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ARTICLE

Special Issue — Law and Political Imagination: The Perspective of Paul Kahn

The Political Jurisprudence of Paul W. Kahn

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Abstract
This article presents an account of the work of the American constitutional law scholar, Paul W. Kahn, by situating it within a European tradition of political jurisprudence. After introducing certain basic features of this school of political jurisprudence, it proceeds to examine and evaluate Kahn's work relating to the political, the state, sovereignty, collective identity and constitution within the framework of that distinctive worldview.

Keywords: Political Jurisprudence; Political Authority; Kahn; Constitution

A. Introduction

Political jurisprudence is a school of thought that conceives of law as an aspect of human experience called "the political." This term should not be confused with politics: politics is a set of practices that evolves to manage conflicts within an established regime, whereas the political is a more basic phenomenon. It refers to the ways in which we imagine how such regimes are formed and can maintain their authority. The political is a distinct way of being and acting in the world. It comes into its own as a modern phenomenon following the collapse of a hierarchically inscribed theological worldview. In this respect, modernity is signified by the emergence of a variety of ways of gaining knowledge of the world. These various ways include scientific, technical, historical, economic, moral, aesthetic, and political perspectives. The school of political jurisprudence holds that law functions in modernity to strengthen the integrative forces of the political. Although rarely identified as a distinct school, it has evolved since the sixteenth century to produce a rich body of knowledge about how political authority is established and maintained.

Political jurisprudence has emerged primarily as a European discourse. This is not surprising, given that European struggles against theocracy, feudalism, and monarchical or aristocratic power have been most intense. In the United States, by contrast, this type of jurisprudence has failed to gain much traction. Commenting on my book on the political foundations of public law, for example, Mark Tushnet concluded that, finding a ready answer in the US Constitution, "US-based scholars see nothing at stake" in such an inquiry. "The US Constitution," they surmise, has "no deep foundations," it is "simply a means of coordinating action and, importantly, for settling disagreements among a population holding widely varying views about good public policy and about the content, (if any) of 'natural' rights."[1] Tushnet expresses the orthodox American view. And it is

[1]Mark Tushnet, *Foundations of Public Law: A View from the United States*, *in* QUESTIONING THE FOUNDATIONS OF PUBLIC LAW, 209–215 (Michael A. Wilkinson & Michael W. Dowdle, eds., 2018).

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for this reason that the work of the US constitutional scholar, Paul W. Kahn, is of such interest and potential importance. Rejecting that orthodoxy, Kahn has been pursuing a sustained inquiry into America's civil religion. Reworking constitutional understanding along these lines, Kahn's inquiry follows a similar trajectory to that undertaken by European exponents of political jurisprudence.

Kahn's work has immense value for the insight it provides into the character of American constitutional law, but it can also be read as making a distinctive contribution to the general subject of political jurisprudence. Scholarly work within that school maintains that the political is an autonomous way of conceiving the world. Kahn acknowledges the centrality of the political, but he also emphasizes the degree to which the political is inextricably bound up with the religious; the political, he suggests, remains continuous with traditional conceptions of the sacred. His work can therefore be seen not only as presenting an original way of thinking about the American regime but also as making an insightful contribution to political jurisprudence.

B. Political Jurisprudence

Scholars of political jurisprudence do not adhere to a common political philosophy and neither do they hold similar views on political questions. They belong to this school by virtue of acknowledging that law is an aspect of the political and recognizing that, in seeking to understand constitutional law, the critical issue to address is the question of how political authority is acquired. This type of inquiry commonly focuses on the institution of the state. But rather than assuming the state's authority, political jurists feel obliged to inquire into certain prior questions about how the state acquires its distinctive character and maintains its standing. Rather than making an objective presupposition, they maintain that legal inquiry should begin by examining the subjective factors that account for the formation of a state.

Political jurists assert that the dominant school of legal positivism is able to present a scientific account of law only by asserting the autonomous character of law as a system of norms, and in doing so, present a skewed account of the subject. Far from examining how law rests on certain underlying conditions of legitimacy, legal positivists equate legitimacy with formal legality, a ploy that detracts from understanding the role of law in establishing and maintaining political authority. In place of a "scientific" positivist account that explains only the internal perspective of participants devoted to the task of delivering justice according to law, political jurists present a historically informed sociological analysis of how law contributes to the legitimacy of political order. Normativists assume the authority of the state and its adopted constitution; political jurists inquire into the ways in which the state is constituted.

The significance of this orientation is most clearly revealed in their accounts of the character of the modern state. That which normativists presuppose becomes the political jurist's primary object of inquiry. Maintaining that the idea of law in modernity cannot be appreciated without examining the ways in which the state acquires authority, they also quickly realize the attendant difficulties. Political jurists employ a variety of methods and approach the issue from a range of perspectives, but they soon converge on a shared realization of the scale of the challenge. They acknowledge that the challenge of deriving an account of law from an inquiry into the nature of the state is made much more complicated once one recognizes the state's ambiguous character. They recognize, specifically, that the concept incorporates an ineradicable tension between two irreconcilable dispositions.

Many attempts at providing a satisfactory formulation to account for that tension—let alone resolve it—have been made. When at the beginning of the twentieth century Georg Jellinek brought the nineteenth century tradition of German state theory to a synthesis, he addressed it by invoking a two-sided doctrine of the state. Recognizing that law is an essential component of the state, he argued that it was nevertheless a mistake to reduce the concept to its juristic form. In addition to the normative dimension concerned with concepts and forms (right: *Recht*), the state

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has an essential material aspect that has regard to issues of purpose and policy (power: *Macht*).[2] Jellinek was not the first to have done so. In the 1760s, for example, Adam Smith had organized his *Lectures on Jurisprudence* around a related distinction between justice and police; while the main objective of the state might be to maintain justice through a system of rules, he demonstrated that it also exists to promote the material well-being of its members through a system of police regulation.[3] In this respect, Smith was doing little more than building on the distinction that Rousseau makes between sovereignty—the exercise of the legislative power to realize the general will—and government—the executive power geared towards making citizens "what one needs them to be."[4]

Variants of Jellinek's two-sided doctrine have nevertheless proved influential in subsequent studies of the state's character. These include: Friedrich Meinecke's account of "reason of state" organized around a distinction between *Kratos* and *Ethos*, that is, "between behaviour prompted by the power-impulse and behaviour prompted by moral responsibility;"[5] Costantino Mortati's contrast between the formal constitution of norms with the material constitution of institutionally-organized social forces;[6] Ernst Fraenkel's study of the Nazi dictatorship, showing that the state divided into two co-existing orders of the normative state (*Normenstaat*), structured by statutes and court orders, and the prerogative state (*Maßnahmenstaat*), operating according to the exigencies of party rule;[7] Michael Oakeshott's presentation of two modes of association—*societas* (the state as a formal relationship in terms of rules) and *universitas* (the state as a corporate entity established to pursue some common purpose)—as the "specification of the self-division of this ambiguous character;"[8] Michael Mann's recognition that the state exercises different types of power, which he labels despotic (power over) and infrastructural (power through);[9] and Friedrich Hayek's analysis of the modern constitutional state divided between nomocratic (*nomos*) and teleocratic (*thesis*) modes of ordering.[10]

This tension in the character of the modern state has loomed large over many of the more ambitious studies of contemporary political thought. When, in 1977, Michel Foucault gave his lectures on the state at the Collège de France, he highlighted the distinction between what he called "the juridical theory of sovereignty" addressed by "philosophers of right" and which "possesses its own instruments in the shape of its laws," and "governmentality," a technology of governing that employs tactics rather than law and uses laws as tactics.[11] When, in 1990, Pierre Bourdieu gave his lectures at the same institution on a similar subject, he contrasted the philosophical and sociological treatments of the state and argued that "these two seemingly antithetical views of the state are as it were two sides of the same coin: you cannot have the Hegelian state without having the Marxist state."[12] And when, during the 1990s, Jürgen Habermas developed his major work on constitutional theory he openly acknowledged that the tension between the idealism of constitutional law and the materialism of administrative law—that is, between the drivers of,

[2]*See* Georg Jellinek, Allgemeine Staatslehre (3rd ed. 1921).

[3]*See* Adam Smith, Lectures on Jurisprudence (R.L. Meek, D.D. Raphael, and P.G. Stein eds., 1978) (1763).

[4]Jean-Jacques Rousseau, The Social Contract and Discourse on Political Economy *in* The Social Contract and other later political writings 13 (Victor Gourevitch trans., 1997) (1762).

[5]Friedrich Meinecke, Machiavellism: The Doctrine of Raison d'État and its place in Modern History 5 (Douglas Scott trans., 1957).

[6]*See* Costantino Mortati, La Costituzione in Senso Materiale (1940).

[7]*See* Ernst Fraenkel, The Dual State: A Contribution to the Theory of Dictatorship (EA Shils trans., 1941).

[8]Michael Oakeshott, *On the Character of a Modern European State*, *in* On Human Conduct 185, 200–01 (Michael Oakeshott, 1975).

[9]*See* Michael Mann, The Sources of Social Power: The Rise of Classes and Nation-States (1993).

[10]*See* Friedrich A. Hayek, Law, Legislation and Liberty: Rules and Orders (1973).

[11]Michel Foucault, Security, Territory, Population: Lectures at the Collège de France, 1977-1978, 99, 108 (Michel Senellart, ed., Graham Burchell trans., Macmillan 2009).

[12]Pierre Bourdieu, On the State: Lectures at the Collège de France, 1989–1992, 84–85 (David Fernbach trans., 2014).

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respectively, social integration and system integration—leads to a growing gulf between philosophical and empirical approaches to law and leaves the concept of law as "a profoundly ambiguous medium of societal integration."[13]

Many contemporary constitutional lawyers have sought to evade the consequent difficulties by narrowing their task to that of explicating the juristic form. The difficulty is that this all too easily leads to an ideologically skewed understanding of law, one in which the exercise of power is tantamount to its abuse, or in which, following Hayek, law is to be conceived as a type of spontaneous order, with legislation and regulations being treated as thoroughly debased forms. Political jurists, by contrast, maintain it is not possible to present a scientific account of the law relating to the activity of governing if one starts by trying to brush aside the ambiguities attendant to tensions exhibited in the concept of the state.

This is the key point Carl Schmitt was making when, during the 1920s, he asserted that the concept of the state presupposes the concept of the political, that the exception is more interesting than the rule, that "a jurisprudence concerned with ordinary day-to-day questions has practically no interest in the concept of sovereignty," and that the issue of legitimacy cannot be equated to legality.[14] The ambiguous character of the state bequeaths an ambivalent identity to law. The concept of law in modernity is not reducible to positive law; behind the law made by the authorized institutions of the state (*das Gesetz/la loi*) is the law that makes the state (*das Recht/le droit*). That is, once the state is recognized as an institution that has been conjured into existence through recognition of the political worldview, it must be conceived as a legally organized political construct.[15] As a feature of the political, the state is constituted by the type of "political law" which Rousseau called *droit politique*.[16] This makes the modern idea of law a profoundly ambiguous phenomenon, but it is this ambiguity, argue the political jurists, which must be embraced as a central theme of scholarly inquiry.

Many of the issues that have been debated in this European discourse find resonance in Paul Kahn's work. It is for this reason that it is best appreciated as exemplary of work in the tradition of political jurisprudence. Significantly, Kahn has argued that legal scholarship should be reoriented away from the immediate concerns of professional practice and towards an understanding of law as a cultural phenomenon.[17] He has consistently maintained that American constitutional theory can be understood only when one recognizes that it is driven by an unresolved tension between reason and will, that is, between "a technical art applying an abstract science" and "a model organized around the image of organic life."[18] And although his early work advanced an appreciation of constitutional law as a form of political discourse,[19] from the early 2000s it can be seen more explicitly to have embraced the basic methods of political jurisprudence.

[13]Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 40 (William H. Rehg trans., 1996) (1992).

[14]Carl Schmitt, The Concept of the Political (George Schwab trans., 1996) (1932); Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty 12–15 (George Schwab trans., 2005) (1922); Carl Schmitt, Legality and Legitimacy (Jeffrey Seitzer ed. & trans., 2004) (1932).

[15]*See* Hermann Heller, *The Nature and Function of the State*, 18 Cardozo L.R. 1139, 1190–91 (1996).

[16]*See* Jean-Jacques Rousseau, du Contrat Social, ou Principes du droit politique (1762). *See also* Martin Loughlin, Political Jurisprudence (2017).

[17]*See* Paul W. Kahn, The Cultural Study of Law: Reconstructing Legal Scholarship (1999).

[18]*See* Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 Yale L.J. 450 (1989). *See also* Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 Yale L.J. 1 (1989) (elaborating on American constitutional scholarship, "American constitutional theory has been cyclical, understanding the Constitution sometimes as a product of will and sometimes as a product of reason").

[19]Paul W. Kahn, Legitimacy and History: Self-Government in American Constitutional Theory (1992).

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C. Kahn's Method

Rejecting the orthodox approach taken by American constitutional scholars, Kahn deploys an innovative method to explain the constitution of political authority in the United States. Rather than assuming the authority of the Constitution, he builds his account of authority from more basic concepts, and particularly those of the political, the state, sovereignty, and collective identity.

Kahn begins by asserting the distinctiveness of the political worldview. The political is acknowledged as a specific way of perceiving meaning. It follows its own rationality, one which is not reducible to the moral point of view.[20] Measuring politics by morality, he argues, "makes as much sense as measuring art by morality." Founded on a friend/enemy distinction, the political worldview comes into its own once "I can imagine myself sacrificing myself and killing others to maintain the state." If thought of as coming into being through the transition from a state of nature to civil order, then peace is not substituted for violence: violence is displaced by power, "unexplained suffering with sacrifice, and chaos with history."[21]

The efficient cause of the state is the revolutionary break from the old order. Kahn here explains that the revolutionary actor must always be conceived as "the people," and their revolutionary success is signified by "the creative act of self-formation by a sovereign people." It is that creative act which establishes "the state," an entity whose character is represented by "the sovereign." Every modern state is to be conceived as a "people's republic," in that the sovereign must always be the people. The sovereign people then adopt a constitution.[22]

Like the divine sovereign, the popular sovereign is treated as omnipotent, in that the political form adopted remains open to the sovereign's decision. Sovereignty evidently is key, but it is a complex concept. It should not be assumed to express "some sort of natural truth about the community;" indeed, it is more likely to have come into being through force. But whatever the circumstances of its appearance, it cannot be explained either as a matter of "class interests" or of "abstract reason." Sovereignty is a political concept: "indeed, it is *the* political concept." It cannot adequately be explained as a purely legal concept: "Rather, it represents an ethos; it absorbs an entire world of meaning."[23] This popular sovereign remains "as mystical and sacred an entity as the king ever was."[24]

Kahn's account of sovereignty has certain affinities with Schmitt's treatment of the concept. Like Schmitt, he recognizes the sovereign as the source of law and as having "the power to suspend law for the sake of defending the necessary conditions of the law." Nonetheless, in a well-established constitutional regime like the United States, he also appreciates that sovereign power "is not just at the border of law, but deep within the law as well." This qualification does not diminish his acceptance of Schmitt's essential point that the political rests ultimately on a friend/enemy criterion. "The more a community understands itself as a political people, the more it will find an ultimate meaning in that identity" and the more it will be prepared to "protect that identity even at the cost of great sacrifice." The claim to collective self-government founded on popular sovereignty yields the "American culture of the political."[25]

The United States, Kahn argues, "was the first and remains the most successful state in the modernist project of collective will formation under the guidance of the new science of politics." He recognizes that one of the characteristic features of modernity is to have exposed the possibility of conceiving a variety of distinctive worldviews. These establish closed systems, but such systems

[20]*See* Paul W. Kahn, *America's New Civil War*, 198 Telos 125, 131 (2022) ("The political distinction of friends and enemies specifies an autonomous domain of meaning. Politics is not a consequence of something more basic: for example, religion, economics, or justice. Its autonomous character means that anything can become political when it becomes the point around which organized groups recognize their identity.").

[21]Paul W. Kahn, Putting Liberalism in its Place, 228, 239–41 (2005).

[22]Paul W. Kahn, Political Theology: Four New Chapters on the Concept of Sovereignty 137–147 (2011).

[23]Paul W. Kahn, *The Question of Sovereignty*, 40 Stanford J. Int'l L. 259, 262–83 (2004).

[24]Paul W. Kahn, Sacred Violence: Torture, Terror, and Sovereignty 34 (2008).

[25]Kahn, supra note 23, at 263–65.

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should not be treated as relating only to a sub-field of society: "A closed system makes sense of an entire world; it sees phenomena—any phenomenon—from a particular point of view." Science is one such system, aesthetics another, and, on the basis that there is no action about which we cannot ask, "is it legal?", so too is law. In making this claim, he is not asserting the autonomy of positive law. Rather, it signifies the emergence of a "system of belief within which Americans understand popular sovereignty." Law, in this understanding, is to be conceived as a cultural phenomenon. This claim could just as readily be expressed as asserting the autonomy of the political since American civil culture is marked by a fusion of the legal and the political. The inextricable link between popular sovereignty and "the rule of law" constitutes America's civil religion.[26] He here presents a distinctively American version of *droit politique*.

America's civil religion expresses the conviction that the popular sovereign exists to maintain the rule of law. It is for this reason that, to an unusual degree, the rule of law carries the weight of collective political identity. It is "in and through participation in law" that "the American citizen realizes the political truth of his or her identity."[27] On its face, this claim is similar to Jürgen Habermas' account of the character of modern constitutional democracy presented in his co-originality thesis. Habermas argues that "popular sovereignty is expressed in rights of communication and participation that secure the public autonomy of citizens and the rule of law is expressed in those classical basic rights that guarantee the private autonomy of members of society."[28] Kahn asserts, similarly, that popular sovereignty and the rule of law are "two of the critical terms defining the American imagination of the political." But this similarity is deceptive; their claims actually differ in fundamental ways. This is made explicit when Kahn explains that there is a third critical principle of the American political imagination, that of "sacrifice."[29]

Habermas' defense of constitutional democracy rests on the assumption that modern culturally heterogeneous societies cannot base their legitimacy on a conception of the common good. The only basis of legitimation today is adherence to universal principles of right prescribed in the constitution. Rejecting the legitimacy of the norms of a "community of fate," he asserts that the only type of patriotism that can be coherently embraced today is what he calls "constitutional patriotism."[30] This is a far cry from Kahn's argument. For Kahn, the state's legitimacy is generated by the shared sacrifices made by this evolving community of fate. "The power of the state," he argues, "is sustained by the willingness of citizens to take up the burdens of sacrifice." Without this willingness, the state loses its authority: "When a state can no longer call for sacrifice, citizens have ceased to understand sovereignty as constitutive of identity, and, losing meaning, politics becomes administration or, at worst, 'a source of oppression'."[31]

Contrary to the rationalist account presented by Habermas, Kahn asserts the power of the political as expressed through the sense of collective identity of a sovereign people. In the American experience, this concept of the political takes shape through a synthesis of popular sovereignty and the rule of law. But this synthesis, far from being an intellectual construct produced by discursive analysis, is the product of a "lived experience" punctuated by political decision. This yields a distinctive conception of justice born of a history of national sacrifice. Being and meaning coalesce in a concept of sovereignty understood as the exercise of the collective self-government of a people.

[26]*Id.* at 266–67.

[27]*Id.* at 265.

[28]Jürgen Habermas, *On the Internal Relation between Law and Democracy*, *in* The Inclusion of the Other 258 (Ciaran Cronin & Pablo DeGrieff eds., 1998) (1996).

[29]Kahn, *supra* note 23, at 273.

[30]Jürgen Habermas, *Historical Consciousness and Post-Traditional Identity: The Federal Republic's Orientation to the West*, in The New Conservatism: Cultural Criticism and the Historians' Debate 249, 253 (Shierry W. Nicholsen ed., trans., 1989).

[31]Kahn, *supra* note 23, at 273.

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D. The American Constitution as Civil Religion

Kahn's method recognizes that the political is forged in the existential dimension of friend and enemy but flourishes in the symbolic dimension of representation. Sovereignty, he argues, is the quintessential political concept. Holding the key to understanding the community's sense of self-identity, we grasp its meaning only by pursuing a form of analysis that is open "to faith, myth, transgenerational identity, and the sacred."[32] Sovereignty is not simply an abstract idea; resisting universalization, it acquires meaning only within the context of a particular community. In the American tradition, this is given specific expression in the conviction that the popular sovereign exists both to make law and uphold the rule of law. This is the core principle of America's civil religion. It finds its authoritative expression in the Constitution.

The unique standing of the Constitution in American political life is therefore to be grasped by examining it through the prism of sovereignty. Kahn traces the origins of the concept of sovereignty to the medieval era, a period in which "the religious and the political constituted mutually supportive aspects of a single tradition." But the point he stresses is that, notwithstanding the modern separation of church and state, and despite the person of the sovereign shifting from the monarch to the people, the character of sovereignty remains continuous. It is wrong, he concludes, to think that modernity leads to a secularization of the sovereign: it was a "process of sacralization of the state rather than secularization of authority" and it has led to the "reappearance of the sacred in the form of an autonomous national politics."[33]

The story of modernity, Kahn maintains, concerns "the transformation of the mystical corpus of the state from the body of the monarch to that collective body that is the people." Modern sovereign identity replicates the religious: revolution may have replaced revelation, and the divine sovereign may have been replaced by the popular sovereign, but "the imaginative order remains structurally the same."[34] The revolutionary action of the sovereign people is assumed to be the source of law. But because this revolutionary action creates a sacred community, its founding law similarly acquires legitimacy only once acknowledged as sacred: "The Constitution is our sacred text, and through law we participate in the sovereign will. The Supreme Court is our Temple and the Justices are our priests."[35]

This elevated standing of the Constitution was signalled from the earliest days of the republic.[36] It may have taken some time for its systemic character to be generally accepted,[37] but today there is no doubt that it stands as the sacred icon of America's political identity.

"To move from efficient to formal cause," argues Kahn, "is to move from revolution to constitution." The efficient cause of the state is to be found in "revolutionary acts of popular self-creation" whereas the Constitution "expresses the [formal] principles of order that give the state its identity."[38] In American political culture, the Constitution bears an unusually great political burden. Only in the USA does "national political identity focus so clearly and quickly on a legal text." Only here do the deepest political questions "merge with ourselves as an expression of popular sovereignty." This is the great American political myth, that "through the Constitution we participate in a sovereign act of self-government."[39]

Alongside this pre-eminent status of the Constitution sits the role of the Court as the guardian of the sacred text. In this guise, the Court assumes the role of representing—that is, speaking in the voice of—the sovereign people. "Belief in this identification of the judicial voice with the people's

[32]Kahn, *supra* note 23, at 282.
[33]*Id.* at 268–69.
[34]*Id.* at 270.
[35]*Id.* at 271.
[36]*See* Paul W. Kahn, The Reign of Law: Marbury v. Madison and the Construction of America (1997).
[37]*See* Paul W. Kahn, Origins of Order: Project and System in the American Legal Imagination (2019).
[38]Kahn, *supra* note 21, at 268.
[39]*Id.* at 252–53.

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voice," Kahn maintains, "is the source of the Court's legitimacy."[40] This is the foundation of the Court's authority to strike down decisions of the political institutions of government; political institutions might express *popular opinion*, but they do not represent the *popular sovereign*.

Only once the Court's role in acting as guardian of the Constitution is recognized do the techniques of judicial decision-making and constitutional interpretation adopted in US practice make sense. In the guise of interpreting the Constitution, the Court in effect conjures into existence an imagined political world. This task involves exercises in mapping and genealogy. The judiciary must implicitly sketch a conceptual scheme, what might be called an architecture of belief, so that meaning can be conferred on official action. And the realization of this task is necessarily shaped by historical meanings: "Genealogy and mapping go hand-in-hand. They drive each other forward in any interpretive process." Constitutional interpretation might be presented by lawyers as an exercise that strives to reveal a "true" understanding, but because this is a political world of inexhaustible meanings, this must unavoidably be an endless task. And the textual formalist's failure to understand this "always leaves him dismayed by the actual process of constitutional interpretation."[41]

Kahn explains that the task of constitutional interpretation is concerned with "elaborating the meaning of the text as if it were the product of a single author: the popular sovereign." It is this emphasis on sovereign will that makes American constitutional discourse exceptional. Elsewhere in the world of constitutional democracies, the constitutional court "expresses the voice of reason" and invokes principles of proportionality and balancing. From that perspective, Americans evidently fetishize the text and, in doing so, proceed in an irrational fashion. Why, Kahn rhetorically asks, "should we care about the views of long dead white men, as opposed to the contemporary understandings of justice, equality, and due process?" The answer is that: "We care because in and through this tradition we maintain contact with the sacred origins of the community." This method maintains its authority because, although "the American popular sovereign is an inexhaustible source of meaning, not a determinate, finite content," this manner of proceeding "makes of us participants in a single, collective project of popular sovereignty."[42]

"Faith in the Court," Kahn concludes, "is embedded within a several-thousand-year-old Western tradition of constructing the sacred."[43]

E. Sovereign Decision

In Kahn's scheme, the tension between the two-sided character of the state is played out in the distinction between law and sovereignty. Recognizing that the law plays an unusually important role in American political life, he asks whether in the world of the American constitutional imagination there remains "a space of sovereignty beyond law?"[44] The claim of popular sovereignty in the United States began with a call to sacrifice in an armed revolutionary struggle and the success of that revolution led to the appearance of the popular sovereign in the form of the people. But once the people have adopted the Constitution as their fundamental law, does a space of sovereign power remain?

Kahn acknowledges that the trajectory of recent developments moves us in the direction of entirely rejecting the existence of any such tension. Many jurists now claim that in the era of globalization and universal human rights, sovereignty is an anachronistic notion. A "Protestant pluralism of interpretive communities," he notes, is assumed to have displaced "the singular mystery of the sovereign body" and today "a modern constitution imagines no political situation

[40]Kahn, *supra* note 23, at 271.
[41]*Id.* at 267.
[42]Kahn, *supra* note 23, at 267–72.
[43]*Id.* at 273.
[44]Kahn, *supra* note 24, at 2.

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or action to which the law does not apply."[45] Yet he maintains that this type of assumption is mainly a feature of contemporary European practice, where the line between the domestic and the international is increasingly blurred and the growth of transnational managerialism leads to domestic depoliticization. That development is, however, a less salient feature of American jurisprudence.

It is true that liberal theorists commonly fail to acknowledge that "the quasi-religious character of the modern nation-state" working as "the site of endless passion and of sacrifice for ultimate meanings" establishes "the context within which liberalism operates."[46] Nevertheless, Americans remain skeptical of the enhanced authority of the international legal order. And the reason they do is precisely because, in seeking to sever law from sovereignty, that development constitutes a direct assault on a key tenet of its civil religion: that law is an expression of the will of the popular sovereign. Insisting on maintaining strong borders and a strict distinction between citizens and aliens, they resist "schism, secession, and division" in the name of sovereignty.[47] In defending borders, they defend not just a territory but a way of life. In these respects, Americans adhere to the political worldview.

Whether there is a space of sovereign authority beyond the law thus remains a pressing issue. Yet his answer to that question is not straightforward. Kahn recognizes that in a certain sense the entire American political experience has been lived "within the shadow of the exception."[48] By this he means that the "order of law begins in the exception of the Revolution and continues always under the possible need to turn to violence to defend the revolutionary accomplishment of a constitution."[49] Consequently, the role assumed by the Court in engaging in constitutional review commonly marks "a reappearance of the political rupture." And when the Court acts, it tends not to be making a claim about reason but to speak "the constitutional truth."[50] In this respect, the Court is speaking in the name of the sovereign. In the United States, he writes, "the most important source of expression of the transtemporal will of the popular sovereign is to be found in the Supreme Court."[51]

Kahn argues that we grasp this essential point only by engaging with the social imaginary of the political operating "at the intersection of constitutional law, cultural anthropology, theology, and philosophy." In doing so, we are obliged to accept that constitutional reasoning is driven by rhetoric rather than logic and to recognize that American constitutional discourse reveals the "persistence of forms of the sacred in a world that no longer relies upon God."[52] When engaging in constitutional analysis we enter the world of political theology.

In this worldview, there is evidently a place for sovereign decision beyond law. But on the question of the implications for understanding the Court's role Kahn's answers are less clear. When he asserts that sovereignty "is not the alternative to law but the point at which law and exception intersect," or that "the exception is tied to law but is not itself subject to law," or that the "sovereign decides outside of law for the sake of law," we sense obfuscation creeping in.[53] He accepts that the Court is assuming a political jurisdiction,[54] notes that closure can never be reached on the issue of the appropriate theory of interpretation, and recognizes that in this sense "we see the connection of sovereign power to every decision."[55] But none of these claims brings us nearer

[45]Kahn, *supra* note 23 at 277; KAHN, *supra* note 22, at 54.

[46]KAHN, *supra* note 21, at 93.

[47]Kahn, *supra* note 23, at 278.

[48]KAHN, *supra* note 22, at 11.

[49]*Id.*

[50]*Id.* at 13.

[51]Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677, 2696 (2003).

[52]KAHN, *supra* note 22, at 26.

[53]KAHN, *supra* note 22, at 34, 47, 50.

[54]*See id.* at 63 ("If the relationship between form and legal decision were direct in the sense that text controls judgment then we will not find ourselves battling so strongly over appointments to the Supreme Court.").

[55]*Id.* at 74.

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to understanding what it means to say that the Supreme Court acts in the name of the popular sovereign when it decides constitutional questions.

Any attempt to develop a legal theory from the standpoint of the decision, Kahn explains, "requires shifting the focus from norms to sovereign, from essence to existence, or from reason to will."[56] Similarly, he rhetorically appropriates such liberal theories as Dworkin's right answer thesis to emphasize that the figure of Hercules is actually the figure of the sovereign. And he states that, far from constitutional review being concerned with deliberation over the meaning of a text, it entails "asserting the authority of the state to bring one meaning rather than another into the world."[57] But none of these statements move us beyond the general claim that "the rule of law is as much about decision as it is about norms."[58]

Deeper insight might be gleaned from Kahn's analysis of the art of judicial opinion.[59] Here, he emphasizes that judicial decision depends neither on discovering the true theory of interpretation nor on identifying the relevant doctrine. The task is not theoretical; it depends on presenting a convincing narrative account of what the tradition of practical self-governance entails. The constitutional authority of the judge rests on evolving practices that enable us to attribute authorship to the narrator. The author is "we the people" and that sense of authorship exists only so long as we continue to "affirm our political identity as part of this We that narrates the text." This is the basis of the Constitution's legitimacy. Unity of meaning is found by imagining a unitary agency, "we the people." And when this is discerned, we are able to move from narrator to author. The judicial opinion, Kahn argues, "is precisely the place where we can see how this idea of authorship is constructed and maintained through the narrative voice." It is a process that depends on presenting the law "in the light of a public purpose that extends to the entire community."[60]

Kahn concedes that: "If this all seems mysterious, it is because it is." Judges have authority not because they are "more reasonable than the rest of us" and not because they have "a special expertise" but because "they stand in a charismatic relationship to the sovereign source of law." Their authority to narrate the law is "a matter of faith and belief, of rituals that maintain that faith, and of rhetoric that gives it expression."[61] We see the implications most clearly in cases of failure. One of the most prominent recent examples of narrative failure is found in *Bush v. Gore*, in which the Supreme Court "told a waiting nation who would be the next president of the United States"[62] but demonstrably failed to "provide a rhetorically persuasive narrative of our national life."[63] A similar criticism is made of the Supreme Court's landmark ruling in *Brown v. Board of Education*, where the Court failed to rise to the occasion and present a persuasive narrative account of the principle it was establishing.[64] The Court instead turned to "the tools of politics in place of the traditional tools of law" and addressed the issue of segregation as a matter of public policy and on the findings of contemporary social science. Having failed to rise to the issue of principle, it was obliged to spend the following decade making tactical political judgments and then "dissembling when it began the long process of retreat from a commitment to equality in the 1970s."[65]

The conclusion we reach is that in determining constitutional questions the Court is making a sovereign decision, but when doing so it is obliged to express this in the language of law and

[56]*Id.* at 75.
[57]*Id.* at 81, 85.
[58]*Id.* at 90.
[59]*See* Paul W. Kahn, Making the Case: The Art of the Judicial Opinion (2016).
[60]Kahn, *supra* note 59, at 54, 57, 62, 60.
[61]*Id.* at 85–86.
[62]*Bush v. Gore*, 531 U.S. 98 (2000).
[63]Kahn, *supra* note 59, at 39, 45.
[64]*See id.* at 112–17; Brown v. Board of Education, 347 U.S. 483 (1954).
[65]Paul W. Kahn, *Judicial Ethos and the Autonomy of Law*, 110 Penn. St. L. Rev. 933, 940 (2006).

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right.[66] On the crucial issue of the Court's constitutional role in speaking as the sovereign, Kahn argues that: (i) the Constitution is "the possession of the people, not of the legal scientist," (ii) "the opinion of the Court quite literally is the authority of the people," (iii) "will precedes reason – legitimacy precedes justice," (iv) the Court works "to support and maintain a cultural formation," but (v) the Court must also recognize that the "American rule of law is neither politics nor science."[67] When performing its constitutional function and acting in the name of the people to uphold their sovereign will, the Court is obliged to maintain the integrity of its own symbolic system.

F. Critical Appraisal

Through an extensive body of writing over the last thirty or so years, Paul Kahn has developed an original analysis of America's distinctive constitutional order. Working against the mainstream of US constitutional scholarship, he offers a powerful account of the constitution of political authority in American life. Showing that the Revolution led to sovereignty being transferred from the king to the people and then the achievements of that Revolution being consolidated in the Constitution, he argues that America's civil religion expresses the conviction that the popular sovereign exists to uphold the rule of law and that the Court, as guardian of the Constitution, exists to uphold the will of the popular sovereign.

Kahn presents a phenomenology of the American practice of constitutionalism. This is a major contribution to political jurisprudence. In reflecting on it as an account of American constitutional practice, the question to be asked is whether Kahn's scheme includes sufficient resources to enable a critical appraisal of these developments to be undertaken. In seeking an answer, his accounts of sovereignty, constitution, and symbolic representation, must be revisited.

Crucial is the treatment of sovereignty. On this topic, I suggest that Kahn too readily asserts a continuity in the meaning of the concept through the transition from medieval to modern. He claims that there was a shift in locus from the king to the people, but the concept itself remains continuous, not least in retaining its hold on the mystical and the sacred. But surely the shift is more complicated. I would argue that the transition leads to such a fundamental rupture that any sense of continuity is strained. Indeed, it is only in modernity that the concept of sovereignty properly emerges. That is, medieval jurists undoubtedly had a clear sense of the concrete notion—the sovereign as holder of a mystical and sacred office—but they had no understanding of the abstract concept of sovereignty. This abstract idea could not have been adequately expressed until the transition to modernity had been made. The concept comes into its own only with the dissolution of the theological order and the emergence of a modern idea of the state.[68]

We can agree with Kahn that the "sovereign body" is "the mystical corpus of the state in which all of the subordinate parts were present," but the point is that in modernity the order of things radically changes. He explains this as "a process in which ultimate meanings shifted from the Church to the state" and asserts that this is "a process of sacralization of the state rather than secularization of authority."[69] But surely it involves *both* sacralization of the state and secularization of authority. And if both, then the symbolic order has changed. Kahn says that "the subject realizes that meaning *only* as he experiences the self as a part of that organic whole that is

[66]*See id.* at 940. (Contrasting the Court's decision in Brown with another controversial ruling, "Roe v. Wade is immensely controversial and has plenty of its own problems, but at least there is the clear articulation of a principle: constitutional liberty includes the right to choose whether or not to have an abortion. Having spoken the truth into existence, the principle proves to be remarkably enduring, even in the face of political opposition."). *Cf. Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

[67]Kahn, *supra* note 51, at 2686–2700.

[68]*See* Martin Loughlin, Foundations of Public Law, 184–86 (2010).

[69]Kahn, *supra* note 23, at 268–69.

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the sovereign corpus."[70] But the processes of differentiation in modernity that lead to the emergence of church, state, society, and economy as distinct orders must surely alter our sense of collective self-identity. This is, after all, the moment at which the political emerges as an autonomous worldview. If modernity is marked by the emergence of a multiplicity of worldviews, this must surely also lead to their underlying belief systems becoming more conditional. As Claude Lefort puts it: "The disentangling of the social order and the order of the world goes together with the disentangling of the political and the mythical-religious; but, by the same necessity, it also goes together with the disentangling of the political and the non-political *within* the social order."[71]

In modernity, each type of discourse is involved in the search for its own foundational sources. The moment at which the political frees itself from the medieval order of the traditional and the sacred is the moment that gives birth to ideology. The function of ideology, explains Clifford Geertz, "is to make an autonomous politics possible by providing the authoritative concepts that render it meaningful, the suasive images by means of which it can be sensibly grasped."[72] Ideology might entail myth-making and the propagation of faith but this is not quite the same as the traditional sense of the sacred. As the nation-state replaces the *Ecclesia*, nationalism takes over from the claim of *societas christiana* the function of providing a justification of an existing system of authority.

The modern shift in the locus of the sovereign from the king to the people thus has more profound implications. In the political worldview we imagine ourselves not as subjects accorded a fixed place in a hierarchical scheme but as equal members of a collective association. In this formal sense it might be said that "the people" is sovereign. But in the constituted world of the political strictly there can be no ultimate underived power that upholds this order. There is no entity analogous to the king in the medieval world occupying the seat of sovereign authority. In modern society "the people" is sovereign but, as the French counter-revolutionary Joseph de Maistre immediately recognized, this is a claim made on behalf of a sovereign that is unable to exercise sovereignty.[73] The concept of popular sovereignty performs the symbolic function of representing political unity within the modern state, but the emergence of the concept coincides with a significant shift in its meaning. Once sovereignty comes to stand as a symbolic representation of the autonomy and authority of the political, it vests neither in the ruler, nor in the office of government, nor in the people. Rather, it vests in the set of relationships established between institutions that uphold the authority of the political worldview.

In the medieval world, Lefort notes, the task of building a territorial power came under the authority of the king, and this task was "accompanied by the process of the sanctification and spiritualization of the kingdom."[74] This was effected by invoking the imagery of "the king's two bodies," an image in which the office of the king combined both a natural person and the power and majesty of a suprahuman being. The king was the embodiment of the state and the locus of sovereign authority. But the modern regime of constitutional democracy, by contrast, "requires that the site of power remain empty."[75] Constitutional democracy, Lefort argues, "is instituted and sustained by the *dissolution of the markers of certainty*."[76] Constitutional democracies are defined by reference to such concepts as liberty, equality, and popular sovereignty, but their meaning remains both thoroughly indeterminate and the subject of continuous contestation.

This change in the modern meaning of sovereignty casts Kahn's work in a different light. His account of a regime founded on a popular sovereign that speaks authoritatively through its adopted Constitution and whose meaning is authoritatively determined by its Supreme Court

[70]*Id.* at 269 (emphasis added).
[71]Claude Lefort, *On the Genesis of Ideology in Modern Societies*, 7 Can. J. Pol. Soc. Theory 1–2 (1983).
[72]Clifford Geertz, The Interpretation of Cultures 218 (1993).
[73]*See* Joseph de Maistre, Study on Sovereignty 93 (Jack Lively ed., 1965) (1794).
[74]Claude Lefort, Democracy and Political Theory 253 (David Macey trans., 1988).
[75]Claude Lefort, Complications. Communism and the Dilemmas of Democracy 143 (Julian Bourg trans., 2007).
[76]Lefort, *supra* note 74, at 19.

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must be seen purely as an elaboration of the ideology of American constitutionalism. It presents to the American people a powerful narrative account of the unique features of their civil religion, but it might strike many, and not just those outside its walls, as a highly peculiar governing philosophy.[77] In the modern world, sovereignty, however figuratively presented, is not possessed by the people: sovereignty belongs to no one.[78] It is true that in the modern world "there is no political society whose constitution does not have a symbolic signification,"[79] but it must not be assumed that the constituted order of the state is to be equated to the regime's adopted Constitution.[80] And far from the Court being elevated into the role of speaking in the authentic voice of the popular sovereign, in reality, the site of power "is always indeterminate" and "has the virtue of belonging to no one."[81]

In certain contexts, Kahn has accepted that institutions other than the Court might speak in the name of the sovereign people.[82] To that extent, he has implicitly acknowledged that the site of power, the locus of sovereign decision, remains indeterminate. But because his work is mainly directed towards explaining how, and with what consequences, Americans have come to place their faith in the Constitution as the foundation of political authority and in the Justices as the high priests of this civil religion, he devotes less energy on critical analysis of that achievement. Yet, recent political developments have obliged him to alter the focus of attention, and with profound consequences.

In his 2022 essay *America's New Civil War*, Kahn examines the partisan turn taken in American politics and considers the constitutional implications of extreme political polarization. His basic argument is that once decisions of governing institutions are seen to be expressions of purely factional interests rather than contestable determinations of the public good, the legitimacy of these institutions is eroded, and they eventually lose the capacity to make sovereign decisions. Once this stage is reached, we enter a moment of constitutional crisis: in other words, we enter a state of civil war, signified not by violence but by "the failure of sovereign authority … a failure of recognition or of a crisis of legitimacy."[83]

Kahn then proceeds to argue that the American system has now reached such a moment. Although writing prior to the *Dobbs* decision, he explains that, were the Supreme Court to overrule *Roe v. Wade*, then far from accepting the decision, the pro-choice faction would be likely simply assert that it is illegitimate. "It will become a further point of conflict between factions" because in a civil war "the rule of law no longer stands apart from political contest." This is a period of crisis in which "[o]ur legally recognized political configurations have yet to catch up with

[77]*See* Martin Loughlin, Against Constitutionalism (2022).

[78]*See* Lefort, *supra* note 74, at 225 (explaining that the symbolic role of sovereignty is carried out "by virtue of a discourse which reveals that power [sovereignty] belongs to no one; that those who exercise power [sovereign authority] do not possess it; that they do not indeed embody it; that the exercise of power [sovereign decision] requires a periodic and repeated contest; that the authority of those vested with power [sovereign decision-making authority] is created and re-created as a result of the manifestation of the will of the people." By using the generic term "power" throughout in this statement, his explanation is less acute than it might be, but once the terms "sovereignty," "sovereign authority" or "sovereign decision" are substituted, its meaning is clarified.).

[79]Lefort, *supra* note 75, at 142.

[80]*See* Loughlin, *supra* note 77, at chapter 3.

[81]Lefort, *supra* note 74, at 41.

[82]*See, e.g.,* Kahn, *supra* note 22, at 86: "… with respect to foreign policy and national security, the Court has traditionally been at its weakest point in asserting an identity with We the People, while the president has been at his strongest. The issue is not one of better 'representing' the national interest. Rather, we have seen the nation through the president in moments of national crisis: his rhetorical role is to present the nation to itself, configuring himself as the universal, sacrificial citizen. If he is successful … the power to decide shifts to him … Here it is enough to say that a system of norms cannot, of itself, order a concrete factual situation. The passage from the abstract to the concrete, from potential to actual, from fiction to history requires the decision."

[83]Kahn, *supra* note 20, at 129.

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our [present] sense of identity." Kahn suggests that the bubble of American constitutionalism has now burst: "the country as a single national project—the constitutional project—is over."[84]

This American crisis is not simply one of party politics or even of governmental authority: it is constitutional. When the Court's legitimacy depends on its voice being identified with the people's voice, when its authority rests not on its reasoning powers but its ability to speak in the name of the sovereign, and when its authority is that which insulates the regime from "schism, secession, and division,"[85] then the crisis strikes at the foundation. The ramifications, which are only now becoming explicit, remain uncertain. But if this crisis leads to American constitutional scholars moving beyond their fetishization of the Constitution and reconsidering the foundations of governmental authority, it might even cause them to recognize that, after all, the European discourse of political jurisprudence has something to offer.

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[84]Kahn, *supra* note 20, at 131, 138, 137.
[85]Kahn, *supra* note 23, at 278.

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