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MOSES AND MODERNISM

*Neil H. Cogan**

THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES. Edited by *Patrick T. Conley* and *John P. Kaminski*. Madison: Madison House. 1992. Pp. xxiii, 542. Cloth, \$39.95; paper, \$ 24.95.

STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES. By *Jennifer Friesen*. New York: Matthew Bender. 1992. Looseleaf binder in one volume. \$140.

REFERENCE GUIDES TO THE STATE CONSTITUTIONS OF THE UNITED STATES. Westport: Greenwood Press. 1991-1994. Nineteen volumes. \$55-89.50.

And now, O Israel, give heed to the laws and norms which I am instructing you to observe, so that you may thrive and be able to occupy the land that the Lord, the God of your fathers, is giving you. You shall not add anything to what I command you or take anything away from it, but keep the commandments of the Lord your God that I enjoin upon you.¹

I warn everyone who hears the words of the prophecy of this book; if anyone adds to these words, God will add to him the plagues described in this book; and if anyone takes away from the words of the book of this prophecy, God will take away his share in the tree of life and in this holy city, which are described in this book.²

I. FORMS OF MOSAIC FUNDAMENTAL LAW

Abraham, not Moses, gave us monotheism.

Moses gave us fundamental law — its forms at least, if not much of its content as well. The forms rule us, not from the grave, but from ever-pregnant texts that shape our beliefs about fundamental law. The recent spate of books on state constitutional law and the prominent criticism of the need for such law prompt this essay about the forms of fundamental law.

Mosaic fundamental law, set forth in the Five Books of Moses in such texts as the Ten Commandments and the Mosaic Codes, provides

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1. *Deuteronomy* 4:1-2, in THE TORAH, THE FIVE BOOKS OF MOSES 330 (Jewish Publication Socy. 1962) [hereinafter THE TORAH].

2. 38 THE ANCHOR BIBLE: REVELATION 22:18 (J. Massyngberde Ford ed., 1975).

the covenantal duties of the people to the Sovereign God and to one another. According to the story related in the texts, God transmitted fundamental law at Sinai through Moses to the people;³ the law is founded in truth and expressive of justice. Mosaic fundamental law is distinguished from other Israelite laws, norms, and practices not discussed in the biblical texts, such as those governing hereditary succession and commercial law, that were in effect prior to and contemporaneously with the transmission of fundamental law but that God did not prescribe in depth and detail.⁴

On the face of the texts, the form of Mosaic fundamental law conforming to the Sinaitic story is ostensibly as follows: The law is not withheld, hidden, or discretionary; it is express. Typically, it is not general, vague, or ambiguous; it is specific and intended to be clear. Although delivered orally at first, it is then written.⁵

There is no other fundamental law; it is exclusive. The law comes from a central, high authority — God; it is descendent. God's law trumps other laws, norms, and practices; it is supreme.

Finally, the law does not change, being neither added to nor subtracted from; it is fixed.⁶ The law, too, does not cease with the death of Moses or any other prophet or leader; it is enduring, indeed eternal.⁷

We may rightfully term the form of fundamental law conforming to the Sinaitic story as "the static form." The more express, specific, and written the law, the less judges can add or subtract. The more exclusive, centralized, and supreme the law, the less other laws, norms, and practices can cause it to progress. Plainly, the more law depends upon ancient revelation, the less competing law can arise.

3. "And this is the Instruction — the laws and the norms — that the Lord your God has commanded [me] to impart to you . . ." *Deuteronomy* 6:1, in THE TORAH, *supra* note 1, at 336.

4. See NAHUM M. SARNA, *EXPLORING EXODUS: THE HERITAGE OF BIBLICAL ISRAEL* 170-71 (1986); MICHAEL FISHBANE, *BIBLICAL INTERPRETATION IN ANCIENT ISRAEL* 91 (1985). It is noteworthy that prior to the transmission of the Ten Commandments and any of the Mosaic Codes, Moses sat as a judge to settle disputes. See *Exodus* 18:13-26, in THE TORAH, *supra* note 1, at 131-32.

5. "When He finished speaking with him on Mount Sinai, He gave Moses the two tablets of the Pact, stone tablets inscribed with the finger of God." *Exodus* 31:18, in THE TORAH, *supra* note 1, at 157.

"And the Lord said to Moses: Write down these commandments, for in accordance with these commandments I make a covenant with you and with Israel." *Exodus* 34:27, in THE TORAH, *supra* note 1, at 163.

6. This characteristic, described in the opening quotation, continued into Talmudic discourse. Rabbi Meir said, "My son, be careful, because thy work is the work of Heaven; if thou omittest a single letter or addest a single letter, thou dost as a consequence destroy the whole world." BABYLONIAN TALMUD, *Sotah* 20a.

7. For a comparison of Roman "ethical rules" with Biblical "categorical injunctions," see DAVID DAUBE, *FORMS OF ROMAN LEGISLATION* 62-64 (1956) ("[T]he Roman percept is Wisdom, instruction, conservative, the Biblical, the Will of God, adjuration, revolutionary."); for a comparison of Roman, Old Testament, and New Testament forms, see DAVID DAUBE, *The Form Is the Message*, in *ANCIENT JEWISH LAW* 71 (1981).

The Sinaitic story, however, is not all there is. Modern critical Bible scholarship argues that the Five Books of Moses include texts of several writers or groups of writers, such as the *J* (Jahwist), *E* (Elohist), *D* (Deuteronomistic), and *P* (Priestly) writers; *JE*, the historiographer of *J* and *E*; and *R*, the redactor of *JE*, *D*, and *P*.⁸ These writers wrote during the course of more than five centuries and in several communities within the Kingdom of Israel, the Kingdom of Judah, and the Transjordan.⁹

The texts of these writers differ in many respects. They differ in language and style. They differ in their narrative of events from the Creation to the death of Moses. Most important, for our concerns, they differ remarkably at times about the form, content, and validity of laws, norms, and practices.¹⁰

For example, *P*, perhaps more so than other writers, used words more general than specific, such as in God's commandments to Israel to be a holy people: "You shall not coerce your neighbor. . . . You shall not insult the deaf You shall not render an unfair decision You shall not hate your kinsman in your heart. . . . Love your neighbor as yourself . . ." ¹¹ In addition, each of the writers, but *P* and *D* in particular, differs as to such rights as property in women, children, and slaves and such religious duties as tithing.¹² Each of the writers presents us with significantly differing corpora of the fundamental law governing Israel in its covenant with God.

These differing texts were redacted within one sacred document, known as the Five Books of Moses, and they were canonized.¹³ This redaction is remarkable, given the ostensibly static form of fundamental law. It is simply remarkable that a text expressing the covenant between a people and its one God would allow such differences.

A likely explanation is that while the form of Mosaic fundamental law conforming to the Sinaitic story is presented in what appears to be a static form, much of that law was in fact the product of what we may

8. See generally RICHARD ELLIOTT FRIEDMAN, WHO WROTE THE BIBLE? (1989). *D* is typically described as two writers, *Dtr*¹ and *Dtr*². Other writers include *H* and *T*. The writers described in the text and in this footnote authored not only parts of the Five Books of Moses but parts of the books of the Hebrew Bible through Second Kings.

9. See 4A THE ANCHOR BIBLE: NUMBERS 1-20, at 48-84 (Baruch A. Levine ed., 1993) (discussing different sources in the Book of Numbers); YEHEZKEL KAUFMANN, THE RELIGION OF ISRAEL 153-211 (M. Greenberg ed. & trans., abr. ed. 1960).

10. See 5 THE ANCHOR BIBLE: DEUTERONOMY 1-11, at 19-35 (Moshe Weinfeld ed., 1991) [hereinafter DEUTERONOMY]; KAUFMANN, *supra* note 9, at 166-72.

11. See *Leviticus* 19, in THE TORAH, *supra* note 1, at 216-18. It may be that *H*, a writer in his or her own regard, and also a redactor of *P*, is responsible for these general words. See ISRAEL KNOHL, THE SANCTUARY OF SILENCE: A STUDY OF THE PRIESTLY STRATA IN THE PENTATEUCH 11-16, 70 (1992) (in Hebrew).

12. See DEUTERONOMY, *supra* note 10, at 19-35; KAUFMANN, *supra* note 9, at 166-72.

13. See FRIEDMAN, *supra* note 8, at 217-33. Friedman suggests that Ezra was the redactor. *Id.* at 218, 223-33.

rightfully term "a progressive form" of lawmaking. Modern critical Bible scholarship informs us that the texts of *J*, *E*, *D*, *P*, and others reflected a crystallization of understandings and traditions that had evolved over centuries and that had been influenced by the transmission of differing texts, by contact with differing Israelite and non-Israelite tribes and peoples, and by the differing influences of political, economic, and social events within the region.¹⁴ The scholarship informs us, too, that the evolution and influences notwithstanding, each set of understandings and traditions was considered divinely transmitted, certainly at the time of its crystallization and no doubt through the process of evolution as well.¹⁵

Thus, when *R*, the redactor, set to work, he or she had the combined text of *JE* and the texts of *D* and *P*, each fixed and divinely transmitted. Each had much in common with the other — the covenant between the people and God and the structure of Mosaic fundamental law — but each differed from the other, too, even regarding the content and wording of the Ten Commandments.

As best we know, *R* edited the narrative accounts of *JE*, *D*, and *P* into the wonderful narratives we now have. But he or she left the legal corpora of the writers intact, despite their significant differences.¹⁶ The redactor did so, I suggest, because each set of legal texts did adhere to the same concept of covenant and to the same structure of Mosaic fundamental law, and because each set of legal texts did assert divine transmission. Under these circumstances, no set could be ignored or discarded, or even revised.

R thus left us with an example — a most influential example — of a people who were given, who were able to accept, and who thrived for fifteen centuries on a text that combined at least three differing accounts of fundamental law.¹⁷

II. MOSAIC FORMS IN STATE AND FEDERAL FUNDAMENTAL LAW

Both the static and progressive forms of Mosaic fundamental law influenced the framers of American constitutions and documents — even the positivists among them, for whom Reason had replaced God.¹⁸ This is not to gainsay the influence of the natural law philoso-

14. See MORTON SMITH, *PALESTINIAN PARTIES AND POLITICS THAT SHAPED THE OLD TESTAMENT* 11-42 (1971).

15. See KAUFMANN, *supra* note 9, at 172; FISHBANE, *supra* note 4, at 277 (noting that each tradition had "an authoritative, even divine, status").

16. See *id.* at 166.

17. On the Jewish concern with history, see YOSEF HAYIM YERUSHALMI, *ZAKHOR: JEWISH HISTORY AND JEWISH MEMORY* (1982); YOSEF HAYIM YERUSHALMI, *FREUD'S MOSES* 19-35 (1991).

18. The static and progressive forms influenced English and other lawmakers, too. See, e.g., *MAGNA CARTA* chs. 39 ("No free man shall be taken or imprisoned or disseised or outlawed or

phers, English lawmakers, and the Hebrew and Christian Bibles upon the content of American fundamental law. The influence of the Five Books of Moses on the *form* of American fundamental law, however, is both important in fact and useful for analysis.

On their face, the forms of American constitutions and documents relating to fundamental law have many of the characteristics of the static Mosaic form. They are written, express, and specific.¹⁹ They are explicitly fundamental²⁰ and — within their jurisdictions — supreme.²¹ This is not surprising because American fundamental law began with the Massachusetts Body of Liberties, its form reflecting the strong influence of the Mosaic Codes.²² American fundamental law continued with Penn's Laws Agreed Upon in England, its form influenced by both the Hebrew and Christian Bibles.²³

The reality of American fundamental law, however, is that the progressive Mosaic form has been dominant. Thus, although there are state and federal constitutions and bills and declarations of rights in written form, many refer directly or indirectly to or assume the existence of natural rights not written in the texts.²⁴ Although the texts are

exiled or in any way ruined, nor will we go or send against him, except by the lawful judg[ment] of his peers or by the law of the land."), 40 ("To no one will we sell, to no one will we deny or delay right or justice."), reprinted in J.C. HOLT, *MAGNA CARTA* app. 6, at 461 (2d ed. 1992).

19. See Bradley Chapin, *Written Rights: Puritan and Quaker Procedural Guarantees*, 114 PA. MAG. HIST. & BIOGRAPHY 323 (1990).

Christ fulfilled the prophecy of Isaiah and Joel by promising to "write my law in their hearts." Even so, biblical texts contained "subordinate, secondary, and declaratory" rules that illuminated the rule which was "the eternal precepts of the spirit." The Quakers committed themselves to definite written law, because statutes acted as guides to the consciences of witnesses and jurors by illuminating Christian equity.

Id. at 327 (quoting WILLIAM PENN, A DISCOURSE OF THE GENERAL RULE OF FAITH AND PRACTICE, AND JUDGE OF CONTROVERSIE 21, 25 (London, T. Sowle 1699)).

20. "[T]he charter of liberties . . . is hereby declared and approved, and shall be for ever held for fundamental in the government thereof . . ." William Penn, *Laws Agreed Upon in England*, in SOURCES OF OUR LIBERTIES 216, 216 (Richard L. Perry & John C. Cooper eds., 1959).

21. The free fruition of such liberties Immunities and priveledges as humanitie, Civilitie, and Christianitie call for as due to every man in his place and proportion without impeachment and Infringement hath ever bene and ever will be the tranquillitie and Stabilitie of Churches and Commonwealths. And the deniall or deprivall thereof, the disturbance if not the ruine of both.

Nathaniel Ward, Massachusetts Body of Liberties, pmbl. (1641), in SOURCES OF OUR LIBERTIES, *supra* note 20, at 148, 148.

22. See GEORGE L. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN 124-31 (1960); A.E. DICK HOWARD, THE ROAD FROM ROUNNEMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 35-37 (1968).

23. See Chapin, *supra* note 19, at 324-29.

24. E.g., U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); MASS. CONST. pt. 1, art. I ("All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness."); see HADLEY ARKES, BEYOND THE CONSTITUTION 58-80 (1990); cf. MORTON WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION 25-30 (1987) (stating that the Federalists embraced the Lockean idea of natural rights); Suzanna Sherry, *The*

express, most — if not all — assume or refer to principles such as judicial review and separation of powers. As is well known, just as the progressive Mosaic form uses words such as *love* and *fair*, so American fundamental texts often use words that are not specific but invitingly — or irritatingly — open-ended.²⁵

More importantly, just as English lawmakers before them, so American Framers were familiar with centuries-old arguments, renewed in the seventeenth and eighteenth centuries, that the Five Books of Moses must have been written by authors in addition to or other than Moses.²⁶ While they may not have been familiar as yet with *J, E, D, P, JE, and R*, the Framers were aware that the sacred text contained a variety of versions of fundamental law, inconsistent in important respects and worded variously. The acceptable variousness of fundamental law in the Bible was a significant concept in the mind of American Framers, leading them to believe, and to act upon the belief, that each community's insight into natural law and the rights of Englishmen was worthy of respect.

Thus, it is entirely unsurprising that the Massachusetts Body of Liberties, the Laws Agreed Upon in England, and such important subsequent texts as the Virginia Declaration of Rights were in variance with one another. Nor is it surprising that state constitutions and state constitutional construction have borrowed from other state constitutions and constructions whatever is fitting and comfortable and have rejected whatever is not. And it is not surprising that the national set of fundamental laws is bound together only by what is fundamental to the *American* scheme of justice.

Moreover, American fundamental law is both ascendent and descendent, not fixed. The people have ratified the texts of federal and state constitutions and are continually revising them. The Federal Constitution has been amended twenty-seven times; Congress proposed each amendment, which state legislatures then ratified. By contrast, most state constitutions have been amended more often, frequently with amendments originated by local groups, associations, and communities, and the people have ratified them directly.

Thus, the reality of American fundamental law is that its form has typically been more progressive than static. Like the Five Books of

Early Virginia Tradition of Extratextual Interpretation, in TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 157 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

25. "Every person within this Jurisdiction, whether Inhabitant or forreiner shall enjoy the same justice and law, that is generall for the plantation, which we constitute and execute one towards another without partialitie or delay." Ward, *supra* note 21, at 148.

26. Ever since the canonization of the Bible, there have been prominent critics of Moses' authorship of the Five Books of Moses, including such figures as Spinoza. Contemporary critics include THOMAS HOBBS, *LEVIATHAN* 415-27 (C.B. Macpherson ed., Penguin Books 1968) (1651); and JEAN ASTRUC, *CONJECTURES SUR LES MEMOIRES ORIGINAUX: DONT IL PARAIT QUE MOYSE S'EST SERVI POUR COMPOSER LE LIVRE DE LA GENESE . . .* (1753).

Moses, there are differing traditions within communities, namely, the states. Nonetheless, like the Five Books of Moses, there is broad adherence to certain basic rules and principles, such as the fundamental aspects of due process, the floor below which no state goes.

Until now, these have been the forms of fundamental law in the United States. The law, the literature, and most importantly the people have assumed it. Until now, too, there has been little dissent to the arrangement, however unstudied.

III. THE LITERATURE OF PROGRESSIVE STATE FUNDAMENTAL LAW

The legal literature of state fundamental law was, but is no longer, sparse. This is due in part to a new realization by lawyers and judges that the form of most state fundamental law is progressive rather than static, and also to an awakening within many communities that state fundamental law may be revised by amendment as well as construction. To put it crassly, there is now movement in state constitutional law, and there is now a market for books about the movement.

Recent publications include collections of papers,²⁷ surveys,²⁸ teaching materials,²⁹ and a practitioners' treatise.³⁰ *The Bill of Rights and the States*, edited by Patrick T. Conley³¹ and John P. Kaminski,³² deserves special recognition for the excellence of its scholarship. It collects essays on the development of fundamental law through the eighteenth century in each of fourteen original states. Each essay ends with a comprehensive bibliography of a state's fundamental law, and the collection concludes with a comprehensive bibliographic essay on the Federal Bill of Rights (pp. 461-514). The book is invaluable for anyone studying American fundamental law, both state and federal.

Professor Jennifer Friesen's *State Constitutional Law*³³ deserves special recognition, too. Besides being the one and only practitioners' treatise on developments in state fundamental law in each state, it is clearly written, well organized, and comprehensive. It is a vital resource for any practitioner contemplating rights litigation.

27. See, e.g., PROTECTING INDIVIDUAL RIGHTS: THE ROLE OF STATE CONSTITUTIONALISM (Barbara Wolfson ed., 1993); TOWARD A USABLE PAST, *supra* note 24.

28. See, e.g., EMERGING ISSUES IN STATE CONSTITUTIONAL LAW (Gerald E. Weiss ed., 1991); *Fourth Annual Issue on State Constitutional Law*, 23 RUTGERS L.J. 723 (1992).

29. JOHN E. COOPER & THOMAS C. MARKS, JR., FLORIDA CONSTITUTIONAL LAW (1992); ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS (2d ed. 1993).

30. JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES (1993).

31. Professor Emeritus and Lecturer in History, Providence College. Mr. Conley is also a practicing attorney.

32. Director, Center for the Study of the American Constitution at the University of Wisconsin, Madison.

33. Jennifer Friesen is Professor of Law, Loyola Law School, Los Angeles.

Of most moment, Greenwood Press has committed itself to publishing *Reference Guides to the State Constitutions*, a series of one-volume guides to each of the fifty state constitutions, and has to date published nineteen of the *Guides*.³⁴ The *Guides'* authors ably summarize the constitutional history of each state, synopsise most provisions of the constitution in force, and provide bibliographic sources not found elsewhere. Nowhere else can lawyers and scholars find a compact summary of each state's fundamental law. The *Guides*, too, are an important resource for the growing body of lawyers who do state constitutional litigation and a valuable educational aid for the many lawyers who want to do such litigation.

Both *The Bill of Rights and the States* and the *Guides* discuss the particularity and specialness of each state's fundamental law, and Friesen's *State Constitutional Law* does so both by state and by groups of states. The *Guides* and *State Constitutional Law* assume, correctly, that each state has a diverse set of groups, associations, and communities and its own particular set of texts and historical memories and that, as a result, the states may genuinely differ even as to aspects of fundamental law. Although none of the authors asserts that each state is unique in each and every aspect of fundamental law, they nonetheless rightly assume that there may be many particulars in which a state differs from other states and that these differences are important. Where there are no differences, the books say so.

Although there are no discussions of form beyond references to principles of federalism, the *Guides* and *State Constitutional Law* understand that there is a basic minimum of liberty, equality, and fairness applicable to each state. Each understands, too, that beyond the basic minimum each state may develop its own tradition of heightened protection.

IV. MODERNIST CRITICS OF PROGRESSIVE STATE FUNDAMENTAL LAW

Several critics, two of whom are discussed below, reject the contin-

34. JOHN D. LESHY, *THE ARIZONA STATE CONSTITUTION* (1993); KAY C. GOSS, *THE ARKANSAS STATE CONSTITUTION* (1993); JOSEPH R. GRODIN ET AL., *THE CALIFORNIA STATE CONSTITUTION* (1993); WESLEY W. HORTON, *THE CONNECTICUT STATE CONSTITUTION* (1993); TALBOT D'ALEMBERTE, *THE FLORIDA STATE CONSTITUTION* (1991); ANNE F. LEE, *THE HAWAII STATE CONSTITUTION* (1993); DONALD CROWLEY & FLORENCE HEFFRON, *THE IDAHO STATE CONSTITUTION* (1994); FRANCIS H. HELLER, *THE KANSAS STATE CONSTITUTION* (1992); LEE HARGRAVE, *THE LOUISIANA STATE CONSTITUTION* (1991); MARSHALL J. TINKLE, *THE MAINE STATE CONSTITUTION* (1992); JOHN W. WINKLE III, *THE MISSISSIPPI STATE CONSTITUTION* (1993); ROBERT D. MIEWALD & PETER J. LONGO, *THE NEBRASKA STATE CONSTITUTION* (1993); MICHAEL W. BOWERS, *THE NEVADA STATE CONSTITUTION* (1993); ROBERT F. WILLIAMS, *THE NEW JERSEY STATE CONSTITUTION* (1990); PETER J. GALIE, *THE NEW YORK STATE CONSTITUTION* (1991); JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION* (1993); LEWIS L. LASKA, *THE TENNESSEE STATE CONSTITUTION* (1990); WILLIAM C. HILL, *THE VERMONT STATE CONSTITUTION* (1992); ROBERT B. KEITER & TIM NEWCOMB, *THE WYOMING STATE CONSTITUTION* (1993).

uing validity of the forms of American fundamental law and the value of the literature discussed above. They argue that there is no need for a progressive state fundamental law. One critic argues, for example, that the states should abandon the field to the national government.³⁵ Another argues that the role of the states is to contribute to an American constitutionalism — a set of national rights to liberty, equality, and fairness.³⁶ Each, in his own way, argues for an exclusive national fundamental law, and each assumes that this national fundamental law has no need of differing state fundamental law.

A. *The Argument for No State Fundamental Law*

Professor James Gardner's article, *The Failed Discourse of State Constitutionalism*,³⁷ has two parts: an empirical part arguing that state constitutional law discourse and, in effect, state constitutional law have failed; and a political part arguing that state constitutional law ought to fail.

In the empirical part, Gardner examines 254 appellate opinions reported for 1990 from seven states — California, Kansas, Louisiana, Massachusetts, New Hampshire, New York, and Virginia — in which the state's highest court arguably decided a state constitutional law issue.³⁸ After examination, Gardner finds that the exemplar state constitutional law opinions are "confusing, conflicting, and essentially unintelligible."³⁹

Comparing the discourse in these state decisions to federal constitutional law discourse, he finds, with only a handful of exceptions, no distinct discussion of "text, framers' intent, constitutional theory, judicial precedent, and societal values."⁴⁰ Gardner concludes from these findings that "the failure of state courts to develop a coherent discourse of state constitutional law — that is, a language in which it is possible for participants in the legal system to make intelligible claims about the meaning of state constitutions" — is the primary reason for the kinds of state constitutional law opinions he found.⁴¹

I have discussed elsewhere some of the empirical weaknesses of Gardner's approach.⁴² Gardner's snapshot of state constitutionalism — an examination of seven states during one calendar year — fails to

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

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

37. Gardner, *supra* note 35.

38. *Id.* at 780 n.68.

39. *Id.* at 763.

40. *Id.* at 778.

41. *Id.* at 763-64, 804.

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

take into account that state constitutionalism was dormant until the 1970s and that federal constitutional provisions such as the Privileges or Immunities, Due Process, and Equal Protection Clauses took far longer for commentators to develop into an intelligible discourse following their dormancy. The snapshot fails to discuss subject areas, such as privacy and equality, in which state courts and state constitutional amendments have made significant developments. The snapshot also fails to give adequate consideration to the absence, until recently, of a significant literature for practitioners and students. A more complete reading of state judicial decisionmaking would show, I have argued,⁴³ that state fundamental law discourse is as intelligent as federal fundamental law discourse.

In addition, because of his concentration on judicial decisionmaking, Gardner misses — as does Paul Kahn, the other critic examined here — the discourse in groups, associations, and communities as they seek to revise and amend state constitutions. He misses the fact that much of the movement in state constitutionalism results from initiatives respecting such rights as the right to privacy and the rights of women, the physically handicapped, and victims of crime.

In the political part of his article, Gardner argues that reliance upon state constitutional law adjudication for the protection of fundamental rights is not simply ill-founded but actually dangerous to the protection of those rights. He argues that reliance on state decisionmaking undermines our national identity and the role of the U.S. Constitution as the embodiment of our national values.⁴⁴ Thus, Gardner urges reliance on federal constitutional law adjudication — and its paradigm of discourse — for the protection of fundamental rights, and he even supports — but does not now urge — the eventual demise of state constitutions and the states along with them.⁴⁵

This argument misses the significant concept taught by Mosaic fundamental law, as well as by our own history: namely, that a nation may have an identity, develop national values, and have fundamental laws and principles in common, while nonetheless tolerating within communities and regions differing understandings and traditions and even different fundamental laws, norms, and practices. There need not be one law respecting speech in shopping centers, if some states wish to expand speech beyond the federal minimum of protection. There need not be one law regarding the disabled, if some states wish to expand protection beyond the federal minimum of protection. The na-

43. See *id.* at 175-76.

44. See Gardner, *supra* note 35, at 823-30.

45. *Id.* Gardner assumes, of course, that federal fundamental law no longer has any need to refer to or incorporate state fundamental law. See *id.* at 770-78 (asserting that federal constitutionalism is superior to and should be a model for state discourse).

tion is better for the federal minimum, and the nation is better for the communities committed to expanded freedom.

B. *The Argument for Participation in American Fundamental Law*

Professor Paul Kahn's recent article, *Interpretation and Authority in State Constitutionalism*,⁴⁶ rejects a state constitutionalism premised on "unique state sources," that is, on "the text of the state constitution, the history of its adoption and application, and the unique, historically identifiable qualities of the state community."⁴⁷ Although Kahn does not expressly assert that there are no such unique state sources, he does argue that there no longer are vibrant state communities — at least none that can become the source for vibrant state constitutionalism. He argues further that even if there were such communities, state constitutionalism unique to each would be inconsistent with trends in American constitutionalism and interpretative debate.

Kahn's assessment of state communities lacks rigor. Although he does not purport to present an empirically sound and complete assessment in his article, his dismissal of the vibrancy of state communities deserves analysis and, if appropriate, rejection.

Kahn begins his essay by disparaging local public life and lauding national public life. People no longer feel constrained by the authority of local associations, such as the "church, family, town, local militia, unions, schools, and political parties," he declares.⁴⁸ "These traditional forms of local association have come to be seen as nothing more than the products of individual choice."⁴⁹ Similarly, state and local communities are only the aggregate of those individuals who choose to reside in a particular area. "Local public life is now often identified with prejudice, discrimination, censorship, and ideological rigidity."⁵⁰ By contrast, "[m]odern constitutional law . . . has generally focused on establishing national political authority."⁵¹ "The individual citizen turns to the national government for protection from these constraints on his or her freedom."⁵²

Kahn's cited empirical basis for these arguments is a series of U.S. Supreme Court decisions, announced between 1962 and 1980.⁵³ These decisions, in which an individual's liberty claim prevailed against a local community or association, assertedly support Kahn's argument

46. Kahn, *supra* note 36.

47. *Id.* at 1147.

48. *Id.* at 1148-49 (footnotes omitted).

49. *Id.* at 1149.

50. *Id.*

51. *Id.* at 1148.

52. *Id.* at 1149.

53. *Id.* at 1148-49.

about the decline of authority. But he cites no decision or scholarly research to support his argument about the perceived decline of vitality or value. Nor does Kahn cite any basis for his ultimate disparagement of local public life: the suggestion that many identify local communities "with prejudice, discrimination, censorship, and ideological rigidity."⁵⁴

The decline in authority and the perceived decline in vitality or value will continue, he argues, because so many persons experience national military service, move across state and local boundaries, and receive information, ideas, art, and literature from beyond the community.⁵⁵ Kahn concludes that, accordingly, "[a] vibrant state constitutionalism must be founded on something other than anachronistic beliefs about state sovereignty as an expression of state differences."⁵⁶

Not only do Kahn's arguments lack empirical support, they make assumptions about the decline of groups, associations, and communities that are simply wrong. Although some structures that were once powerful have weakened considerably, such as city political machines and union locals, others are replacing them. These new structures, from citizen anticrime groups to women's and gay-lesbian coalitions, have and exercise power locally. These groups act within their communities, help shape local understandings, and actively push for change — often fundamental change.

Next,⁵⁷ Kahn argues that constitutionalism is an interpretive enterprise that is not bound to a single truth or set of truths.⁵⁸ He argues further that the interpretive enterprise in the United States has sought for two centuries to reconcile the nation's commitment to a rule of law — undergirded by the values of equality, liberty, and due process — and its commitment to rule by the majority.⁵⁹ Constitutional text, to the extent that it is of "constitutional dimension . . . is interpreted in light of the larger constitutional commitment to liberty, equality, and due process, as well as an understanding of the meaning of representative government."⁶⁰

Kahn would enlist state judges into this American interpretive enterprise. "The effort of each [state] judge should be to construct the best interpretation of equality [or liberty or due process] of which he

54. *Id.* at 1149.

55. *See id.* at 1149-50 (citing U.S. Supreme Court decisions and James Madison).

56. *Id.* at 1150.

57. Before making the next argument described in the text, Kahn criticizes Justice William Brennan's support of state constitutional decisionmaking as "not an acknowledgment of a vibrant, state-centered community life, but rather an attempt to enlist the states in the liberal project of defending the individual against authority." *Id.* at 1151.

58. *See id.* at 1156-58; *see also* PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY (1992).

59. *See* Kahn, *supra* note 36, at 1153-59.

60. *Id.* at 1159.

or she is capable."⁶¹ Remarkably, he believes that the state judge is not bound to his or her state's texts, traditions, and history. He argues that "[t]he inquiry might turn to any number of texts, precedents, or historical events, as well as moral intuitions and principled arguments."⁶² "We distort this process if we conceive of it as an effort to put into place a local community's unique concept of equality [or liberty or due process], instead of the constitutional goal of equality [or liberty or due process] that is a common aspiration of American life."⁶³

Not only does Kahn miss the legal mandate imposed upon judges by their oaths of office and the historical teaching discussed above, but he misses the broad landscape of state constitutionalism. Although liberty, equality, and fairness may encompass the world of constitutional law, Kahn misses the point that many developments of state constitutional law will not be part of the Federal Constitution for years, decades, or longer, if at all. If they will not be part of the Federal Constitution, then the enterprise of an American constitutional law is tilting at windmills.

As I show below,⁶⁴ the people by their own initiative have protected women and men more in some states than the national government is likely to do for quite some time. The protection of privacy at the state level, for example, is years ahead of federal constitutional law. Protection of access to courts and protection of victims appear to be topics that the federal judiciary may not address on its own.

Both Gardner and Kahn conceive of "modernism" as in part a movement away from local power to national power and away from local identity to national identity. Without conceding that this is an accurate description of social reality, I suggest that the forms of Mosaic fundamental law as understood by modern critical Bible scholarship are as modern, and as influential, today as they were twenty-five hundred years ago. Modern fundamental law is a mixture of basic national rights and broad national values with sometimes differing and more protective local rights and values.

V. PROGRESSIVE STATE CONSTITUTIONALISM

A brief overview of several developing state constitutional issues shows that both Gardner's and Kahn's theories are challenged by the distinctiveness of local development. The overview begins with rights to equality, protected specifically under state and federal constitutions, and then proceeds to rights to privacy, rights of access to courts, and

61. *Id.* at 1161.

62. *Id.*

63. *Id.*

64. See *infra* notes 70-90 and accompanying text.

rights of victims, all of which are protected specifically under state constitutions and — to an increasingly lesser extent, if at all — under the Federal Constitution.

A. *Equality, a Right Specially Protected Under Federal and Most State Constitutions*

In the Federal Constitution, protections for equality derive principally from the Equal Protection Clause. Among the states, by contrast, there are four categories of language, some of them more specifically protective and some more broadly protective of equality than the federal provision.⁶⁵

The first category of language, found in thirteen states, is similar to that of the federal provision.⁶⁶ A second category of language, by contrast with equal protection language, prohibits the award of special privileges or immunities to persons and classes and appears in sixteen state constitutions.⁶⁷ A third category of language, used in at least six states, does not grant equal protection but instead guarantees equality of rights in general language.⁶⁸ A fourth category of language protects equality in class-specific language and appears in twenty-three state constitutions, including eighteen that use gender-specific clauses.⁶⁹

The class-specific protections exceed federal constitutional protection. For example, Florida specifically prohibits denials of equality on the basis of physical handicap,⁷⁰ while the Supreme Court has interpreted the Federal Constitution to give very little protection against

65. Friesen ably discusses these provisions, and the text of this review owes much to her discussion. See FRIESEN, *supra* note 30, para. 3.01.

66. CAL. CONST. art. I, § 7(a); CONN. CONST. art. I, § 20; GA. CONST. art. I, § 1, para. 2; HAW. CONST. art. I, § 5; ILL. CONST. art. I, § 2; LA. CONST. art. I, § 3; ME. CONST. art. I, § 6-A; MICH. CONST. art. I, § 2; MONT. CONST. art. II, § 4; N.M. CONST. art. II, § 18; N.Y. CONST. art. I, § 11; N.C. CONST. art. I, § 19; S.C. CONST. art. I, § 3.

67. See ALA. CONST. art. I, § 22; ARIZ. CONST. art. II, § 13; ARK. CONST. art. II, § 18; CAL. CONST. art. I, § 7(b); CONN. CONST. art. I, § 1; IND. CONST. art. I, § 23; IOWA CONST. art. I, § 6; KY. CONST. § 3; N.C. CONST. art. I, § 32; N.D. CONST. art. I, § 21; OR. CONST. art. I, § 20; S.D. CONST. art. VI, § 18; TEX. CONST. art. I, § 3; VT. CONST. ch. 1, art. VII; VA. CONST. art. I, § 4; WASH. CONST. art. I, § 12.

68. See FLA. CONST. art. I, § 2; KAN. CONST. Bill of Rights § 1; KY. CONST. §§ 1, 3; MO. CONST. art. I, § 2; TEX. CONST. art. I, § 3; WYO. CONST. art. I, § 2. Some of these states, in addition to general protective language, have class-specific protection in either the same or another section of their constitutions. See *infra* note 69. Other states combine this general language with a specific equal protection grant. See, e.g., ME. CONST. art. I, § 6-A; MICH. CONST. art. I, §§ 1, 2.

69. See ALASKA CONST. art. I, § 3; CAL. CONST. art. I, § 8; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; FLA. CONST. art. I, § 2; HAW. CONST. art. I, §§ 5, 21; ILL. CONST. art. I, § 18; LA. CONST. art. I, § 3; ME. CONST. art. I, § 6-A; MD. CONST. art. XXXXVI; MASS. CONST. pt. 1, art. I; MONT. CONST. art. II, § 4; N.H. CONST. pt. 1, art. II; N.J. CONST. art. I, § 5; N.M. CONST. art. II, § 18; N.Y. CONST. art. I, § 11; N.C. CONST. art. I, § 19; PA. CONST. art. I, § 26; TEX. CONST. art. I, § 3a; UTAH CONST. art. IV, § 1; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI, § 1; WYO. CONST. art. I, § 3, art. VI, § 1.

70. FLA. CONST. art. I, § 2.

such discrimination.⁷¹ Texas courts have interpreted its equal rights amendment to give out-of-wedlock fathers parity with mothers in legitimation actions,⁷² in contrast to federal law.⁷³ Washington courts have interpreted that state's equal rights amendment to prohibit gender discrimination, not simply to subject such discrimination to strict scrutiny; thus, they applied the amendment to strike down a rule barring girls from playing on a high school football team.⁷⁴

Even when state language is the same as or similar to federal language, such as California's equal protection language, state protection exceeds federal protection. California is an example of a state in which the courts have interpreted equal protection language more broadly than the federal courts, though Californians have voted to keep equal protection in one area at the federal floor. The California courts have protected homosexuals against employment discrimination⁷⁵ and have accepted statistical proof of disparate impact against women as sufficient to trigger strict scrutiny.⁷⁶ The California courts had also held that both de facto and de jure school discrimination violate the state equal protection clause,⁷⁷ but the people by ballot have limited the reach of the state clause to that of the federal clause in school cases.⁷⁸

B. *Privacy, a Right Generally Protected Under the Federal Constitution and Specifically Protected Under Many State Constitutions*

There is no specific protection of privacy under the Federal Constitution. The federal courts have, however, given some protection to privacy interests under the Due Process Clauses.⁷⁹ By contrast, ten states have eleven specific protections of privacy, five in freestanding clauses,⁸⁰ and six by express language in search-and-seizure clauses.⁸¹ Others, like the federal courts, have interpreted due process and natu-

71. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 313 (1985).

72. See *In re McLean*, 725 S.W.2d 696 (Tex. 1987).

73. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

74. See *Darrin v. Gould*, 540 P.2d 882 (Wash. 1975).

75. See *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979).

76. See *Boren v. California Dept. of Employment Dev.*, 130 Cal. Rptr. 683 (Ct. App. 1976).

77. See *Crawford v. Board of Educ.*, 551 P.2d 28 (Cal. 1976).

78. CAL. CONST. art. I, § 7(a), *as amended* by Proposition I (1979); see *Crawford v. Board of Educ.*, 458 U.S. 527 (1982) (upholding Proposition I).

79. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

80. See ALASKA CONST. art. I, § 22; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 6; MONT. CONST. art. II, § 10.

81. ARIZ. CONST. art. II, § 8; HAW. CONST. art. I, § 7; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.

ral rights clauses to protect privacy.⁸²

State protection of privacy exceeds federal protection in many instances, such as a higher standard protecting a woman's right to choose to terminate a pregnancy,⁸³ funding of abortions for poor women,⁸⁴ and recognition of gay marriage.⁸⁵ California, unlike the federal government, guarantees fundamental privacy protection against private action.⁸⁶

C. *Rights to Remedies and Rights of Victims, Rights "Unknown" to the Federal Constitution*

The Federal Constitution, with its Due Process Clause and its Retention of Rights Clause, may someday include several new rights, however unknown today. Nonetheless, it is noteworthy that states explicitly protect rights that, unlike privacy, are at best on the fringes of the Federal Constitution. Examples of these are a right to remedies and victims' rights provisions.

Most state constitutions guarantee that their courts will be "open" — a guarantee that courts frequently have construed to preserve common law remedies for injuries to persons. For example, a court held a Texas statute limiting the award of damages to \$500,000 for any medical malpractice injury, with the exception of necessary expenses for treatment, unconstitutional under such a provision.⁸⁷ Another court attempted to construe a right-to-remedy provision to strike down a state governmental immunity provision.⁸⁸ The federal courts have not made any similar decisions, and indeed, history counsels against such a construction of at least the Fifth Amendment Due Process Clause.⁸⁹

Finally, eleven states now have victims' rights provisions in their state constitutions.⁹⁰ It is too early to know how significantly these provisions will affect personal security, but nonetheless, their guaran-

82. See, e.g., *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986); *Greenberg v. Kimelman*, 494 A.2d 294, 304 (N.J. 1985).

83. See *In re T.W.*, 551 So. 2d 1186, 1196 (Fla. 1989).

84. See *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982).

85. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (applying strict scrutiny to a statute discriminating against single-sex marriages).

86. See *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618, 627-28 (Ct. App.) (finding that California law guarantees protection for privacy rights against intrusion by private actors, unless the private actor can show a compelling interest), *cert. denied*, 498 U.S. 939 (1990).

87. See *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988) (holding TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 11.02-.03 (Vernon Supp. 1986) unconstitutional under TEX. CONST. art. I, § 13).

88. See *Pfost v. State*, 713 P.2d 495 (Mont. 1985), *overruled by Meech v. Hillhaven W., Inc.*, 776 P.2d 488 (Mont. 1989).

89. See David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35, 39-40 (1986) (explaining that the suggested access-to-court provisions in the Bill of Rights were never included).

90. See ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; FLA. CONST. art. I, § 16(b); ILL. CONST. art. I, § 8.1; MICH. CONST. art. I, § 24; MO. CONST. art. I, § 32; N.J. CONST. art. I,

tee that victims may be present and heard in criminal proceedings and California's guarantee of restitution may be sources of protection not soon encompassed by the Federal Due Process Clause.

CONCLUSION: FOLLOWING THE MODERNIST MOSAIC FORM

It is not news for the Law Page of *The New York Times* that the form of American fundamental law reflects the forms of Mosaic law twenty-five hundred years ago and emulated first in Massachusetts and Pennsylvania three hundred to three hundred and fifty years ago. It is not news that there are basic national rights and broadly defined national values, and that within that framework states and communities are free to enhance liberty. Perhaps it is news, however, that so much of the enhancement of liberty is the handiwork of local groups, associations, and communities, and not the judiciary.

None of this should be especially surprising. As Leo Strauss observed:

[K]nowledge of the indefinitely large variety of notions of right and wrong is so far from being incompatible with the idea of natural right that it is the essential condition for the emergence of that idea: realization of the variety of notions of right is the incentive for the quest for natural right.⁹¹

God etched fundamental law in stone. Moses broke the first set of tablets. The second set disappeared. Then the people canonized the varieties of fundamental law.

para. 22; N.M. CONST. art. II, § 24; R.I. CONST. art. I, § 23; TEX. CONST. art. I, § 30; WASH. CONST. art. I, § 35.

91. LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 10 (1953), quoted in Robert P. George, *Natural Law and Civil Rights: From Jefferson's Letter to Henry Lee to Martin Luther King's Letter from Birmingham Jail*, 43 *CATH. U. L. REV.* 143, 148 (1993); see Joseph Boyle, *Natural Law and the Ethics of Traditions*, in *NATURAL LAW THEORY* 3 (Robert P. George ed., 1992).