touted turn toward state constitutional discourse of the past two decades, the results have been disappointing. Yet, the renaissance of state constitutional law hardly influenced currents of constitutional theory with respect to fundamental issues of constitutional structure or even interpretation. On the whole, contributions by constitutional theorists to state constitutional theory have been rather modest. State constitutional theory remains a rather barren, mundane field, with little substantive controversy, creative thinking, or paradigm-shaking.[5]

This is an unfortunate state of affairs, for state constitutions are not only intrinsically important as legal frameworks for the implementation of public policy throughout all fifty of the states, but they are also especially fertile objects of inquiry for theoretical discussion of the key issues in American public law. By

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1. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). *See also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

2. *See, e.g.*, Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1 (1995); Sol Wachtler, *Our Constitutions—Alive and Well*, 61 ST. JOHN'S L. REV. 381 (1987); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980).

3. Paul Kahn describes the renaissance of state constitutionalism as reflecting "a kind of forum shopping for liberals." Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 464 (1996). *See also* Lawrence G. Sager, *Forward: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985); Laurence Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 HARV. L. REV. 1065 (1977); Frank Michelman, *States' Rights and States' Roles: The Permutations of 'Sovereignty' in* National League of Cities v. Usery, 86 YALE L.J. 1165 (1977).

4. *See generally* Brennan, *supra* note 1.

5. This is less true of a field which is, in some ways, a sub-field of state constitutional law, that is, local government law. Curiously, though, local government scholars have seldom examined seriously the intersections among local government law and politics and state constitutionalism and constitutional law. *See, e.g.*, CLAYTON P. GILLETTE, LOCAL GOVERNMENT LAW (1995). *But see* Richard Briffault, *Localism in State Constitutional Law*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 117 (1988).

understanding state constitutions and state constitutionalism, we can better understand the processes in which fundamental sub-national decisions are and should be made. Moreover, coming to terms with the law, politics, and economics of modern federalism requires, as I have suggested elsewhere,[6] coming to terms with the intrastate aspects of law and politics. And the basic framework within which intrastate governmental decisionmaking is made is the constitution of the state.

Reading the scholarly literature on constitutional law and theory, one would suppose that state constitutionalism is a relatively minor element of the American constitutional order.[7] In reviewing writings on state constitutionalism in the mid-1980s, prominent appellate lawyer John Frank describes state constitutional law as too-often "a sort of pallid me-tooism."[8] More recently, constitutional lawyers have attacked more directly the notion of an independent state constitutionalism, suggesting that intellectual "discourse" at the state level has decisively "failed."[9] Whether or not these attacks hit the mark, one of the most arresting features of modern state constitutional jurisprudence is that there are no distinct theoretical paradigms that shape state constitutional theory. We borrow whole cloth from federal constitutional theory when we interpret state constitutions. And while debate rages about the extent to which state constitutional provisions involving rights ought to be interpreted independently of, or in lockstep with, equivalent federal provisions,[10] the basic approaches we use in addressing the question are drawn from traditions of national constitutionalism and national constitutional theory. This is so notwithstanding the fact that state constitutions differ fundamentally from the federal constitution in their respective histories, their political theories, and the intra-state circumstances to which they respond, if imperfectly, as instruments of public governance.

This is reason alone to find disconcerting the dearth of creative analysis concerning state constitutionalism and state constitutional theory. However, there is an additional reason, particular to current events, to care about the domain of state constitutional theory. The so-called "devolution revolution" has resulted in a substantial retreat by the federal government in American public policymaking.[11]

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6. *See generally* Daniel B. Rodriguez, *Turning Federalism Inside Out: Intrastate Aspects of Interstate Regulatory Competition*, 14 YALE J. ON REG. 149 (1996).

7. By contrast, within the space of a few years in the early to mid-1980s, there was a substantial amount of commentary in the legal literature on state constitutionalism and state constitutional theory. *See, e.g.*, *Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 11-346 (1988); *Symposium: The Bicentennial of the United States Constitution*, 61 ST. JOHN'S L. REV. 379-472 (1986) (collecting articles on state constitutional law); *Symposium: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959-1318 (1985)[hereinafter *Texas Symposium*]; *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324-1502 (1982) [hereinafter *Harvard Developments*].

8. *See* John P. Frank, *Symposium: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1339, 1340 (1985) (book review).

9. *See generally* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992). For a more measured, and, for that among other reasons, more insightful analysis of state constitutional theory and its failings, see Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993). *See also* Kahn, *supra* note 3.

10. *See* Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 199-200 (1998); *Harvard Developments*, *supra* note 7, at 1332-47.

11. *See generally Symposium Issue: Constructing a New Federalism: Jurisdictional Competence and Competition*, 14 YALE J. REG. 1-503 (1996). On the legal aspects of this devolution, with particular focus on the

The role of state and local institutions in public policy has been augmented accordingly. To the extent that intrastate decisionmaking takes place within the context of state constitutions and their respective constitutional law, the pertinence of state constitutionalism seems unavoidable, and even urgent.

Above, I have explained why state constitutions are important. But is there a role for a distinct discourse of state constitutionalism and state constitutional theory? This asks a different question than that put forth by those who counseled in the 1970s and 80s a renaissance of state constitutional law as a source of individual rights protections.[12] Is there anything theoretically special about state constitutionalism beyond the availability of state constitutions as a source of rights and liberties? The aim of this essay is to suggest that yes, indeed, there is a special place for state constitutional theory within the framework of American constitutionalism. There is both a weak and a strong case for distinctive discourse. The weak case is built on the essentially positive insight that there are salient differences between state and national constitutional processes. These differences represent not merely distinct ways of phrasing the same essential structures and rights provisions. Rather, the differences go the heart of distinct principles of how to structure the processes of government, and how to allocate to legislative and executive institutions the powers of governance. Moreover, these differences counsel the development of a separate prescriptive discourse. While it may be that constitutional theory could incorporate these differences into a more general framework, modern currents in constitutional theory do not, as suggested below, engage state constitutions as independent objects of inquiry. Modern constitutional theory is, in the main, *national* constitutional theory.

The strong case for a distinct constitutional theory rests upon a vision of state constitutions and state governance within the American constitutional system. States are not political islands unto themselves. They are units of government within a diffuse yet *united* states. The union of states has, as suggested in the ever-growing literature on American federalism, certain political and economic aims. The accomplishment of these aims requires attentiveness to the national/state relationship to be sure. However, it also requires attention to the ways in which states structure their own processes of governance. When we are attentive to these processes, we see that state constitutions can and do perform very distinct regulatory roles. A principal role, as described in more detail below, is the facilitation of strategies of intrastate governance, and, in particular, the design of intrastate institutional mechanisms that enable differentiated local communities to flourish economically, politically, and socially.[13] A related role is the facilitation of each state's capacity to compete in an interstate (and increasingly global) economic marketplace.[14] In essence, then, the strong case for state constitutional theory as an independent discourse is that it enables us to fix our energies more closely on the distinct roles of state constitutions in a federal system.

Court's recent commerce jurisprudence, see Robert Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643 (1996). *See also* United States v. Lopez, 514 U.S. 549 (1995).

12. *See supra* notes 2-3 and sources cited therein.
13. *See infra* text accompanying notes 106-09.
14. *See infra* text accompanying notes 146-50.

In Part I, I consider some of the elements that illustrate the differences between state and national constitutional processes. The focus is on the structural relationships between levels of government in both systems, for it is with respect to these relationships that we traditionally build the base of a coherent theory of constitutionalism. The discussion in Part II centers on currents of federal constitutional theory and its relevance to issues of state constitutionalism. In Part III, I turn to a discussion of state constitutional discourse as a distinct phenomenon. With reference, again, to structural elements of state and national constitutionalism, I consider whether some of the key predicaments of state constitutionalism counsel a more particularized theoretical approach. At the end of Part III, I sketch some of the issues that this state-focused theoretical approach would confront.

I. STATE CONSTITUTIONALISM AND ITS DISTINCT PROCESSES

American constitutional theory is built around a rather mythic obsession with the American constitutional tradition as framed by the creation of the republic in the late 18th century. The founding of the republic represents the story that, in the myriad of ways in which it is told, frames the normative enterprise of constitutional theorists. These theorists aim to provide not only retail guidelines to interpreting difficult provisions, but, more grandly, to provide a rich theoretical vocabulary for understanding the relationship between legal ideology, judicial doctrine, American political history, and the normative foundations of constitutional interpretation. In short, the object is to provide a theory of *American* constitutionalism, and not merely constitutionalism more generally.

This poses a problem for the enterprise of state constitutional theory. It may well be the case that the same sets of doctrinal puzzles and prescriptive agendas animate debates in state constitutional law and politics, and that the resonant positive story told about American constitutionism *circa* 1787 and beyond can adequately frame our understanding of the states' respective constitutional experiences. However, given the particularized focus in mainstream constitutional theory on the American constitutional experience at large, it is not obvious that federal constitutional history, structure, and theory provides an adequate template for state constitutional theory. Rather, it is more likely that the similarities are obscured by the salient differences. Or at least this is the thesis of the discussion below.

A. *Constitutional Formation and the Federal Analogy*

American state constitutions are fifty separate documents shaped over the course of two centuries.[15] All but the original thirteen states came into the union with their constitutions after the establishment of the national constitution. For these original, pre-1787 state constitutions, much of the basic architecture looks rather like that of the United States Constitution. Moreover, many of these post-1787 state constitutions track, in important respects, national constitutional discourse, from the establishment in each document of a separation of powers and, in all but one, a bicameral state legislature. They also each embody a bill of rights, containing

15. *See* COUNCIL OF STATE GOV'TS, 31 THE BOOK OF THE STATES 3 (1996-97 ed.).

collections of rights which are at least as protective of individual liberty as those embodied in the national constitution and are, more commonly, more protective.[16]

This structural equivalence is not surprising. We should fully expect that the 18th century constitutional discourse in the country would have incorporated principles and theories applicable to both federal and state constitutions of the time.[17] There are two related reasons why this is so. First, the structure of government within the states whose constitutions were adopted contemporaneously with, or after, the national constitution of 1787, trace, in fundamentals, the structure of government detailed by the framers of our national constitution. With respect to the design of institutional relationships, not only does each state constitution maintain a system of separation of powers, but each separation of powers arrangement tracks the tripartite division of powers in exactly the same way, at least on paper, as does the national constitution.[18] Thus, each state constitution distributes powers to an elected legislature and chief executive; and each maintains a judiciary, albeit one whose selection and retention is constituted in profoundly different ways than the "independent" judiciary of the U.S. Constitution.[19] Similarly, each state constitution maintains a system of judicial review,[20] of judicial supremacy,[21] and of limits on the scope of delegation to institutions outside the three branches of state government. While there is nothing in the United States Constitution that appears to require these analogous arrangements,[22] state constitutions mirror in many fundamental ways the structure apparatus of legislative, executive, and judicial powers delineated in the national constitution of 1787.

Second, our governmental structure may have grown out of a general, theoretical sense of proper institutional arrangements which would, naturally, be folded in both state and national constitutional orders. The framers of the constitutions of our first states were, like the founding fathers of our national constitution, students of the political theory of the day.[23] The discussion of political and constitutional fundamentals in the writings of Locke, Hume, Burke, and Montesquieu, discussions which formed the baseboards of the founding fathers' constitutional theory, did not distinguish for the most part between intra-national and national systems.[24] Federalism was the essential puzzle in the framers' national constitutional design, and it was with respect to forging a satisfactory set of federalism principles that the

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16. *See, e.g.*, Note, *Unenumerated Rights Clauses in State Constitutions*, 63 TEX. L. REV. 1321, 1321-23 nn.4-5 (1985) (describing examples of state constitutional rights provisions which go beyond federal protections).

17. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 125-255 (1969).

18. *See id.* at 150-61.

19. *See Harvard Developments*, *supra* note 7, at 1351-53. *See also* STATE SUPREME COURTS: POLICYMAKING IN THE FEDERAL SYSTEM (Mary C. Porter & G. Alan Tarr eds., 1982).

20. *See generally* William Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States 1790-1860*, 120 U. PA. L. REV. 1166 (1972). *See also* WOOD, *supra* note 17, at 453-63.

21. *See* Nelson, *supra* note 20, at 1170-73.

22. It may be argued, however, that the so-called "guarantee clause," in requiring the states to provide to their citizens a republican form of government, mandates a series of structural arrangements in the states that are identical to the national government. However, no state or federal court has so held.

23. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); DOUGLASS ADAIR, FAME AND THE FOUNDING FATHERS: ESSAYS (T. Colbourn ed., 1974).

24. *See* WOOD, *supra* note 17, at 127-61.

framers' were particularly creative and original.[25] Yet, with regard to other elements of constitutional design, including the division of powers, electoral procedures, and the scope of individual rights, there were theoretical connections between the political theory of the framers' inspirators and the needs and wants of the state constitutions' architects. The point is that the adoption of the basic rudiments of government design in the state constitutions adopted contemporaneously with the national constitution suggests that a similar understanding of American constitutionalism—an understanding borne of a similarly redolent political theory—informed both state and national constitutional processes of the time.[26]

The matter looks different, though, when we consider the processes of state constitution-building in the century-and-a-half following the adoption of the national constitution. Here, the role of the national constitution as template is not altogether obvious; nor did the United States Constitution restrict, except in particular instances,[27] the prerogatives of states to construct their own fundamental charter of government. Most state constitutions were adopted after—and, in a majority of instances, *substantially* after—the U.S. Constitution.[28] Each constitution has its own discrete history; many states have, over the course of their own histories, gone through periods of substantial political crises and constitutional upheaval. In contrast to the national constitution, the experience of state constitution formation and adaptation has followed a much more eclectic and unstable path. Amendments through direct initiatives and through constitutional conventions, while unheard of at the federal level, are a commonplace in the various states' constitutional experience. Indeed, most state constitutions did not sprint forth fully formed by a momentous framing experience, but are, instead, documents whose structures have been patched together through periods of change and reconstruction.

In many cases, this change has taken the form of overall reconstruction; more than a judicially generated constitutional "moment,"[29] these reconstructions represented the state's overhauling of basic principles and institutional arrangements. While American constitutionalism is described as being rather distinct from other systems in the world, systems in which constitutions are frequently amended, the experience of state constitutional change in the United States reveals that state constitutionalism is fluid, dynamic, and even unstable.

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25. *See* JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 161-202 (1996).

26. *See* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA (1980); Robert F. Williams, *"Experience Must Be Our Only Guide": The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L.Q. 403 (1988).

27. These instances entail basically the limits on state power under the federal constitution. In addition to the rights guaranteed by the first ten amendments, there are curtailments in the structure of the Constitution that, at the very beginning, circumscribed the prerogatives of states to act in defiance of federal constitutional strictures. *See, e.g.*, U.S. CONST. art. IV, § 2, cl. 1 (privileges & immunities clause). For our purposes, it is not important to distinguish between limits imposed directly on states in the United States Constitution, and tacit limits which grow out of authority granted in the Constitution to the federal government, for example, the so-called "dormant" commerce clause. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

28. *See* COUNCIL OF STATE GOV'TS, *supra* note 15, at 3

29. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

When state constitutions do undergo change and revision, the adaptations do not go in the direction of adopting federal constitutional forms; nor do state constitutions change in order to bring them into line with extant federal constitutional doctrine. They change, to put the point very broadly, because of the will of the legislators and voters of the state to reconstruct intrastate political and legal institutions. Retail changes frequently take the form of new (or curtailed) rights protections;[30] more structural changes redesign, for example, the system of state and local finance and the authority of intrastate political institutions to enact policy, raise and spend money, and carry out their electoral responsibilities.[31] We can hardly generalize about the sources and motivations of the multiplicity of state constitutional adaptations over two centuries; and no constitutional historian, to my knowledge, tries to. Instead, stories told about state constitutional change are appropriately localized, contextualized, and interestingly differentiated from the various stories told about the origins of the national constitution of 1787 and of the (rare) changes to that document in the two centuries following its enactment.[32]

Why doesn't state constitutional adaptation follow in some coherent form the template of federal constitutionalism? We might leave it with the observation that states are *entitled* to act differently from the nation as a whole, and so they do. But there is a more interesting explanation, one grounded in the most fundamental distinction between state constitutionalism and national constitutionalism. This is the distinction drawn between state constitutions as documents of limits and the federal constitution as a document of grant.[33]

B. *Straining the Analogy: On the Structure of Governmental Powers under State Constitutions*

The most fundamental structural difference between the scope of delegated powers under the national constitution and the state constitutions is this: State constitutions are documents of *limits*, while the federal constitution is a document of *grant*.[34] In other words, state governments can exercise all those powers not prohibited to them under their constitutions or other limits imposed by the national constitution. By contrast, the national government must find in the United States Constitution a delegation, whether express or implied,[35] of power to act. It is from this principle that we get the idea of a state police power, a power not possessed by the federal government in the United States Constitution.[36]

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30. *See Harvard Developments*, *supra* note 7, at 1353-56 ("[S]tate constitutions often guarantee substantive rights in terms far broader than even the federal Constitution's most expansive protections.").

31. *See, e.g.*, CAL. CONST. art. XIII(A).

32. One key distinguishing feature in the state constitutional process is the role of the initiative system. The initiative system provides greater mechanisms and opportunities for constitutional change. *See, e.g.*, DAVID MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984).

33. *See Harvard Developments*, *supra* note 7, at 1326-31.

34. *See, e.g.*, Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); Howard McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 190 (1916).

35. This caveat is necessary, of course, because of the United States Supreme Court's first, and still most significant, statement regarding the issue of whether the federal government's limited powers must be the product of express delegation. *See* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405-06 (1819).

36. *But see* Champion v. Ames, 188 U.S. 321, 347-53 (1903) (suggesting that the commerce clause authorizes the national government to exercise what is tantamount to a national police power).

Does anything turn on this theoretical distinction? The notion of the state police power expresses the core idea of the state legislative and executive power under principles of state constitutionalism, which is that state political entities may exercise all powers (except as limited by the national constitution) necessary to carry out state goals.[37] Those goals are, of course, to be defined by state political institutions, including the legislative, executive, and judicial branches of government. From the perspective of constitutional theory more generally, this principle is both peculiar and fundamental. It is *peculiar* to lawyers steeped in the American national constitutional tradition. The basic idea there is that the federal government has limited powers.[38] The states' police power and the corollary that state constitutions are documents of limit,[39] not grant, is the direct reverse of this. It is *fundamental*, for it tends to construct the system of state decisionmaking around the ideology of political discretion and choice, rather than around an ideology of the rule of law.[40]

The essential object of inquiry in the federal constitution's structural framework is the description of how powers are allocated by the constitution to the national government. The recurrent question is: What is the source of national authority?[41] By contrast, the object of inquiry in state constitutionalism is describing the source of the limits on state power under the state constitution.

To see how this is just so, consider the constitutional relationship among state political institutions and local governments. Whereas states occupy an essential role in the American constitutional system, there is no equivalent principle of federalism (or "localism") in state constitutionalism.[42] Local governments are creatures of the state.[43] The basic arrangement of intrastate government is the product of state-by-state choices about how to construct an appropriate system of state government.[44]

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37. *See id.* at 347.

38. *See M'Culloch*, 17 U.S. (4 Wheat.) at 406.

39. *See id.* at 374 (noting that state governments may exercise power not "expressly forbidden" by their constitutions).

40. Of course, the state may be constrained by particular constitutional provisions in a way which ultimately and firmly limits the scope of discretion and choice in political decisionmaking. Nothing in the notion of a state police power, after all, means that this power cannot be constrained by constitutional rules. *See id.* But surely the tendencies to so limit the states' powers are less in a constitutional framework within which state action need not be taken pursuant to a constitutional grant of power.

41. *See id.* at 402-04 (discussing whether federal power emanates from the people or the states).

42. The term "localism" has confused things somewhat by borrowing an analogy from discourse about federalism. *See generally* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990); Briffault, *supra* note 5. Federalism expresses not merely, or even especially, a principle about national-state relations, but rather, a core constitutional principle of power allocation. *See* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 108-18 (1995). Perhaps critics of federalism are correct in regarding the concept of federalism as anachronistic in the modern administrative state. *See* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 903-09 (1994). Or perhaps they are wrong. *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (arguing that federal power under the commerce clause is narrower than modern judicial interpretation). In any event, tying federalism as a constitutional principle to questions of national/state economic, political, and social relations requires a substantive argument. Likewise, insisting that there is something called our "localism" which describes the relationship between local governments and the states requires not only a political and economic argument for local prerogatives and power, but also a coherent political theory that explains why localism is properly a part of state constitutionalism.

43. *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907); GILLETTE, *supra* note 5, at 209-28.

44. *See, e.g.*, NANCY BURNS, THE FORMATION OF AMERICAN LOCAL GOVERNMENTS: PRIVATE VALUES IN

In the most extreme case, states can dismantle local governments altogether; in the more usual case, states create schemes for establishing, augmenting, and shrinking local governments' powers as circumstances change.[45] Even where the existence of certain municipal units, such as counties, are assured in the state constitution, it is left to the legislature to establish the scope and limits of those powers to be exercised by these units. This essential dependence of local governments on state legislative authority is a truism of state constitutional law.[46]

This is in profound contrast to the structure of the American federal system under the United States Constitution. States, in our system, are exogenous data; they are taken as given for the purposes of governmental organization.[47] It may well be the case that states have outlived their usefulness as components of regulatory administration in the modern administrative state.[48] Yet, however contingent or central we wish to regard the American states as a matter of constitutional history or normative theory, no one supposes that states are creatures of the national government, subject to the deconstruction by same and the reorganization into more functional administrative units.[49] At least no one supposes as much under our current theories of American constitutionalism.[50]

Insofar as the matter within state constitutionalism is of a wholly different conceptual dimension, the plethora of legal questions raised by state/local conflicts in the fifty states occupy a fundamentally different conceptual ground than the enduring questions of federalism that are part of the structure of constitutionalism at the national level. First, and most obviously, the nature of the political relationships between states and their local governments are necessarily quite different from the national/state relationship under American federalism. Not only does the principle of limited government and delegated powers represent this difference, but the insurance indicated by the Tenth Amendment's guarantee of

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PUBLIC INSTITUTIONS (1994). I do not mean, however, to overstate the extent to which these state/local arrangements are the product of rational political choice. On the historically contingent nature of state/local relations, see generally HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW 1730-1870 (1983); Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369 (1985) (tracing the development of modern American municipal law from its origins in English corporate law).

45. *See, e.g.*, Briffault, *supra* note 42, at 113-14.

46. This is not a *necessary* truism, to be sure, but one that describes the reality of state constitutional arrangements. *See id.* at 7. Surely a state could decide, in its own constitution, to establish a fixed series of local government units and to distribute a range of powers to those units. Municipal home rule functions somewhat like this. *See id.* at 10-12.

47. *See* Rodriguez, *supra* note 6, at 152-53 (discussing intractability of states' existence within the federal order).

48. *See, e.g.*, Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 GA. ST. U. L. REV. 1009, 1060-62 (1997); Rubin & Feeley, *supra* note 42, at 908-09.

49. This is so whether we believe, with Justice Thomas' dissent in *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), that states were the engines behind the creation of the constitutional republic and were, thereby, the proper locus for reserved powers, or whether we believe, with Justice Stevens, that the Constitution was created because of, and in the name of, "we the people." *See id.* at 846-48 (Thomas, J., dissenting) & 803. *See generally* SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 308-40 (1993) (discussing sovereignty issues in the ratification of the Constitution).

50. *See generally* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997) (discussing the centralization of power and the need to value federalism); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994) (examining the effect of political institutions and shifting social culture on federalism).

reserved powers[51]—whether a truism or a substantive, enforceable constraint[52]—reflects at least some degree of political empowerment of the states. By contrast, this empowerment is essentially lacking at the state/local level.

However, more turns on this distinction than the quite practical issues concerning the political and legal structure of local governments within state constitutional systems. The dependence of local governments on state political institutions renders moot a variety of deep normative questions that lie at the heart of constitutional theory pertinent to the United States Constitution. For example, there is no question that states may, within the scope of their police powers, regulate the intralocal movement of goods, services, persons and, indeed, may enact suitable regulations designed to control the system of commerce and commercial activities within their borders. Moreover, the states can regulate a plethora of non-commercial activities in the name of controlling the moral and social environment of the state (save, of course, for whatever individual rights are secured by the state and federal constitution). The pervasiveness of this police power makes a number of the most persistent issues in American constitutional law, including nearly all federalism-related issues, simply disappear as a constitutional matter. To the extent that these issues are left to the ordinary political process, we might think of the "documents of limit" principle as functioning as a comprehensive political question doctrine.

"Yes," it might be argued, "but the central questions of contemporary constitutional theory concern the nature and scope of individual rights. To the extent that theorists are preoccupied with those questions, then the structural differences between national and state constitutionalism are rather beside the point."[53] To begin with, the focus on individual rights characteristic of the advocates of a more muscular state constitutional law does not undermine in any way the different conceptual universes occupied by state and federal constitutionalism. Key to the enforcement of individual rights, after all, are those instruments of government who are under their respective constitutional commands. Moreover, this line of argument assumes, incorrectly, that there is a fundamental disjunction between the structural issues underlying constitutionalism and constitutional theory and issues involving individual rights. It is a fascinating feature of contemporary constitutional discourse that nearly everyone now agrees that this disjunction between structural and rights components of the United States Constitution is at least overstated and, at worse, fundamentally wrong. Indeed, it is a commonplace in modern constitutional theory debates to note the deep, mutual interdependence of the rights and structural provisions of the Constitution.

The connections between constitutional structure and the Bill of Rights under the United States Constitution have been elegantly and forcefully laid out in recent

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51. See U.S. CONST. amend. X ("the powers not delegated to the United States by the Constitution, nor prohibited by it to the state, are reserved to the states respectively, or to the people").

52. *See* William Leuchtenburg, *The Tenth Amendment Over Two Centuries: More Than a Truism*, (manuscript on file with author, 1997); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) (contending that the purpose of the Tenth Amendment was to allocate power between the nation and the states).

53. *See, e.g.*, *Texas Symposium*, *supra* note 7, at 959-1318; Note, *supra* note 16, at 1321-38.

theoretical debate.[54] Not surprisingly, this structure/rights connection has both a modern "conservative" and a "liberal" spin. The "conservative" spin highlights the significance of the framers' confidence in the Constitution's structural arrangements, particularly federalism and the separation of powers, to protect individual liberties and rights.[55] The essence of rights-protection lay not in strategies of activist judicial review (or, in the normative vocabulary, overreaching), but in conscientious safeguarding of the Constitution's structure and form. For Hamilton, of course, these structures were wholly adequate, and the Bill of Rights unnecessary, and even dangerous.[56] But even for Madison and other important framers, these structural arrangements would represent the very frontline of defense in threats to individual liberties and freedom.[57]

The "liberal" spin on this rights/structure connection aims to tie together the rejuvenated doctrines concerning federalism and separation of powers with the imperative of protecting individual rights.[58] Liberals' concern with more muscular federalism, for example, is that this empowers states to trample on individuals' political and civil rights. Federalism was, after all, the flag carried by opponents of civil rights in post-Reconstruction America and in the 1950s and 60s.[59] Nonetheless, federalism and separation of powers can be, with the right perspective in hand, means of ensuring complementary insurance for individual rights protection. Both structural doctrines are concerned, it is suggested, with securing a system of ordered liberty and in facilitating citizen engagement with and participation in the processes of American government at the national, state, and local level. Moreover, the slogan "we the people" ought to represent more than a rallying cry for democracy; it should instantiate as a fundamental premise of American constitutionalism the idea that governmental arrangements are no more nor less than *instruments* of individual liberties and of human flourishing through public action and participation in the processes of government.[60]

Therefore, we cannot easily sort federal and state constitutionalism into separate issues of *structure* and of *rights*. The core difference in inter-governmental relationships built into, respectively, federal and state constitutionalism, is an

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54. *See, e.g.*, Geoffrey P. Miller, *Liberty and Constitutional Architecture: The Rights-Structure Paradigm*, 16 HARV. J. L. & PUB. POL'Y 87 (1993); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PENN. L. REV. 1513 (1991); Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267 (1988).

55. *See* Miller, *supra* note 54, at 90-92.

56. *See* THE FEDERALIST NO. 84, at 364 (Charles Beard ed., 1948).

57. As Rebecca Brown explains:

> On the American side of the Atlantic the primary impetus for separated powers was the establishment and maintenance of political liberty. There was perhaps a secondary concern for greater efficiency in government, but clearly "[t]he doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power." In general, then, separation of powers aimed at the interconnected goals of preventing tyranny and protecting liberty.

Brown, *supra* note 54, at 1533-34. The quotation within this quotation is from Justice Brandeis' dissent in *Myers v. United States*, 272 U.S. 52 (1926).

58. *See* the discussion in Amar, *supra* note 54; Brown, *supra* note 54.

59. *See, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1111 (1977). *See also* Leuchtenburg, *supra* note 52.

60. *See* Miller, *supra* note 54, and Brown *supra* note 54.

important impediment to building state constitutional theory on the edifice of national constitutional theory. The point is not that this difference makes such an enterprise impossible, or even undesirable. Rather, the point is that a more sustained argument is needed for such an ambition.

C. *Constitutional Differences and the Development of Constitutional Theory*

Constitutional theory represents, in part, the process of telling a persuasive story about the American constitutional tradition. Where theory is informed in whole or in part by history, this story is organized, naturally, around the Constitution's founding.[61] Where there are other theoretical foundations in play, this story is a more eclectic admixture of different sources, principles, and inspirations. But, in any event, constitutional theory has a distinct context. There is a subject—*the constitution*—that is being studied. And the task of constitutional theory is not only descriptive—"what happened"—but also interpretive.

It follows, then, that the distinctiveness of state constitutional history and structure means that there is a distinct context for the shaping of constitutional theory. To the extent that we are interpreting events, the salient events in state constitutional theory are different; to the extent that we are telling stories which entail other, non-historical processes, these processes are, I have suggested, peculiar to state constitutionalism as a legal framework. Thus, the weak case for a distinct constitutional discourse rests on the insight that state constitutions reflect different processes and thus a different context. These differences call for, at the very least, close engagement with questions concerning whether the distinctions between federal and state constitutional processes have implications for how we ought to interpret these documents respectively.

There is, as I suggested in the introduction, a strong case to be made for an independent state constitutional theory. This strong case rests on a vision of state constitutionalism in the American political and legal system. In addition to differences in processes and contexts, *there are very good reasons to pursue a distinct state constitutional discourse*. This is the theme of the next Part of this essay. Before proceeding, though, to the stronger case for an independent state constitutional theory, we should pause to consider the question whether there is, despite the distinctiveness of state constitutional processes, still some relevant themes in extant federal constitutional theory. Can we address this distinctiveness by applying prescriptive tenets of federal constitutional theory to the enterprise of state constitutionalism?

D. *The Relevance of Federal Constitutional Theory*

There is no one decisive theory of American constitutionalism. Nor is there a consensus theory of constitutional interpretation. Debates continue to rage in ways that shape the discourse of constitutional scholarship at the end of this century.[62] Each contribution to the shifting debate adds to the mix of critique of extant

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61. *See* RAKOVE, *supra* note 25, at 3-22. *See also* the collected essays in FAITH AND THE FOUNDING FATHERS: ESSAYS BY DOUGLASS ADAIR (1974).

62. *See generally* the discussion in LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996).

theories and approaches and also, in the main, enhances our incomplete understanding of the vexing, exhilarating national constitutional experience. Shared in common among these large clusters of theories, though, is the exclusive focus on the United States Constitution, and its history, politics, and doctrine.[63] In reflecting upon the emergence of state constitutional theory as an element in making sense of state constitutionalism, we should pause to consider whether and to what extent contemporary constitutional theory, which theory developed in the context of national constitutional circumstances, sheds light on state exigencies and experiences.

Contemporary constitutional debate often clusters around two main theoretical projects. To the extent that these projects are especially in vogue of late, I consider how and whether they shed light on the subject of state constitutionalism. While not exhausting the field of modern constitutional theory, they suffice to illuminate the theme of my discussion in this essay, which is that state constitutional theory requires a theoretical approach tailored sensibly to the predicaments of state constitutionalism. The first approach is what I call *interpretive eclecticism*, a body of theory that confesses uncertainty in our ability to reduce constitutional interpretation and historiography to a few essential principles or values. This cluster of theories acknowledges the complex, multielemental characteristics of American constitutional discourse, and thereby counsel a rich, layered approach to tackling difficult constitutional questions.[64] As compared with a traditional balancing approach, which often rests on a crude cost/benefit weighing of government versus individual values,[65] interpretive eclecticism aims toward sophisticated theory and guidelines (or, at least, guidance), and thus distinguishes itself from efforts to turn away from theory toward something more pragmatic, ad hoc, and modest. Interpretive eclecticism is aspirational, highly sophisticated, and informed by not only lawyer's good common sense, but by an appreciation for the interdisciplinary (and perhaps even post-modern) sensibilities of contemporary constitutional adjudication as a distinctly normative enterprise.

I have in mind constitutional theorists such as Philip Bobbitt,[66] Steven Shiffrin,[67] Robin West,[68] Robert Post,[69] Michael Klarman,[70] Stephen Carter,[71] Sanford

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63. Consider, for example, Professor Laurence Tribe's seminal modern treatise on, as he titles it, "American Constitutional Law." The focus is exclusively on the national constitution. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978).

64. *See* the discussion in Michael Klarman, *Anti-Fidelity*, 70 S. CAL. L. REV. (1997); *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. (1997); *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 FORD. L. REV. 1739 (1997).

65. *See* the discussion of balancing in T. Alexander Aleinikoff, *Constitutional Law in an Age of Balancing*, 96 YALE L.J. 943 (1987).

66. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

67. *See* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983).

68. *See* ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994).

69. ROBERT POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995); "Theories of Constitutional Interpretation" 30 REPRESENTATIONS 13 (1990).

70. *See* Klarman, *supra* note 64.

71. *See* Stephen Carter, *Constitutional Adjudication and Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821 (1985).

Levinson,[72] and Richard Fallon.[73] Each of these scholars, and others, have criticized recent constitutional theory for its paucity of imagination and, at the same time, its frequently rigid adherence to a narrow intellectual template of what constitutes "proper" constitutional interpretation.[74] Each rejects uncritical adherence to traditional originalism, while maintaining fidelity as a key objective in interpretation. And each reject treating the constitution as a fixed and immutable object of interpretation, an object which can and ought to be interpreted like any other legal text.[75] Most importantly, though, each rejects the idea that constitutional interpretation can be reduced to few essential criteria. What is called for, instead, is a textured approach that folds in theories of democratic decisionmaking and of avowedly *value-laden* perspectives on the nature and scope of individual liberties, and of governmental structure and inter-institutional relationships. Constitutional interpretation is a *purposive* enterprise, meaning that the aim of the judge is not merely to enforce exogenously formed limits on governmental action, but to facilitate the maintenance of a congerie of constitutional values, such as the enhancement of democracy and of effective public governance.[76] For some, the enterprise of constitutional interpretation requires a hierarchy of theories in appropriate instances. Bobbitt and Fallon, for example, counsel the elaboration and implementation of a coherent collection of methods in tackling hard cases.[77] And even for those who, like Post and West, have in mind an overarching theme of American constitutional ideology, the normative suggestion is to bring to the adjudicative table an eclectic, sophisticated menu of interpretive devices.

The other approach very much in vogue in contemporary constitutional theory is what has been called *neo-originalism*.[78] Theories included under this approach grow out of the originalist tradition of pedigreeing historical evidence and context in considering how to discern framers' intentions and understandings.[79] The intentions of the framers are both discernible and relevant to the object of interpretation; and it is consistent with the proper role of the judge in constitutional interpretation to implement these intentions.[80] The scholars' related role is to unpack systematically, these multifaceted intentions through careful attention to American constitutional and political history.[81] The "neo" in this theory reflects the ambivalence of these theorists towards drawing solely on framers' intentions to ground constitutional doctrine; neo-originalists aim to unpack salient historical

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72. *See* SANFORD LEVINSON, RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (1995).

73. *See* Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

74. *See, e.g.*, Fallon, *supra* note 73; POST, *supra* note 69.

75. *See* RONALD DWORKIN, FREEDOM'S LAW (1996); LAW'S EMPIRE (1986).

76. *See, e.g.*, Klarman, *supra* note 64.

77. *See* Fallon, *supra* note 73, at 1240-48.

78. See the discussion in KALMAN, *supra* note 62, at 160-63 (discussing neorepublicanism) and 211-21 (discussing neofederalism).

79. *See, e.g.*, ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143-60 (1990).

80. *See, e.g.*, John O. McGinnis, *The Original Constitution and Our Origins*, 19 HARV. J.L. & PUB. POL'Y 251 (1996); Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. PUB. POL'Y 283 (1996).

81. *See* Jack Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMEN. 159 (1996).

understandings, to provide a more complete, historically informed body of evidence, leavened by careful theoretical and normative analysis, in order to shape out of traditionally value-laden debates a more grounded, and thereby more legitimate, basis for constitutional adjudication in the areas in which history can and ought to guide judgment.[82]

It has been said, not without cynicism, that neo-originalist approaches grow out of liberals' and moderates' desire to recover constitutional history from conservative originalists who, finding a sympathetic ear in the Reagan-Bush judiciary, built what turned out to be rather conservative interpretive guidelines upon exegeses into the intentions and beliefs of the founding fathers as they saw them.[83] Indeed, neo-originalism has flourished in the Rehnquist court; its message has been shaped and advocated by a collection of mostly young, conservative legal academics in a growing body of prescriptive constitutional scholarship.[84] Whatever the motivations for the enterprise, neo-originalist perspectives on constitutional interpretation are filling the pages of the law reviews and are shaping, in significant ways, the directions of mainstream constitutional theory.[85]

Significantly, each of the theories described above are tied deliberately and closely to the distinct American constitutional experience. Without exception, each of these clusters of theories, constitutional eclecticism and neo-originalist theory, aim to make sense of the values of the national constitution and its context.[86] They are most decidedly theories of constitutional interpretation; yet, they aim at more general goals—to construct a positive and normative perspective on American constitutionalism and its underlying values.[87] With respect to neo-originalism in particular, the agenda is to reconstruct in a more sophisticated way, the understandings and values of the Constitution's framers as shaped through the lens of modern constitutional practice and, where appropriate, contemporary understandings.[88]

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82. For an exceptionally nuanced discussion of originalism and its limitations, see RAKOVE, *supra* note 25, at 4-22.

83. *See* Richard Fallon, *The Political Function of Originalist Ambiguity*, 19 HARV. J. L. & PUB. POL. 487, 492 (1996) (describing originalism as "most often a political or rhetorical stalking horse for a set of substantive positions with respect to a relatively narrow set of constitutional issues in the current age.").

84. *See generally* Symposium: *Originalism, Democracy, and the Constitution*, 19 HARV. J. L. & PUB. POL. 237 (1996).

85. *See* Rakove, *supra* note 81.

86. For recent criticisms of the use of history by constitutional scholars in the originalist tradition, see Martin S. Flaherty, *History 'Lite' in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601 (1995).

87. *See generally* Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 357 (Andrei Marmor ed., 1995).

88. *See, e.g.*, John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996) (war powers); Michael McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (race and the Fourteenth Amendment); *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (takings); William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491 (1994) (judicial review); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (presidential power); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993) (federalism); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992) (separation of powers).

In this regard, both theoretical enterprises represent a movement away from more avowedly jurisprudential theories of interpretation. This move is significant, for it contextualizes the process of interpretation and thereby drives a wedge between theoretical approaches that might furnish a basis for tying together state and federal constitutional interpretation. The principal exemplar of a more jurisprudential approach to constitutional interpretation is Ronald Dworkin. Although Dworkin's recent contributions have concentrated on the United States Constitution and its judicial construction, he builds a theory of constitutional interpretation upon a general theory of legal interpretation.[89] Indeed, he has taken great pains to point out to his critics that his theory of constitutionalism and constitutional interpretation joins squarely with his general theory of legal interpretation, as spelled out most fully in *Law's Empire*.[90] The object is not to situate constitutional interpretation in the particulars of American constitutional history or, instead, in a positive political theory of constitution formation in 18th century United States.[91] On the contrary, Dworkin's comprehensive theoretical framework for organizing the task of legal interpretation is generalizable, good potentially for all systems which aim for, or instantiate presently, a set of justice principles which fall out along the lines suggested by Dworkin.

Whatever one might think of the theory, it represents, in its coherence, an approach to interpretation which, *at least in design*, could apply plausibly to issues of state constitutionalism and state constitutional interpretation.[92] Certainly, the ambition of interpretation as facilitating law as integrity could, if plausible, inform the interpretation of the state constitution as a text and could infuse contemporary state constitutional doctrine. Moreover, the nature of individual rights contained in state constitutions are equally well suited as are federal constitutional rights, to Dworkinian constitutional interpretation—or at least Dworkin and his adherents offer no reasons why this should not be so.

By contrast to this conspicuous jurisprudential approach, though, mainstream modern constitutional theory has turned more decisively toward a deep contextual and historically infused approach. Leading contemporary constitutional theorists represented by the cluster of theories I have traced above are determined to situate more closely the enterprise of constitutional interpretation, and of American constitutionalism more generally, within distinctly American constitutional politics, histories, practices, and legal developments. What is, if anything sacrificed, in these

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89. *See generally* RONALD DWORKIN, FREEDOM'S LAW (1996).

90. RONALD DWORKIN, LAW'S EMPIRE (1986).

91. Whether or not Dworkin would agree with this assessment of his approach as jurisprudential and historical, the separation between his object of normative inquiry and the subject of the American Constitution as a distinct document with a distinct historical process, is well illustrated in a recent article prepared for a symposium on "constitutional fidelity." In it, he criticizes prominent American constitutional theorists, including Laurence Tribe and Antonin Scalia, for their respective concerns with the framers' views and, more generally, with fidelity. Interestingly, Dworkin moves back and forth from discussions about the American Constitution to analysis of the moral constitution of which our Constitution is an imperfect archetype. Michael McConnell shrewdly contrasts Dworkin's occasional remarks concerning the constraining role of history with his more thoroughgoing fidelity to a "right answers" thesis. *See* Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269 (1997).

92. The effort to develop prescriptive theories of legal interpretation into which the architecture of constitutional interpretation can be folded is not something what is characteristic of philosophical approaches.

more contextualized, even American exceptionalist, approaches, is the connection between American constitutional theory and other constitutional forms and experiences.

In describing these approaches thusly, I resist voicing any criticism of their lack of a sustained comparative approach. On the contrary, there is something utterly sensible, and even brilliant, in the coherent enterprise of tying normative constitutional theory to the special legacy of the United States' constitutional experience. For one thing, the rediscovered relevance of political history in shaping interpretive approaches is well overdue; we now have an emerging vocabulary with which to tie together discussions among American historians, political scientists, and legal scholars.[93] At the same time, the tacit injunction of these theorists is for each constitutional republic to discover and explain its own distinct political histories and constitutional practices. Close scrutiny of our constitutional practice will no doubt frame debates about other constitutional systems; there is, indeed, evidence that American constitutional theory has informed discussion of constitutionalism abroad.[94] Yet, the location of modern constitutional theory in distinct American history and politics gives us substantial pause in considering, without further reflection, whether and to what extent such theory can be applied fruitfully when we have, as our object of scrutiny, a different constitutional system.

We return, then, to the question: To the extent that both interpretive eclecticism and neo-originalism confine their focus, as do other clusters of constitutional theorizing, to debates regarding the United States Constitution, can these theories be applied effectively to state constitutional practice? Not easily, I would suggest; that is, not without a sustained, and very contextualized, series of arguments for their applicability to state constitutional debates. Moreover, it is implausible that, as currently constituted, these theories will inform sensibly emerging state constitutional theory in a way adequate to tackle the central state constitutional debates of the contemporary American republic.

It is my claim in Part I of this essay that the American states have indeed a different constitutional system. We are all Americans, to be sure; and the development of state constitutionalism in the period beginning in the late 18th century and continuing, in periods of ubiquitous constitutional change, to the present has built, in greater or lesser respects, on the American constitutional tradition generally.[95] But if one is persuaded that the distinct properties of state constitutionalism represent a form of government and a strategy of political decisionmaking significantly removed from the creation of our national constitutional system, then we ought to be wary of translating prescriptive constitutional theory of the sort described above into state constitutional practice. It is telling, in this regard, that few coherent attempts at such translation have been made. On the contrary, mainstream constitutional theory remains nearly exclusively a *national* enterprise. Even supposing that the reasons for this lie not in deliberate

93. *See* KALMAN, *supra* note 62; RAKOVE, *supra* note 25.

94. *See* PETER C. ORDESHOOK, A POLITICAL THEORY PRIMER (1992); JON ELSTER & RUNE SLAGSTAD, CONSTITUTIONALISM AND DEMOCRACY (1988); STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY (1995).

95. *See supra* text accompanying notes 27-33.

choice but, rather, in a combination of inadvertence, elitism, and specialization of interest, I would suggest that there are, in fact, good reasons to resist at least the wholesale adoption of federal constitutional theory into state constitutional discourse.

The discussion thus far has focused on what is essentially a negative proposition, that is, the idea that federal constitutional theory is not obviously relevant to issues of state constitutionalism. We are left, though, with a large question: What are the sources, then, of our nascent state constitutional discourse? Is there not a version of, say, constitutional eclecticism, neo-originalism, or some other pieces of theory which can help guide state constitutional discourse? This is the question addressed in the final part.

II. STATE CONSTITUTIONALISM REVISITED: IS THIS A DIFFERENCE WITH A DIFFERENCE?

As noted in the introduction, there is both a weak and a strong case to be made on behalf of state constitutional theory as an independent normative enterprise. The weak case has been traced out, for the most part, in the previous two Parts. Therein I considered how state constitutionalism has distinct processes and histories, and how these distinct processes point to a more distinct theoretical project. While there are, to be sure, important common elements in the national and state designs, the evolving experience of state constitutional formation, along with the different stakes raised by the inter-governmental dynamics of state constitutions as documents of limit as opposed to the United States Constitution as a document of grant, at least raise the question whether the template of national constitutionalism is the appropriate one when questions arise in the context of state constitutional law. Moreover, given the preoccupation of modern constitutional theory with federal issues, a salient question is whether the context-laden thrust of constitutional theory as developed in mainstream scholarship has much to teach us about state constitutionalism and the issues therein raised. Again, though, this analysis merely raises questions concerning the largely uncritical connections between national and state constitutionalism. The objective of this last Part is to elaborate more fully the case for a distinct constitutional theory. My claim is that the stakes and operation of state constitutionalism raise distinct questions; accordingly, there are reasons to think more systematically about whether and to what extent we require a coherent state constitutional theory, with particular, context-laden principles and practices.

A. State Constitutions in the Federal System

It might be tempting to ask the question of whether, if we were concerned with crafting an American federal republic from scratch, we would design a system in which states could adopt their own, separate constitutional arrangements and, in turn, a uniquely state constitutional discourse. This question is especially pertinent in light of serious critiques of modern American federalism and, in particular, of the role of states and state law in an increasingly nationalized system of law and politics. Malcolm Feeley and Ed Rubin, for example, go so far as to argue that states

and the modern American federalism are both anachronistic.[96] If we are concerned, they argue, to preserve the values associated with decentralized decentralization, we have available both the theoretical vocabulary and practical architecture to implement more systematically a structure of decentralized policymaking.[97] Hence, there is nothing intrinsically valuable in preserving states *qua* states or the correlative constitutional principle of federalism.[98]

Yet, this is exactly the wrong starting point for a theoretical discussion of American constitutionalism and state constitutional discourse. States constitutions flourish in light of, and not despite, the American constitutional system.[99] Notwithstanding the enduring struggle over the scope of the national government's power and, relatedly, the prerogatives of states and their so-called "reserved" powers under the United States Constitution's Tenth Amendment,[100] the basic idea that states enjoy wide latitude to govern their own economies and their own citizens is essential. Significantly, states and their constitutions have not been collapsed into the federal government and the national constitutional system.[101]

This does not mean, of course, that the scope of state power under their respective state constitutions is without limit. For example, states are significantly restricted in their ability to act in ways that impose externalities on other states and governmental units.[102] The message of the dormant commerce clause and the privileges and immunities clause is that state regulation must coexist with the constitutionally imposed environment of free trade and free and equal movement of goods and persons.[103] State decisionmaking is, after all, subject to the general, national imperative of equal citizenship and interstate mobility.[104] Moreover, the pervasive rights enshrined in the Bill of the Rights and of the Reconstruction era amendments creates an elaborate, fundamental series of restrictions on the "freedom" of the states to protect their own interests at the expense of the American polity.[105] This is *at the very least* what it means to live in a *united* states, and not merely a confederation of essentially sovereign polities.

These limits imposed by the national constitution are interstitial, however. States' latitude to act within the domain of their (geographical, political, and legal) boundaries represents the baseline; limits imposed by the national constitution represent the exceptions, the side constraints on the general freedom of state action. It could not be otherwise, given the premise of American constitutionalism that the federal government is one of limited, delegated powers. To be sure, given the wide parameters of national power in late 20th century America, we can be forgiven for

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96. *See* Rubin & Feeley, *supra* note 42. *See also* Rubin, *supra* note 48.

97. *See* Rubin & Feeley, *supra* note 42, at 910-26 (discussing decentralization and federalism). *See also* SHAPIRO, *supra* note 42, at 79-91.

98. *See* SHAPIRO, *supra* note 42, at 14-57. *See also* Rubin, *supra* note 48; Rubin & Feeley, *supra* note 42.

99. *See* Sager, *supra* note 3.

100. U.S. CONST. amend. X.

101. *See* Rodriguez, *supra* note 6, at 156-62; Vern Countryman, *Why a State Bill of Rights?* 45 WASH. L. REV. 454 (1970).

102. *See, e.g.*, Kramer, *supra* note 50, at 1515-20.

103. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 401-545 (2d ed. 1988).

104. *See, e.g.*, Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

105. *See id.*; TRIBE, *supra* note 103.

taking occasionally for granted the enduring principle of limited government that underlies American constitutionalism.[106] The federal government has, after all, only those powers delegated to it under the national constitution; all other powers are reserved to the states.

It is critical to note that what is being reserved is not individual freedom, and, thereby, a defeasance to private ordering, but in fact *powers*.[107] Reserving powers to "states or respectively to the people" makes clear that, at least so far as the national constitution is concerned, the prerogatives of the states and their political units to exercise power within their domains is not the business of the national government.[108] Moreover, the states' primary role represents not only the *theory* of the American constitutional order, but also the *reality* of this order. States in fact regulate all types and manners of public and private decisionmaking. State constitutions, and the intrastate laws enacted in their shadow, are the most common elements of American public governance. State constitutional systems of varying scope persist in every state; no state cedes its own regulatory authority to the national government, although each could conceivably do so in order to surrender its own prerogatives to the protective power of the national government.

These, then, are the twin predicates of the state constitutional systems within the United States: First, the United States Constitution preserves to the states the power to create and enforce their own constitutions as charters of government for the citizens within the states; second, each state has accepted this power and has constructed a system of intrastate governance and public authority tailored to the particular circumstances of its state systems. In light of these brute facts, it makes little sense to invest ourselves in considering whether state constitutions make sense in a world of multiple boundaries and shifting spheres of administrative and economic conveniences.[109]

While it follows that each state is to be left to its own devices in shaping its own constitutional discourse, it does not follow that each state ought to fashion its independent, separate theory of state constitutionalism. On the contrary, there are sound reasons for developing a comprehensive—let us call it "trans-state"—constitutional theory which can help orient constitutional discourse throughout the United States. What is called for in the end is a balance: States can

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106. *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

107. Reserving to the states the right to exercise these powers, however, does not guarantee that the states will in fact exercise any particular powers. The states may, in the end, cede their authority to private citizens within their domain. The more interesting question is whether the national constitution's framers created a system of government, and a constitutional philosophy, which made it more or less likely that states would exercise their discretion *not* exercise certain powers. On the one hand, James Madison cautioned against the accomplishment of certain "wicked objects" by the state, including the overregulation of private property and the abridgement of contractual rights, suggesting that state power was at least as fearsome as national power. *See* THE FEDERALIST NO. 10 (James Madison). *See also* THOMAS PANGLE, THE SPIRIT OF THE AMERICAN REVOLUTION (1988). On the other hand, Article IV requires the states to guarantee to their citizens "a republican form of government," suggesting that the framers expected the states to govern, and to exercise some amount of powers, rather than merely to cede decisionmaking prerogatives to individual citizens. U.S. CONST. art IV, § 4.

108. To the extent that this expresses a constitutional principle, it does not matter whether and to what extent the United States Constitution's framers themselves shared a view about the proper content of state constitutions. What is critical is that they did not *express* a view within the national constitution. *See* WOOD, *supra* note 17, at 469-615.

109. *But see* Rubin & Feeley, *supra* note 42; Rubin, *supra* note 48.

develop independent discourse to account for their own, distinct constitutional traditions; at the same time, states can build upon a more general, trans-state constitutional discourse. After all, states share in common a set of constitutional objectives.

B. Comparing Constitutional Predicaments and Objectives

Modern constitutional theory aims at excavating and explaining the purposes and principles underlying American constitutional ideology.[110] As a contextualized enterprise, this ideology is profoundly shaped by—and, in the neo-originalist schema, beholden to—the ideas and theories of the founding framers at their key moments in time.[111] This ideology is shaped, as well, by close scrutiny of the *objects* of the American constitutional design.

It is impossible to understand American constitutionalism more generally without engaging the dilemmas and predicaments posed by the very task of designing "the machine that would go of itself."[112] The predicament which overshadowed all others was how to design the structural provisions of the constitution to ensure, simultaneously, a proper distribution (and separation) of powers among the branches of the federal government and also between the national and state government.[113] Serving both these aims, if imperfectly, was the essential principle of limited government. No principle is more significant to the apparatus of American constitutionalism than that principle. And yet the maintenance of limited government requires giving up to some fundamental extent the use of the national constitution as a positive instrument of governance and public policymaking.[114]

To the extent that the national government's powers are restricted to a domain created by the Constitution's broad charter, there will necessarily remain a range of positive actions and regulatory instruments that remain off limits to the national government. This is so notwithstanding the temptation to reconstitute the Constitution, especially through the device of implied powers, into an engine of a far-flung national police power. It is tempting to reconfigure national constitutional discourse in just this way, since the needs of modern American society are so pressing, so intractable, and, in many ways, requiring a comprehensive, national response. Yet, the principle of limited, delegated power which lies at the foundation of American constitutionalism requires us to resist scrupulously these temptations.[115] The United States Constitution has limited objectives. And constitutional theory, in its various shapes and sizes, is tethered to these fundamentally limited objectives.

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110. *See generally* LAWRENCE A. ALEXANDER, CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS (1997).

111. *See, e.g.*, McConnell, *supra* note 91, at 1278-79; BeVier, *supra* note 80. *See generally supra* text accompanying notes 15-38.

112. *See* MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986).

113. *See, e.g.*, Lance Banning, *The Practicable Sphere of a Republic: James Madison, the Constitutional Convention, and the Emergence of Revolutionary Federalism, in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 162 (R. Beeman, et al. eds., 1987).

114. *See generally* JENNIFER NEDELSKY, PRIVATE PROPERTY AND AMERICAN CONSTITUTIONALISM (1990).

115. *See, e.g.*, Richard Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388 (1987). *See also* United States v. Lopez, 514 U.S. 549, 552-57.

By contrast, state constitutions have much broader objectives. State constitutions are, as noted above, documents of limit rather than grant. State governments may act, through their police powers, to regulate, to govern, to tax, and in these ways to fulfill a myriad of social, political, and economic objectives within their jurisdictions.[116] State powers are not limitless.[117] Not only do states commonly limit the scope of governmental action under the domain of their respective state constitutions, but the national constitution through, among other devices,[118] the guarantees of individual rights, cabins exercises of state police power. This is all besides, of course, ubiquitous political constraints on the regulatory initiatives of state governments. But, as a fundamental theoretical matter, it is critical to sort out the objectives and strategies available to state governments under their constitutional systems and those more limited objectives characteristic of the national constitution.

When federal decisionmakers run up against the limited objectives of the national constitution, their only legitimate remedy is to find, in the Constitution, authority to implement their agendas. Of course, the United States Constitution has proved rather capacious with regard to these federal strategies.[119] The *leitmotif* of American constitutionalism during the two most momentous eras in constitutional development[120] was successful legal adaptations, through the impetus of courts and legal doctrine, in order to sanction assertions to broad federal authority.[121] The key move was, after all, the Court's decision in *M'Culloch v. Maryland*,[122] and its imprimatur on the notion that federal power may rest not only on expressly delegated authority, but also on authority implied from powers delineated in the Constitution.[123] Yet, however significant this acts of modulation, notice that they represent *doctrinal* innovations. They are all the product of judicial approving of national initiatives, approvals which have not undermined the principle of limited government but, rather, have settled arguments (mostly, through not completely, in favor of the national government) regarding the nature and scope of delegation.

The corresponding dilemma in state constitutionalism looks different when we recall the principle underlying the exercise of state governmental power under the constitution, which is that state constitutions are documents of limit, not grant.[124] Although judges are still called upon to decide questions concerning the scope of those limits, the opportunity for state decision-makers to act without the need to

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116. By "state power to act" here, I mean to include, too, the exercise of power by sub-state units such as municipalities and special districts. Indeed, the ability to rely upon these created sub-state units is a key feature of the states' capacity to accomplish social, regulatory objectives.

117. See discussion *supra* Part I.B.

118. *See supra* note 27 and accompanying text. (discussing the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and Privileges and Immunities Clause, U.S. CONST. art. IV, § 2, cl. 1).

119. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (constricting states' Tenth Amendment powers via Court's expansive reading of the Commerce Clause); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).

120. The two eras to which I refer are Reconstruction and the New Deal.

121. *See* TRIBE, *supra* note 63, ch. 5. *See also* ACKERMAN, *supra* note 29, at 99-104.

122. 17 U.S. 316 (1819).

123. *See id.* at 353.

124. *See supra* text accompanying notes 34-40.

convince courts to find authority "in" the state constitution is, by any measure, greater than their counterparts in the federal government. As a consequence, public policymaking in state government is, on the whole, a much richer, expansive, proactive enterprise than the national government, even under a very broad construction of what is "necessary and proper," constitutionally.

This may well have to do with the greater capacity of smaller governmental units to act aggressively;[125] or it may represent a certain distribution of functions either acquiesced in, or deliberately designed, by national politicians who are, after all, responsible for dealing with more inherently national issues such as foreign policy. There is a structural explanation as well for this divergence of policymaking activism: State constitutions preserve to state decisionmakers the power to act energetically, without jumping through certain hurdles as contrasted with the national government's domain, which, at least as a theoretical matter, is limited by design.[126]

The comparative structure of constitutional delegation and limits is well illustrated by the United States Supreme Court's two recent decisions in *New York v. United States*[127] and *Printz v. United States*.[128] Both cases involved federal statutes which required states to implement federal law through the deliberate use of state political institutions in the manner described in the federal legislation. The situation in *New York* was that the Low-Level Radioactive Waste Policy Act[129] required the state, when certain circumstances were triggered, to enact legislation in order to take title to certain radioactive waste facilities.[130] In *Printz*, the Court considered the Brady Handgun law[131] and a provision in it which required local sheriffs to carry out registration responsibilities.[132] In both cases, the Supreme Court struck down the federal government's attempts to, in the words of the Court, "commandeer" the states' legislative and administrative processes where such efforts aimed to conscript states and local governments into the service of national regulatory objectives.[133] The principal problem with this arrangement was this: Conscripting state and local officials into the service of national objectives rendered these decisionmakers vulnerable to the perception that it is the state and local governments, and not the feds, who are pursuing these initiatives.[134] Voters can be expected to punish, as it were, the "wrong" decisionmakers, thus undermining the constitutionally salient values of representative government.[135] While the national

125. *See* VINCENT OSTROM, THE MEANING OF AMERICAN FEDERALISM, chs. 6, 7 (1991). *See also* SHAPIRO, *supra* note 42, at 82-85.

126. *See supra* text accompanying notes 34-36.

127. 505 U.S. 144 (1992).

128. 117 S. Ct. 2365 (1997).

129. Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240, 99 Stat. 1842 (1986).

130. *See New York*, 505 U.S. at 149-54.

131. Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536 (1993).

132. *See Printz*, 117 S. Ct. at 2368-69.

133. *See New York*, 505 U.S. at 175-76.

134. *See Printz*, 117 S. Ct. at 2382; *New York*, 505 U.S. at 168-69.

135. Notice how the "accountability/representation" argument described in *Garcia* stands *New York/Printz* on its head. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). Therein the Court insisted that states would be adequately represented in the national political process and, therefore, no independent, enforceable constitutional right located in the 10th amendment is necessary to safeguard states' interests. *See id.* at 551.

government retained wide power, under their commerce and spending powers, to impose their regulatory objectives,[136] they could not blur the accountability line by using state and local officials to do their bidding.[137]

If the issue were to arise at the state constitutional level, by contrast, it is unquestionable that the state legislature would be free to commandeer local governments and their elected representatives in just the same manner as was disapproved by the Court in *New York* and in *Printz*. This is so, notwithstanding the fact that the accountability concern is *exactly the same*. The reason for the different result reflects the structural distinction between national and state constitutionalism described above: States have not only a broader scope of regulatory powers, but they have, correspondingly, a large arsenal of regulatory *strategies*. Indeed, the device of enforcing state commands through local officials is an ordinary and uncontroversial element of state regulatory decisionmaking.

The only rationale available to distinguish the doctrine of *New York* and *Printz* from the undoubtedly opposite result in the imagined state/local context is that the federal government is a government of limited, delegated powers. These limits entail restrictions on not only the subjects which the federal government may seek to regulate under its (broad) powers, but they also entail substantial restrictions on the regulatory methods available for the exercise of power. States' essential constraints follow from their own constitutional principles; yet, it is unlikely that states would constrict themselves in ways similar to the federal government. It is much more probable—and here we return to the subject of distinctive constitutional objectives—that states will allow themselves the latitude to adopt appropriately flexible regulatory instruments to tackle policy issues. The dependent relationship of local governments on state design reflects this latitude, as does the fundamental principle of state police power.[138]

Contrasting the limited capacity of national political institutions under the U.S. Constitution with the energy and activism available to state institutions under state constitutionalism may put an excessively positive spin on state constitutionalism. It is worth remembering that constructing our national constitution around a sphere of limits and constraints was a profoundly wise decision. Not only was there value in the decisions of the framers to limit the risk of national aggrandizement of power and reduction in citizen's liberties, but the creation of "limits" was, as Chief Justice Marshall shrewdly explained in *M'Culloch v. Maryland*, to be understood as part of a *constitution*, a charter of practical, adaptive governance.[139] Moreover, the label of activism attached to state constitutionalism as I have described it has also a

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Presumably if that analysis is correct, then there is little worry about state/local accountability in the *New York/Printz* context; after all, states can manifest their concerns with respect to accountability in their negotiations involving the original federal legislation. Or at least this is the logic of the Court's *Garcia* argument. Of course, a more mundane, but critical, difference between the analysis in *Garcia* and in *New York* is the alignment of the Court. Justice O'Connor, in her *Garcia* dissent, rejects the representation argument proffered by the majority. *See id.* at 580-89 (O'Connor, J., dissenting). The accountability argument fleshed out in *New York* follows from this rejection.

136. *See* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911 (1995).

137. *See generally* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993).

138. *See supra* text accompanying notes 37-50.

139. *See M'Culloch*, 17 U.S. 316, 407 (1819) ("it is a constitution we are expounding . . .").

negative, or at least cautionary, connotation. The presence of a state police power risks empowering state governments to trample on individual liberty both directly, through the broad assertions of governmental authority over decisions otherwise made by individuals and free markets, and indirectly, through the curtailment of local, community-based processes of decisionmaking in favor of more centralized, statewide action.[140] In short, we have in hand, when considering national and state constitutionalism, a double-edged sword. The opportunities for sound governance as shaped by state constitutions' real and potential objectives are cabined by the national constitution in a way more draconian than in state constitutions. At the same time, limits of the sort represented by our tradition of national constitutionalism have the advantage of channeling wisely federal authority; and the inherent grant of power to state governments has the disadvantage of risking dangerous expansions of state authority in the name of "policing" undesirable private conduct.[141]

C. *Toward a Distinct State Constitutional Discourse*

The preceding discussion has highlighted, through a comparative analysis of the structure of powers under the federal and state constitutions, the different predicaments facing these two levels of government under their respective constitutions. In this section, I consider how the particular dilemmas facing state governments may influence the project of developing a distinctive discourse of state constitutionalism.

1. Incentives and constitutional design

The objectives of state governance are achieved primarily through the instrumentalities of state and local political institutions. While the state constitution governs these choices, the broad latitude of authority entrusted to these political institutions by state constitutionalism means that most of these choices entail judgments about how best to pursue policy aims—in other words, the domain of *political* choice overshadows the domain of *legal* authority. Yet, to the extent that state political institutions are subject to the overriding commands of their respective constitutions, there is important room left for legal limits in the form of constitutional restrictions. The prudent course for state constitutional architects would be to create the sort of incentive structure that would feasibly preserve the essential prerogatives of state action—and, thereby, the advantages of proactive, energetic policymaking—while checking the temptation of the state to disregard local and individual interests in the name of fulfilling the interests of the state *qua* state or of individual state legislators.

To be sure, the interest in creating proper incentives is not unique to state policymaking. Surely, James Madison had exactly this issue of incentives and

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140. *See supra* text accompanying notes 128-136.

141. For example, if we return to the "commandeering" scenario described *supra* in the text accompanying notes 127-38, we can see that with the states' greater latitude to act comes a greater threat not only to individuals' liberties but also to the structure of representative government and political accountability which underlies, at the broad level of democratic political theory, both national and state constitutionalism.

power in mind when he described the values of separation of powers in the 51st Federalist paper.[142] Yet, the particular concern with incentives structure in connection with state constitutional design is the result of, first, the absence of any coherent federalism-like arrangement which would safeguard the institutional interests of sub-state units in a state constitutional system,[143] and, second, the absence of a principle of limited government which would, as designed and as enforced by courts, impose a special, *ex ante*, burden on the state government to describe reasonably precisely the constitutional authority for their actions.[144]

Therefore, one element of a distinct constitutional discourse at the state level is the development of a constitutionally embedded incentive structure which would function to check state political decisionmakers in their pursuit of energetic policymaking and would correspondingly empower sub-state political units, such as local governments, to participate in policy decisions and to provide their own sets of checks on the exercise of power by state institutions.

The advantages of such a incentive-based constitutional discourse would be two-fold: First, creating proper incentives would enable state governments, and the implementation mechanisms upon which states rely to carry out their policy agendas, to more effectively accomplish their multifaceted aims. Given the uniquely broad latitude with which states are entitled to operate through their police powers, the function of incentives are both to limit states to a range of appropriate, just actions—a need especially acute insofar as we are wary of the self-interested motivations of political decisionmakers[145]—and also to channel state and local decisionmaking into optimal, efficient patterns. Even as we are realistic about law's capacity to shape political decisionmaking and institutional behavior, we can hold out hopes that a carefully designed, independent state constitutional theory will aid us in developing these incentives.

There is a second advantage associated with an incentive-based constitutional theory. That is, it can create the set of conditions and legal/political environments in which states can more successfully compete and collaborate in an interstate economic marketplace.[146] The growing interdependence of states has been well described in the political economy literature; and much attention has been lavished on the increasing globalization of commerce.[147] However, it is important to remember that, with respect to a nation like the United States, economic regulatory

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142. *See* THE FEDERALIST NO. 51. (James Madison). *See generally* GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST 95-175 (1981) (explaining THE FEDERALIST NO. 51 and comparing it to Alexander Hamilton's vision of government in THE FEDERALIST NO. 78).

143. *See supra* text accompanying note 109.

144. This point raises an immensely large set of issues concerning the relationship between constitutional structure and political incentives, issues which are mostly beyond the scope of this essay. *Cf.* Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 52-56 (1994) (questioning whether the framers deliberately created such a system, and analyzing how the legislative branch should act in the wake of the Constitution's all too frequent silences).

145. *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 12-37 (1991) (describing behaviorist assumptions underlying public choice theory of legislation).

146. *See* SHAPIRO, *supra* note 42, at 76-88. *See generally* THOMAS R. DYE, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS (1990).

147. *See generally* Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441 (1994); Laurence T. Aurbach, *Federalism in the Global Marketplace*, 26 URB. LAW. 235 (1994).

strategies must account not only for the decisionmaking processes of the national government, but also for the processes of the fifty state governments. The most common set of legal strategies for dealing with the inefficiencies of federalism, namely, the barriers on mobilized, national action associated with the fifty-headed behemoth of the states, is centralization and command-and-control.[148] The problem, as traced in the relevant literatures, is not only with coordination difficulties, but also with what is perceived as a deleterious set of incentives on the part of the states.[149] There are utterly sensible reasons for, in the appropriate circumstances, following command-and-control strategies and thereby to replace state initiatives with a nationally designed competition policy. That was, after all, at the heart of the dismantling of the Articles of Confederation over two centuries ago.[150]

At the same time, little attention has been paid to the capacities of state constitutions to adapt, through a scheme of properly designed incentives, their own mechanisms to deal with the increasingly important interstate and international marketplace. I offer no serious reflections on the precise contours of this interstate marketplace, except to note that, whatever its descriptive and normative dimensions, states' capacities to participate successfully (and on behalf of their citizens) in this market turns profoundly on the shape and implementation of their fundamental law, their *constitutions*.

2. Constitutional forms and functions

To consider more carefully what such an incentive structure might look like, let us return to the constitutional relationship between state and local governments under state constitutions. The potential for exploitation of local communities or, to put it less melodramatically, the disregarding of local interests in the name of statewide concerns, exists because the absence of any sovereignty-like protections for local governments.[151] This lack of protection is not an historical oversight or a peculiarity of contemporary urban politics; rather, it is a concomitant of the principle that local governments are no more nor less than creatures of state government.[152] This is as it should be. Nonetheless, a state constitution ought to preserve some sphere of decentralized decisionmaking, if only to yield the significant economic and social advantages associated with such decentralization.[153] Perhaps, as well, such decentralization could preserve more noninstrumental,

148. *See generally* ALICE RIVLIN, REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES, AND THE FEDERAL GOVERNMENT (1992).

149. *See, e.g.*, SHAPIRO, *supra* note 42, at 34-50. One especially interesting strand of the debate over state versus federal control has concerned the so-called "race to the bottom" in environmental law. For different perspectives on this question, compare Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, YALE L. & POL'Y REV./YALE J. ON REG. 67 (1996) (symposium issue) and Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of Environmental Policy*, 86 YALE L.J. 1196 (1977) with Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

150. *See, e.g.*, BEER, *supra* note 49, at 244-78.

151. *See* GILLETTE, *supra* note 5, at 301-47; Terrence Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1964).

152. *See supra* text accompanying notes 42-45.

153. *See supra* text accompanying notes 145-50.

communitarian values, values which were certainly championed by at least a segment of the framers' generation, and, more recently, by a wealth of democratic theorists concerned with local democracy and self-government.[154] These values include the development of creative, original mechanisms for the expression of citizen preferences in local decisionmaking. They might also include the articulation of distinct municipal rights, and also the pursuit of unique protectionist goals with respect to the community's natural and built environment, goals which would, again, be appropriate if generalized to the inter-local and statewide level, but goals which might adapt especially well to local communities.[155]

The key to this preservation of local power, albeit in the shadow of the complete legal dependence of local governments on state action and the corresponding control of local decisionmaking by state political institutions, lies in the sensible construction of political and economic incentives, along with the careful design of appropriate legal safeguards. One device, however imperfect in practice, for the accomplishment of these aims is the principle of municipal home rule, which was developed in order to maintain a sphere of local prerogatives in the area of "local affairs" and therefore to ensure, through the operation of state constitutional law, some degree of decentralized decisionmaking.[156]

Another incentive related constitutional device is the power of the state to delegate certain lawmaking and law adjudication powers to regulatory agencies and bureaus. Such delegation at the federal level has long been countenanced as part of the national government's sphere of "necessary and proper" commerce power.[157] Delegation at the state level has been more of a mixed bag—ironically, given the greater sphere of state power under their constitutions—with courts crafting different standards for gauging constitutionally appropriate delegations. If anything is clear from this admixture of state "delegation" decisions is that state courts have not developed a persuasive constitutional theory, either particular to their own state constitutions or more generally, to sort out proper from improper delegations. Part of the task in developing such a theory, I would suggest, is to consider what scheme of constitutional delegation is most consistent with the two aims described above—facilitating sound intrastate governance, and contributing to the states' respective capacities to compete and collaborate in an interstate economic marketplace. Delegation of power, as part of the enterprise of regulatory strategizing, would seem to be connected strongly to both of these aims.[158] The task of a distinct, trans-state constitutional discourse would be to shape a delegation "doctrine" suitable for the particular dilemmas facing state government.

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154. *See, e.g.*, Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047 (1996); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993).

155. *See* Daniel B. Rodriguez, *State Supremacy, Local Sovereignty: Reconstructing State/Local Relations Under the California Constitution*, *in* CONSTITUTIONAL REFORM IN CALIFORNIA 401 (Bruce F. Cain & Roger G. Noll eds., 1995).

156. *See* Gillette, *supra* note 5, at 301-47; Sandalow, *supra* note 151.

157. *See* Touby v. United States, 500 U.S. 160 (1991); Mistretta v. United States, 488 U.S. 361 (1989); J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928); Field v. Clark, 143 U.S. 649 (1892). For different perspectives on the desirability of broad legislative delegations, see David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 YALE J.L. ECON. & ORG. 81 (1985).

158. *See* Mashaw, *supra* note 157.

Because much of the preceding discussion has been preoccupied with structural issues, I have not said much about the role of individual rights protections under state constitutions. Such protections are undoubtedly critical. They function, as does the Bill of Rights in the national constitution, as fundamental limits on the power of government to deprive individuals of essential liberties and freedoms. And, as in the nation generally, these protections are enforced in each of the fifty states by courts equipped with the power of judicial review. Courts are also, however, equipped with their own, respective theories of constitutional interpretation. It is in the development of these theories that state constitutional theory which takes state constitutionalism seriously as a distinct enterprise is imperative. Given the absence of the principle of limited government in the state constitutional system, the responsibility falls even more squarely than at the federal level on judges to articulate the scope of individual rights and to enforce their protections against state and local encroachment. The other side of the ubiquitous police power is, of course, the risk that states will, in the name of active, energetic government, trample on citizens' liberties. Moreover, to the extent that constitutional protections under the federal constitution are limited—as Justice Brennan argued powerfully in his call twenty years ago for a state constitutional renaissance[159]—state enforcement of individual rights in an independent, and even "activist" fashion, is especially appropriate.[160] At the same time, disagreement will likely continue to rage concerning the proper scope of individual rights under state constitutions; yet, the point is not to resolve squarely these disagreements but, rather, to suggest modestly that discussions about the state constitutional interpretation of individual rights and liberties ought to proceed within the context of a distinct, sophisticated state constitutional theory. The challenge, after all, is for states to design a system in which their citizens both construct their body of essential individual rights and maintain a legal and political structure for the protection through the rule of law of these rights.[161]

Each one of these incentives structures I have described above are ideal types. If we were to consider in detail how these principles and doctrines play out in the practice of state constitutionalism in the fifty states, I suspect we would identify some systems as reasonably effective in structuring incentives, with others deeply dysfunctional. I do not offer here any extended explication or defense of these devices in practice. Rather, the aim of this discussion, as with this essay generally, is to offer some concrete examples of how a distinctive state constitutional theory, one which is attentive to the particular predicaments of state governance, would tackle certain legal conundra. Each of these devices has an analogy of sorts in federal constitutional law, so we might compare municipal home rule to federalism, insofar as both constitutional principles aim to explain the dimensions of the relationship between layers of government in a constitutional democracy.[162] Additionally, the principles concerning the proper delegation of legislative power

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

160. *See supra* text accompanying notes 53-60.

161. *But see* Kahn, *supra* note 3; Gardner, *supra* note 9.

162. *See supra* the discussion at note 42.

also resonate in national constitutional law where the delegation doctrine exists to limit the scope of national legislative power.[163] However analogous these federal constitutional doctrines and principles are, they fail to describe accurately the nature of the *state* constitutional dilemmas to which the state doctrines and principles respond. Home rule is *not* the same as federalism; not only is the history and context distinct, but these two principles respond to fundamentally different political and economic circumstances.[164] Moreover, they exist in distinct constitutional universes.[165] Rather than straining the analogies in order to connect extant constitutional theory to the state constitutional enterprise, we would do better to think more independently and creatively about how a more distinct constitutional discourse would make sense of these dilemmas and doctrines.

D. *State Constitutionalism and Interstate Differences: Contrasting Constitutional Projects*

A dominant theme of this essay has been the difference—between national and state constitutionalism—and its consequences. One is entitled to ask, then, why I stress the virtues of a coherent state constitutional theory rather than, say, a California constitutional theory, a New Jersey constitutional theory, a New Mexico constitutional theory, and so on. Surely, states are entitled not only to their own distinctive state constitutions, but are also entitled to arguing for a particularized state constitutional theory which is tailored to local needs and circumstances. However, states have similar objectives in governance; moreover, they face similar dilemmas and require fundamentally similar incentive structures. What it means to be a state political system within the structure of the American republic is to face a collection of predicaments and to tackle a common set of policy issues.[166]

Let me begin with the most abstract version of the argument for a trans-state constitutionalism. Each state in our union ought to be seriously responsible for addressing systematically and efficiently the needs and demands of its citizens. Notwithstanding discrepancies in wealth, size, geography, location, and political structure, we believe that there are agendas which ought to be—not as a federal constitutional matter, but as a general normative matter nonetheless—part of the processes of state governance. One of these agendas is the construction of a state economy which enables citizens and businesses to participate in both intrastate and interstate market, as consumers and as producers.[167] Other agendas include the provision of basic human security, such as protection against crime and natural disasters, and also the provision of a system of private law which enables a system of property rights and enforcement of contracts, and a system of legal redress for torts and invasions of other legally cognizable interests. While we might

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163. *See generally* Peter H. Aranson, Ernest Gellhorn & Glenn O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1983).

164. *See* the discussion in Rodriguez, *supra* note 6.

165. *See id.*

166. *But see* Kahn, *supra* note 3; James A. Gardner, *The "States-as-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475 (1996). Both Kahn and Gardner insist that any identification with states *qua* states has dissolved in the face of the nationalization of citizenship.

167. *See, e.g.*, Wallace E. Oates & Robert M. Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?*, 35 J. PUB. ECON. 333 (1988).

legitimately quarrel over the scope of these necessary agendas, so long as we believe that there are certain responsibilities which the states and their respective systems of government owe us as a matter of just and efficient social policy, then one of the objects of a constitutional theory which has salience across the fifty states is to provide a means of facilitating, through constitutional design, doctrine, and principles, the carrying out of these responsibilities.

There is a second, and very different reason to insist upon a trans-state constitutional theory. This pertains to the dynamics of interstate competition and policymaking. Once again, we need to recall the fundamental structure of the federalist system. Each state is entitled not only to govern within its borders, but it is also expected to compete with other states in an interstate economic marketplace. This expectation lies at the heart of the framers' construction of both free trade and competitive equality principles in the U.S. Constitution of 1787.[168] The free trade principle is, of course, manifest in the commerce clause of Article I, Section 8. Whatever other values the commerce clause serves in a national, and now global, economy, its basic aim was, as articulated well in the Virginia and Kentucky Resolutions,[169] to ensure a system of free movement of goods and persons and, overall, a system of free trade. The equality principle is embodied in the Privileges and Immunities clause of Article IV.[170] While the equivalent clause of the Fourteenth Amendment[171] has, through the device of incorporation, been construed to protect the equality of individuals more generally, the original Privileges and Immunities clause of 1787[172]—along with the commerce clause,[173] part of the structural protections of the Constitution—safeguards equality in order to facilitate the equal opportunity of citizens in all fifty states to pursue economic and social advantage regardless of where they reside and to where they travel. Both principles express the framers' fundamental interests in creating the conditions of a flourishing economic marketplace, one in which citizens' key representatives—the states and their political organs—can pursue their political and economic aims in this market, subject to the pursuit by their state competitors of their own aims.[174]

In the end, though, the case for a trans-state constitutional theory is only as strong as the theory itself. The task described in this essay is to develop principles and doctrines appropriate for addressing the distinct elements of state constitutionalism. Within state constitutionalism are common themes and also important differences. As a positive and normative project, state constitutional theory must keep squarely in mind whether and to what extent differences in states call for particularity and functional context, rather than for general principles and rules. My suspicion, though, is that the cluster of issues which emerge within states' legal and political systems at this time in our history raise similar stakes and have more or less similar shapes. The prospects for state constitutional theory, then, remain as strong as do

168. *See* Regan, *supra* note 104.

169. *See* ANDREW C. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 272-81 (1935) (discussing the Virginia and Kentucky Resolutions).

170. U.S. CONST. art. IV, § 2, cl. 1.

171. U.S. CONST. amend XIV, § 1.

172. U.S. CONST. art. IV, § 2, cl. 1.

173. U.S. CONST. art I, § 8, cl. 3.

174. *See* Kramer, *supra* note 50; Friedman, *supra* note 50.

these similarities and common contexts. The case for centralization in the national government has long rested on versions of the slogan "we are all in the same boat together." Perhaps paradoxically, this slogan also undergirds the quest for a comprehensive, trans-state constitutional theory, theory which addresses our collective aspirations as citizens of our respective communities, states, and the nation.

III. CONCLUSION

Constitutional theory is a key part of the project of creating legal rules and principles in order to implement our vision of constitutionalism in the United States. While this enterprise has, in its eclectic elements, been preoccupied with the United States Constitution, there are different challenges facing those of us preoccupied with state constitutional law and with the relationship among levels and layers of government within a state constitutional system. We are interested in how our states confront challenges concerning regulation, politics, institutional design, and social and economic goods and services.[175] Moreover, we are interested in how state constitutionalism as a more or less coherent theoretical apparatus addresses ubiquitous questions of institutional design and competence. The descriptive questions concern what we see, and what we think about what we see, when we look into state constitutional forms; the normative question concerns how to make the system work better. So, however quaint sounding these questions are to the ear of folks steeped in federal constitutional discourse, they are real and enduring when considered through the lens of state constitutionalism.

The questions are real and enduring because of qualities characteristic of state constitutions and their particular and general histories. These qualities are distinct from our federal constitution in ways that make our attention to the intersections of positive constitutionalism and prescriptive theory pertinent; and these distinctions help shape the domain of normative theory within which our efforts are carried out.

The objective of this essay is to provide some traces of a framework within which we can think creatively about state constitutional theory. I have considered the case for a distinctive state constitutional discourse and described, in broad outlines, a few of the key issues which such a discourse will need to engage. There are sound reasons to believe, with James Gardner, that state constitutionalism has to now been a "failed discourse." There are equally strong reasons to believe, however, that these failures have been failures of imagination.

175. We may be interested in this from the perspective of one particular state or from a comparative perspective, with the fifty states as our laboratories. *See* Gardner, *supra* note 166.