TWO COMMUNITIES: PROFESSIONAL AND POLITICAL

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James Gardner's article, *The Failed Discourse of State Constitutionalism*,[1] is an important contribution to the rapidly developing debate over the role of state constitutions. Gardner serves us well in pointing to the gap between the recent rhetoric of state constitutionalism and the reality of state-court practice. He raises important warnings about the unintended consequences for the national community of a vigorous pursuit of state constitutionalism and correctly insists that we take a hard look at the people we are before we romanticize about the peoples we might like to be.

Gardner's critique of state constitutional discourse provides an opportunity to explore the role of discourse in constitutional adjudication as well as in constitutional theory. Constitutional adjudication occurs within the discourse of a professional community. Gardner's critique of state constitutionalism largely relies upon his understanding of the conditions under which this professional discourse can successfully go forward. When Gardner moves from the professional discourse of adjudication to the theoretical discourse on legitimacy, he invokes a different idea of discourse—that of a political community. Like other constitutional theorists, he then identifies the discourse of the professional community with the discourse of political community.[2] This is a surprising identification, given the distance that the public ordinarily perceives between itself and the legal profession.

Behind this turn from professional discourse to political discourse are two intertwined beliefs. First, discourse can constitute the identity of a community and its members. Second, the authority of constitutional law must be grounded in a community of constitutive discourse. This set of beliefs leads to a focus on the discursive aspects of adjudication and, consequently, to a search for that ideal community which can lend its legitimacy to the authority of the courts. This search is bound to be

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

2. *See, e.g.*, Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

frustrated, because the authority of the courts can neither be explained by, nor reduced to, discourse.[3]

In the first part of this essay, I describe the conditions under which a professional community of lawyers can maintain a common, constitutional discourse. Next, I contrast the professional community with the political community and consider what is behind the effort to collapse the distinction between the two communities. Finally, I sketch an alternative understanding of the interpretive turn in constitutional theory—not as an effort to ground authority but as a strategy for contesting the power of the courts.

I. THE TALE OF THE FRUSTRATED LAWYER: THE POSSIBILITY OF PROFESSIONAL DISCOURSE

Gardner begins with the story of a frustrated lawyer. This lawyer wants to make an argument for his client under the state constitution but finds the case law either entirely empty or so confused and partial as to be useless: "[N]othing in these state opinions gives you any idea of what you, as an advocate, could say to convince the state courts of the merits of your state-constitutional claim."[4]

The frustrated lawyer needs a "constitutional discourse" that will allow him to operate in his professional role. Gardner defines "constitutional discourse" as "a language and set of conventions that allow a participant in the legal system to make an intelligible claim about the meaning of the constitution."[5] "[B]y 'participant in the legal system,' I mean primarily lawyers, judges, and litigants—the people who carry on the daily business of adjudicating actual controversies within the legal system."[6]

Gardner asks a question of obvious relevance to the growth of a vital state constitutionalism: What are the necessary discursive conditions of the professional activity of lawyering? Lawyers must know what counts as an argument. They must be able to respond to each other and to the courts in ways that professional participants recognize as appropriate. Gardner finds a model in the adjudication of

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3. For an earlier elaboration of this distinction between discourse and authority in the context of state constitutionalism, see Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993).

4. Gardner, *supra* note 1, at 766.

5. *Id.* at 767.

6. *Id.*

claims under the federal constitution. Lawyers litigating federal cases know how to write briefs and make arguments. In contrast, when lawyers try to make arguments about the meaning of state constitutions, all too often they come up speechless.

This is the perspective of craft. Gardner claims that judicial opinions on state constitutionalism have none of the virtues of the lawyer's craft. There is no elaboration of text and history or of governmental structure and community-specific values—the materials out of which federal constitutional arguments are regularly constructed. State court opinions are too thin to support the lawyer's craft—they offer "no language in which to engage in intelligible debate with an opponent or with a judge over the meaning of the state constitution."[7]

This question of craft should be distinguished from two related, but distinct, questions that Gardner also poses. First, what must lawyers believe about the character of their arguments if they are effectively to adjudicate constitutional issues? Lawyers do not only exercise a craftsman's skill; they also operate within a set of normative beliefs about the relationship between their craft and the virtues of the political order. Second, what must the relationship be between professional, legal discourse and the discourse of the political community if the courts are to be understood as exercising a legitimate authority? Gardner's answers to each of these questions deepens the frustrations of the well-meaning lawyer attempting to construct an argument in support of a state constitutional law claim.

Lawyers are professionals who make arguments for clients. Nevertheless, most lawyers do not consider themselves merely agents of their clients' wishes. They do not believe that the value of the legal system depends upon the moral worth of the interests that choose to use it. Viewing themselves as professionals, officers of the courts, and members of the bar, lawyers maintain a self-understanding that is independent of particular clients and the interests those clients pursue. Such interests are exogenous to the legal system, but the lawyer carries forward a set of endogenous interests that represent the internal values of the legal enterprise.

Lawyers generally believe that their enterprise advances a just, or at least a reasonable, ordering of the polity. One form in which they maintain this belief is through the invocation of the adversary system. Vigorous representation of a client's interests, even though one-sided, is

7. *Id.* at 797.

conceived as a role within a larger system that balances competing representations. An ideal observer would presumably see the interactions of all the roles—lawyers and judges—and see that the system as a whole produces just results.[8]

Gardner is not very interested in this approach to the lawyer's role. Instead, he asks what the lawyer must believe about the character of legal argument. Gardner is surely right to push the inquiry in this direction. The adversary system, as a contextual justification of legal roles, works less and less well as we move from an idea of law as a means of resolving private disputes to an idea of law as a resource for the construction and maintenance of our public order and political identities.

Certainly in constitutional litigation, lawyers see their arguments not as simply client-driven, but as expressions of the correct constitutional interpretation. We need to distinguish between the lawyer as a social actor with the role of client representation and the lawyer as a speaker. In public law litigation, at least, the lawyer's speech adopts the judicial point of view—lawyers say what they believe the judges *should say* and what they believe they would say were they judges.[9]

Ethical problems arise when lawyers cannot accomplish this complex mediation between representational roles and discursive functions. This process is completely frustrated when legal discourse fails to demonstrate the virtues of craft. If one does not know what counts as a good or bad argument, then nothing is left but the interests of the client. But the issue here goes beyond craft. We do not want simply the best crafted argument to win. In constitutional adjudication, the "best" has a measure other than the virtues of craft.

Gardner abandons the perspective of craft when he suggests that a belief in an independent truth is a necessary condition of the lawyer's role in constitutional adjudication. The point of legal argument, of both lawyers and judges, is to realize this preexistent truth.[10] This view is illustrated most clearly when Gardner distinguishes between "assertion" and "argument."[11] Gardner is critiquing a set of state-court decisions that fail to offer a rationale for their outcomes: the "opinions reveal no

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8. For an exploration of the limits of this theory of justification, see DAVID LUBAN, LAWYERS AND JUSTICE (1988).

9. *See* ANTHONY T. KRONMAN, THE LOST LAWYER (1993).

10. *See* Owen M. Fiss, *The Supreme Court 1978 Term Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9-17 (1979).

11. Gardner, *supra* note 1, at 797.

intelligible discourse of distinctions on which litigants could rely in order to build effective arguments concerning the ways in which the state and federal constitutions differ."[12] Intelligible discourse should be the link between lawyers' arguments and the products of the courts. Courts must explain themselves in a way that reveals the rational basis of their decisions. This rationale is the end toward which the lawyer's arguments reach. Intelligibility is, therefore, a condition of successful adjudication. All participants in constitutional adjudication are engaged in a common inquiry into the intelligible meaning—i.e., the truth—of the constitution.

Everyone familiar with the work of the courts, however, knows that the problem of unjustified outcomes is not unique to state constitutionalism. It may be that the problem of federal constitutional law is not the paucity of arguments but the superabundance of arguments, different subsets of which support different outcomes.[13] One side might appeal to history to displace text, while another appeals to text to displace history. The problem of the relationship between argument and outcome remains the same, however, whether we suffer from a scarcity or plethora of arguments. Choosing among possible arguments appears as another form of assertion. The Cartesian hope for rational reasons at all levels, the desire for intelligible transparency of legal outcomes, has not yet been reached by any court of which I am aware. The point at which argument exhausts itself may shift, but just at that point courts are vulnerable to the charge that assertion has displaced argument.

Nevertheless, Gardner has identified a genuine problem for the development of a vigorous state constitutionalism. The professional role of the lawyer cannot tolerate a belief that judicial outcomes are unrelated to the well-crafted constructions of legal argument. Lawyers are committed to the belief that they and the decision makers are engaged in a common enterprise aimed at the discovery of truth. If argument gives way too quickly to assertion, then the entire enterprise is threatened.

The distinction between assertion and argument is the distinction between power and truth. Assertion opposes counter-assertion as one claimant to power against another. There is no common measure, only

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12. *Id.*

13. Of federal constitutional discourse, Gardner himself writes: "Our federal constitutional discourse is extraordinarily rich. . . . [There] is more than enough raw material to allow a wide variety of disparate claims about the meaning of the Constitution . . . ." *Id.* at 770.

competing interests. Argument is an effort to persuade, not by pointing to self-interest but by revealing the common interest. We do not take up the craft of legal persuasion without first believing that through our common engagement in a discursive inquiry we can jointly discover truth.[14] When lawyers are seen as sophists—as those whose craft makes the weaker argument appear the stronger—they lose the respect of the larger community and may, in fact, lose their self-respect as well.

I have not said that a necessary condition of constitutional adjudication is the existence of *a* truth. Rather, I have said that a necessary condition of the lawyer's function is a belief in truth as an ideal. This belief is necessary to sustain the distinction between assertion and argument, between acting merely as an agent of a client's self-interest and elaborating the public order.

Gardner's exposition of the frustrated lawyer operates first as an observation about the failure of legal craftsmanship and second as a comment on the absence of those conditions that are required if the lawyer is to believe that a state constitutional order can be ordered through adjudication. As Gardner suggests, a state constitutionalism that is so open to pluralist political bargaining that it can take up the subject of the width of ski trails, or that is open to revision by the shifts of interest-group strength, contains no deep truth about the polity that can sustain the process of constitutional adjudication.[15] The general failure of lawyers to pursue a vigorous state constitutionalism may not be a consequence of ignorance or lack of creativity. Rather, the necessary conditions for the pursuit of public order through adjudication have not been satisfied. Lawyers cannot make something of nothing.

II. FROM THE PROFESSIONAL TO THE POLITICAL COMMUNITY

Gardner leaves the perspective of the professional community when he asks what we—the nonprofessional community of citizens—must believe about the adjudicatory enterprise, if we are to entrust the construction of public order to the professional community of lawyers and judges. Here he follows much contemporary constitutional theory in shifting focus from the professional discourse of lawyers—with their implicit claim to specialized knowledge—to a discursive process that

14. For a comprehensive effort to take this norm of persuasion through argument as the guiding principle of constitutional law, see ROBERT BURT, THE CONSTITUTION IN CONFLICT (1992).

15. Gardner, *supra* note 1, at 819-21.

creates and sustains self-identity.[16] Constitutional adjudication, on this view, is a discourse that grounds itself by simultaneously maintaining the historical community and constituting individual identity within that community. "Thus, constitutional discourse is an integral aspect not only of constitutional law as a body of positive legal authority, but of societal self-identification as well."[17]

This is no longer an argument about the self-understanding of lawyers, except insofar as lawyers are also citizens. Rather, the argument now concerns the political legitimacy of constitutional law. Gardner, however, confuses these two distinct perspectives on adjudication. His argument moves through three steps:

1. constitutional adjudication is a discursive process among a community of legal professionals;
2. "discourse is . . . a means of self-definition";[18] and
3. constitutional adjudication is a process of creating and maintaining the self-identification of the political community.

Gardner errs in passing from one to three without recognizing the gap between the professional community of discourse and the larger political community, which may or may not be discursive but certainly is not professional. Thus, while Gardner starts by isolating *professional* discourse and inquires into the conditions of the successful pursuit of that discourse, he ends up confusing the professional community with the larger political community. "Under the influence of a robust constitutional discourse, the contours of the constitution thus come to define not merely a body of positive law but the identity and character of the polity itself."[19]

Lawyers may engage in a professional discourse that is self-creating—at least some of the time—but that tells us nothing about the relationship between this discursive community and the larger political community. To see that the relationship between the professional identity of lawyers and the political identity of citizens is problematic requires only a moment's reflection on the public's low regard for lawyers, as well its general ignorance of, and indifference to, the content of professional, legal discourse.

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16. For a discussion of the variety of forms in which the idea of a discursive community operates in contemporary theory, see Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1 (1989).

17. Gardner, *supra* note 1, at 770.

18. *Id.* at 769.

19. *Id.* at 816.

Gardner's commitment to a discursive grounding of judicial legitimacy drives most of his pessimistic conclusions. Even if we could achieve the virtues of the lawyer's craft in the domain of state constitutionalism, the products of that craft would, Gardner argues, remain illegitimate. The professional discourse must be grounded in a political community if it is legitimately to act as an authoritative voice. There is, however, no separate state political discourse to ground the lawyer's discourse: "[T]he communities in theory defined by state constitutions simply do not exist, and debating the meaning of a state constitution does not involve defining an identity that any group would recognize as its own."[20]

Gardner juxtaposes a hypothetical professional, discursive community, operating successfully from the internal perspective on state constitutional law adjudication, to the actual discursive political community he finds in place. The gap between these two communities is too large to sustain a claim of legitimacy for the former. No amount of craftsman's virtue can overcome this gap. Indeed, the virtues of craft may only widen the gap. "The tension between state and national constitutionalism has been largely resolved in the modern day United States by the collapse of meaningful state identity and coalescence of a social consensus that fundamental values in this country will be debated and resolved on a national level."[21] To achieve a professional discourse of state constitutional law would, therefore, offend the basic understanding of ourselves as members of a national community—an identity sustained through a national political discourse.

Unable to ground the professional enterprise of state constitutionalism in an actual political community, Gardner would give up the enterprise altogether. He sees only three choices: refounding the states in order to create true discursive communities; abandoning state constitutionalism as a "constitutional" discourse; or realigning our discourse to the communities—national and local—within which we actually engage in the discursive project of self-creation. The first, he admits, is impossible; the third is not a "serious proposal."[22] This leaves only the second: abandonment.

Gardner has offered two different critiques of state constitutionalism: one from the perspective of the professional

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20. *Id.* at 837.
21. *Id.* at 828.
22. *Id.* at 835.

community of lawyers, the other from the perspective of a self-constituting political discourse. These different critiques are linked only through an invalid argument, which collapses the professional community into the political community. I consider now the relationship between these two critiques in order to understand why they have been confused.

III. INTERPRETATION AS A STRATEGY OF POWER

While Gardner's arguments are framed as a critique of state-constitutional law adjudication, they expose the larger problem of judicial authority. Lawyers may have greater resources in arguing federal constitutional law claims, but the norms upon which Gardner relies are equally problematic in the federal courts: argument blends into assertion, while the professional and political communities speak different languages.

Gardner's analysis exemplifies the responses to judicial authority characteristic of contemporary constitutional theory. Justifications of judicial authority appeal either to professional norms of expert knowledge or to the representative capacities of the judiciary. Courts however, are not easily cabined by either form of justification. From the perspective of the professional community as well as that of the political community, courts raise the threat of an arbitrary and capricious wielding of power.

The professional discourse of law is rarely sufficiently determinative to constrain decision-making. Legal discourse is marked by its openness to alternative outcomes. Both sides write equally professional briefs; appellate decisions are often accompanied by dissents. Between the conflicting arguments presented to the court and the actual decision, there operates an exercise of authority that is fundamentally different from the discourse itself. Authority always overflows the boundaries of interpretation as it must if action is ever to be taken.[23] This does not mean, however, that professional discourse counts for nothing or that any position at all remains an open possibility within the terms of that discourse. Yet those choices that are beyond the possibilities of legal discourse are unlikely to be points of actual controversy in constitutional adjudication. With respect to those controversies which do come before

23. The classic text on this distinction of authority and interpretation remains Robert Cover's *Nomos and Narrative*. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

the courts, legal discourse is usually sufficiently open to permit the construction of professionally competent argument on both sides.

No less problematic is the relationship of the courts to the political community. The difficulty of this relationship has been at the center of modern constitutional theory since Alexander Bickel clearly raised the "countermajoritarian difficulty" thirty years ago.[24] Bickel's resolution of the problem that the courts present to democratic theory appealed to the representative virtues of the judiciary: courts, he argued, can represent the long-term values of the community.[25] He left unexplained, however, why long-term values should trump the short-term or why principles should trump policies.[26] His claim for the representative virtues of the judiciary, moreover, was little more than a projection of the virtues of the scholar on to the judge.

It is unnecessary to review here the uneasy relationship between courts and peoples, even if one believes that there is a "people" that has a will capable of expression. A command to represent the will of the people offers no more determinative a norm for the guidance of judicial decisions than a command to act in a professional manner. There is no avoiding the fact that the courts exercise authority over a political community. They do not simply express back to the community that which it already is.

That the authority of the courts resists the totalizing claims of discourse, whether professional or political, does not simply leave a space for the exercise of personal preference by judges. The alternative to the professional and political communities is not the subjectivity of an individual judge, although too often this is seen as the only alternative. This fear drives the effort to bind the authority of judges to even narrower forms of interpretation.[27]

Courts themselves do not claim that their authority rests on their participation in either a professional or a political discourse. Instead, they point to the law as an on-going historical project. The power of the courts is inextricably linked to the permanence of law. Courts are both a product of law and the institution responsible for the maintenance of the law. We need to abandon the belief that our discourse, whether

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24. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

25. *Id.* at 239.

26. *See* Kahn, *supra* note 16, at 11-12.

27. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

professional or political, can, through an autonomous act of self-creation, somehow relieve us from the burden of the past.[28] We need, in short, to know a great deal more about power as it operates in and across time.

Political communities are dangerous because they too often live through the violent construction of history.[29] We cannot excise this part of ourselves and of our political order by pretending that we simply are our discourse. Judicial authority is a form of violence because it is bound to law, which operates through the transformation of bodies into the representation of ideas.[30] Political identity is not just talk; it is the recognition that the state has the right to demand the sacrifice of the self to the project of maintaining the political order. The true meaning of citizenship is not constituted by discourse, but rather by a kind of speechlessness. Citizenship entails an implicit recognition that there may come a moment when the government may call for the sacrifice of your life and there will be no grounds upon which to object. There will be nothing further to say—only the act. To understand political authority, which includes the courts, we must turn from endless speech to the end of speech.

Despite our knowledge of this, we don't see it clearly in our theorizing. We know that courts are historical, that they are always looking backward, attempting to ground their authority in past political acts constitutive of law.[31] We know that our judges are neither pure voices of theory, nor private subjects granted a power to remake the state in their own image. We know that the ritual of the court is the embodiment of the authority of government and that judges are powerfully constrained by that role. The donning of the robe is an act of personal sacrifice by the judge. Judges are not private citizens who happen to have been given a public responsibility. Neither are they academics pursuing an endless interpretive debate. They are the state, and this ultimately makes them people of violence.[32] Their

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28. For such a theory of the historicity of the state, see PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY (1992).

29. *See, e.g.*, ELAINE SCARRY, THE BODY IN PAIN (1985).

30. *See* Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815, 833 ("In law to be an interpreter is to be a force, an actor who creates effects even through or in the face of violence. To stop short of suffering or imposing violence is to give law up to those who are willing to so act.")

31. *See, e.g.*, RONALD M. DWORKIN, LAW'S EMPIRE 93 (1986); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990).

32. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

responsibility is to sustain the past in the present and to control the future—to ensure the continued existence of the historical project that is the law.

To say that judges are "people of violence" is not to describe a personal attribute. Rather, it locates judges in their historical role as the embodiment of political authority. They are not just another claimant to a "correct" interpretation of law. "Violence" points to actions beyond words and, as such, to the moral responsibility of judges. Judges choose; they cannot avoid that choice by pointing to the endless talk that swirls around them. Neither the professional discourse of lawyers nor the political discourse of the community relieves the judge of the responsibility for choice. Judges, accordingly, operate at the intersection of violence and responsibility. This makes the authority of judges a contested field, a locus of struggle.

If the problem of the courts is the problem of power—violence and responsibility—then we should recognize that constitutional theory can be a response to power. Appeals to professional discourse and to interpretive communities are strategies of power. Even while packaged as efforts to explain the legitimacy of the courts, their real value is as constraints on the exercise of authority. Authority is not and can never be discourse, but that does not render authority indifferent to discourse. The role of interpretation, whether of lawyers or academics, is to contest power through discourse.

One of the reasons the debate over a renewed state constitutionalism has been so interesting is because the use of theory for political ends has been so much on its surface. From Justice Brennan's first invocation of a vigorous state constitutionalism,[33] the movement has appeared as an uneasy alliance between those with a distinct political agenda for the state courts—they are to be a counterforce to the increasingly conservative federal courts—and those who believe that the "theory of state sovereignty" itself requires a vigorous state constitutionalism.[34] This uneasiness exists because the political ends of theory are so apparent in Justice Brennan's appeal.[35] But power, if not politics, is no less at issue for those who pursue a "purer" theory of state sovereignty.

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

34. *See, e.g.*, Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984).

35. *See* Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988).

For both groups, the end is action by the state courts—the assertion of power which will necessarily compete with other loci of power in the social and political order.

Recognition of the gap between interpretation and authority was the premise from which my previous work on state constitutionalism began.[36] The resistance of authority to theory, I argued, can be used to free the interpretive enterprise. An authority that is ungrounded in interpretation cannot act as a restraint on the interpretive enterprise. The debate over the meaning of state constitutions should, therefore, recognize its freedom to appeal to any source it finds meaningful. For the reasons that Gardner identifies, those sources will necessarily expand beyond the confines of the state. They will reach deeply into the national community, its history and values.

It is now clear to me that my own argument was a strategy of power. A state court exercising its authority in response to an interpretive debate over the meaning of American constitutionalism is likely to act differently than one confronting an interpretive debate limited to unique state sources. It will respond to a different set of norms in the conceptualization of its own role; it may be willing to use its authority to confront the institutions of national political authority and to contest the meaning of American political life.

While interpretation can never control authority, interpretation may still have an effect on authority. Ultimately, interpretation is the only power that lawyers and scholars have. We go wrong when we confuse the role of interpretation with the exercise of governmental authority. But in the struggle with and against authority, truth itself has a strategic function.

Gardner's confusing identification of professional and political communities is evidence of the strategic character of his work. Professionals claim a kind of expert knowledge which serves as a constraint on authority. Indeed, for long periods of American constitutional history it was assumed that constitutional law represented governance by, and through, expert knowledge—whether of political science or of the common law.[37] The uncertain legitimacy of this strategy of constraint causes Gardner to link professionalism to the single source of legitimacy in the modern democratic state: the people. That this appeal too is only another strategy is evident in the odd self-

36. *See* Kahn, *supra* note 3.

37. *See* KAHN, *supra* note 28, at 24-31, 108-17.

projection that results: the political community within which the theoretician would have us believe he lives, is one in which all members are engaged in this professional pursuit of interpretive discourse. The theoretician, accordingly, becomes the paradigmatic citizen. Needless to say, no such community exists. This is theory projecting itself on to the political community in order to make a counter-claim for authority.

Gardner makes an important contribution by exposing the gap between modern theories of constitutionalism and the reality of state constitutionalism. He falls short, however, in failing to examine the theory of constitutionalism that serves as his norm. That theory is not a description of a positive legal order. It is a normative claim created to contest the power of the courts. The greatest danger to this strategy of interpretation is that of cooptation—the danger that the state will mask its authority within the description of interpretation. The state will assert that it satisfies these conditions of legitimacy; courts will claim to be both professional communities and representatives of the political community. When theoreticians accept this view, they become agents of political power. While this may be where lawyers feel most comfortable, it is a failure of theory.

Gardner risks falling into this position when he accepts the claim to legitimacy of federal constitutional law and when he suggests, even as an ideal, the possibility of a state constitutionalism that could meet his norms. The tension between authority and interpretation, however, is irresolvable and no plan of reform can solve the problem of legitimacy. Any attempt to do so will either fail or convert the theoretician into an apologist for the government.

A BRIEF RESPONSE TO *FAILED DISCOURSE*

Burt Neuborne*

It is a good idea to warn even fledgling emperors that their clothes are threadbare. To the extent *Failed Discourse*[1] casts a jaundiced eye on overly enthusiastic assessments of state constitutional jurisprudence, it performs an important service. Recognizing the gap between potential and performance is a far cry, however, from a defeatist assertion that state judicial failure is inevitable. I part company with *Failed Discourse* at the point it claims, not that the emperor's clothes are threadbare, but that it is impossible to mend them.

As a cheerleader for the renascence of state constitutional protection of individual rights, I confess to an optimistic vision of the potential of state constitutions as repositories of rights desperately needed by the weak.[2] Federal constitutional law provides a fertile source of "negative" rights against the government, but the state judiciaries, with their twin arsenals of common law adjudication and state constitutional lawmaking, hold the promise of shaping American law in the twenty-first century to meet the challenges of a remarkably prosperous society that has left a quarter of its population out of the American dream.

While several state judiciaries have begun to accept that challenge, the bleak truth is that state judiciaries remain an underutilized resource in the struggle for justice, as opposed to mere law. For every New Jersey decision on housing or Oregon decision on free speech, there are ten state cases either ducking the issues or parroting the federal line. Not content with lambasting the state judiciaries for failing to seize the moment, however, *Failed Discourse* argues that state judicial failure will inevitably occur because the raw material for a serious jurisprudence of state constitutional law does not exist.

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

2. I have previously discussed the potential of state constitutions as repositories of "positive" rights. Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L. J. 881 (1989). I make no apology for arguing that American judges have a special responsibility to develop a jurisprudence of individual rights that will help the weak receive adequate attention in the democratic process. Professor Gardner's thoughtful work, although couched in academic jargon, is no less "normative" in urging a skeptical view of the judicial articulation of rights.