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# Contingency and Universalism in State Separation of Powers Discourse

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The recent increased interest in state constitutions has focused on the individual rights portions of state charters.[1] In this context, a central question has been whether provisions of the state constitution should be interpreted differently from provisions of the federal Constitution that contain the same or similar language. State courts clearly have the power to diverge from federal doctrine in construing their states' constitutions,[2] but the appropriateness of such independent interpretation has occasioned widespread debate. Courts and commentators often take federal law to be the presumptive benchmark and seek to specify the conditions justifying deviation from federal precedent. In line with this privileging of federal doctrine, studies confirm that in construing their states' constitutions, state courts frequently defer to federal case law and seldom deviate from federal analysis.[3]

As this symposium helps to make clear, state constitutions contain much more than substantive protections of individual rights. State constitutions, like the federal Constitution, also em-

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1. *See* Honorable Stanley G. Feldman & Michael D. Blanchard, *Perspectives: Foreword*, 61 Alb. L. Rev. 1491, 1493 (1998); G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 Notre Dame L. Rev. 1097, 1097 (1997).

2. *See* Michigan v. Long, 463 U.S. 1032 (1983); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535, 548 (1986).

3. *See infra* note 9 and accompanying text.

body structural safeguards of liberty, such as the separation of powers. As I will explain, because of significant distinctions between separation of powers and individual rights jurisprudence, one would expect less deference by states to federal separation of powers doctrine. Contrary to this expectation, however, federal precedent sets the terms for much state separation of powers debate, and federal principles provide a presumptive standard for state constitutional decisions. This essay offers an analysis and a critique of the powerful influence that the federal Constitution exerts over state separation of powers doctrine.

I argue that the community model of state constitutional interpretation helps to explain the appeal of federal doctrine. The community model posits that a constitution represents the deepest sentiments of a particular community. According to this model, the community both guides the interpretive process and legitimates a court's exercise of judicial review. Conversely, the absence of such communal sentiments renders constitutional interpretation impossible. Under the community model, then, the validity of independent state constitutional interpretation rests on the existence of unique state values. A distinctive state community of value is necessary to provide a validating referent for the interpretation of the state constitution.[4] In view of the assumptions of the community model, attempts to craft an independent interpretation of separation of powers provisions face substantial obstacles. Separation of powers issues provide an unlikely locus of distinctive communal sentiment. Whatever the validity of arguments concerning distinctive state traditions in the area of individual rights, distinctive state values concerning second-order principles, such as the separation of powers, are even more elusive. Even if a love for the outrageous or bizarre justifies a robust interpretation of the New York Constitution's protection of free speech,[5] it is more difficult to argue that the particular character of Rhode Islanders requires a specific method of achieving the goals of avoiding tyranny or ensuring effective governance. Separation of powers discussions often focus on the structures appropriate to regulate universal features of human nature. Such discourse does not lend itself to arguments based on unique state customs and traditions. Under the commu-

4. *See* Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 Va. L. Rev. 389, 398 (1998).

5. *See* People v. Scott, 593 N.E.2d 1328, 1337 (N.Y. 1992).

nity model of constitutional interpretation, then, separation of powers issues cannot easily support independent interpretation of state constitutions.

Having examined the reasons for the deference to federal separation of powers doctrine, this essay describes the flaws in this presumptive adoption of federal precedent. Elsewhere I have criticized the theoretical foundations of the community model.[6] Here, I focus on the consequences of this model for construing separation of powers principles. My argument will be that the presumption of following federal separation of powers doctrine leads to distorted and unsatisfying efforts at state constitutional interpretation. The kinds of dangers that the separation of powers seeks to prevent take on very different forms in different governmental systems. Tyranny and effective governance are contingent concepts, varying with the particular needs of a specific political configuration. Moreover, separation of powers doctrine, itself, must shift over time to ensure that this important constitutional principle continues to keep pace with the evolving needs of the polity. Neither federal doctrine, nor a state's own past practices, provide a dependable interpretive beacon.

Part I briefly examines the debates concerning whether courts should interpret the individual rights portions of state constitutions independently of the federal Constitution. Part II explores the prominence of the federal model in state separation of powers jurisprudence. Part III turns to the current separation of powers controversy in Rhode Island and illustrates how the federal Constitution shapes the legal arguments employed by advocates in that dispute. Finally, Part IV argues that the contingency of separation of powers concepts renders suspect the wholesale adoption of federal doctrine. Similarly, a state's own past practices may provide insufficient guidance in applying separation of powers principles to the changing exigencies of the state political system.

## I. INDIVIDUAL RIGHTS MODEL

The "new judicial federalism" has focused on the individual rights guarantees in state constitutions.[7] These provisions generally mirror the federal Bill of Rights. The advocates of the new

6. *See* Schapiro, *supra* note 4, at 428-30, 440-56.
7. *See* Tarr, *supra* note 1.

judicial federalism urge state courts to give independent interpretation to these rights provisions, rather than assuming that their charters have the same meaning as the federal Constitution.[8] Despite the hopes of the new judicial federalism's proponents, federal law has continued to provide the presumptive starting point for state constitutional analysis, and in interpreting state constitutions, courts generally adhere to federal doctrine.[9] One can perhaps debate the level of independent interpretation, but the federal Constitution undeniably exerts a strong hold on state constitutional interpretation.[10] Theoretical, pragmatic and institutional concerns all help to explain the deference to federal doctrine.[11]

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8. *See generally* Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 Val. U. L. Rev. xiii, xiii-xxii (1996) (describing the history of new judicial federalism). Prominent advocates of the new judicial federalism include Judge Hans Linde and Professor Williams. *See, e.g.*, Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts, in* Developments in State Constitutional Law 273, 294-95 (Bradley D. McGraw ed., 1985); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Court Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. Rev. 353 (1984).

9. *See* Barry Latzer, State Constitutions and Criminal Justice 158 (1991); Craig F. Emmert & Carol Ann Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 Just. Sys. J. 37 (1992) (finding extensive state court reliance on federal law); Susan P. Fino, *Judicial Federalism and Equality Guarantees in State Supreme Courts*, 17 Publius: J. Federalism 51 (1987) (same); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 780-84 (1992); Barry Latzer, *Into the '90s: More Evidence that the Revolution Has a Conservative Underbelly, in* 4 Emerging Issues in State Constitutional Law 18 (1991); Barry Latzer, *The Hidden Conservatism of the State Court "Revolution,"* 74 Judicature 190 (1991); G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 Publius: J. Federalism 63, 74-77 (1994) (summarizing research finding limited state court reliance on state constitutions); Tarr, *supra* note 1, at 1114-17 (same); *see also* Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. Cin. L. Rev. 317, 322-39 (1986) (discussing models of "post-incorporation judicial review"); Peter J. Galie, *Modes of Constitutional Interpretation: The New York Court of Appeals' Search for a Role, in* 4 Emerging Issues in State Constitutional Law, *supra*, at 225, 226-33 (discussing models of state court deference to federal doctrine).

10. *See* G. Alan Tarr, *Understanding State Constitutions*, 65 Temp. L. Rev. 1169, 1170 n.3 (1992) ("In state constitutional law . . . the legitimacy issue is how to justify state judges' divergence from the United States Supreme Court's interpretation of analogous federal constitutional provisions.").

11. The following discussion of the attractiveness of federal doctrine draws on my account in *Identity and Interpretation in State Constitutional Law*. *See* Schapiro, *supra* note 4, at 419-27.

### A. *Attraction of Federal Doctrine*

A common assumption of legal theory is that a constitution serves as the embodiment of the distinctive values of the corresponding polity. Constitutional interpretation involves locating and articulating those values.[12] From this theory it follows that the state charter can provide an authentic source of constitutional meaning only if the constitution rests on a distinctive state community. The absence of state community would deprive the state constitution of its validating referent.[13] Under this model of constitutional interpretation, if the state and federal provisions contain the same or similar language, the meaning of the state constitution should diverge from the federal only if the state community differs from the national community. Unique state values are necessary to ground independent interpretation of the state constitution. The existence of a distinctive state community, however, cannot be taken for granted. Nationalizing forces threaten to render state boundaries irrelevant as demarcations of value.[14] Under the community model, therefore, the declining significance of state identity undermines the possibility of independent state constitutional interpretation.

In addition to the theoretical obstacles to independent interpretation posed by the doubtful status of state community, other pragmatic and institutional factors support adherence to federal precedent. The federal Bill of Rights has spawned a vast body of decisional law filling in the abstract individual rights guarantees of the federal charter. Federal doctrine may involve complex features, but the substantial body of precedent helps to clarify many issues. If state courts follow federal doctrine, they can make use of these precedents. Because the federal individual rights guarantees apply directly to the states, a huge volume of decisions exist concerning the permissible conduct of state officials. Deviating from federal precedent presents the daunting task of pursuing a new, uncharted course. Even without wholesale adoption of federal law, state courts still could make use of the precedents as per-

12. *See id.* at 418 (citing sources).

13. *See* James A. Gardner, *What is a State Constitution?*, 24 Rutgers L.J. 1025, 1025-26 (1993).

14. *See* Gardner, *supra* note 9, at 827-30; Gardner, *supra* note 13, at 1048-50; Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 Harv. L. Rev. 1147, 1148-50 (1993); Linde, *supra* note 8, at 292-93.

suasive authority, but substantial resources would be devoted to deciding which decisions to follow. Adhering to federal law means that decades of case law can be taken off the rack, without the cumbersome process of special tailoring. A ready-made source of legal explication is the incorporation doctrines's gift to state constitutions. Further, state courts are intimately familiar with federal doctrine because so much federal law, particularly in the criminal context, is applied in the first instance by state courts. Independent interpretation requires leaving the familiar and finely reticulated web of federal precedent.

Not only state judges, but other state officials too, must comprehend constitutional standards. Particularly in the area of police procedure, the federal Constitution imposes many, often complex, strictures on official action. Government officers must learn and understand what the Constitution requires. Police officers must know when they are permitted to search a car and when they must cease questioning a suspect. These issues arise daily, and officers must make rapid decisions without benefit of legal counsel. Assimilating state to federal doctrine ensures that state officials need learn only one body of law. Deviation from federal precedent would impose additional, potentially confusing requirements on officials. Ensuring uniformity in state and federal law facilitates officials' understanding and obeying the constitutional requirements.

Deferring to federal doctrine serves a related, institutional purpose as well. Because the federal Constitution binds the states, interpreting the state constitution in lockstep with the federal represents a kind of judicial passivity. State judges must enforce the federal protection of individual rights, and state officials must comply with federal constitutional dictates. A different state constitutional standard can only impose additional limits on official conduct. By interpreting the state constitution to mean the same as the federal, state courts give the maximum possible deference to the state executive and legislative branches. Adherence to federal doctrine thus represents a type of judicial restraint, a refusal by courts to place further restrictions on governmental actors.

### B. *Interpretive Implications of the Deference to Federal Doctrine*

The presumptive deference to federal doctrine has profound consequences for the interpretation of state constitutions. To jus-

tify independent interpretation, courts feel obligated to highlight distinctive features of state culture. Arguments for independent interpretation become celebrations of difference. For example, when deciding to interpret its free speech guarantee more broadly than the federal First Amendment, the Texas Supreme Court extolled "the unique values, customs, and traditions of our citizens."[15] The court noted with hostility that some scholars had the temerity to deny that states had distinctive characters. The court singled out for attack an article written by Professor James Gardner that questioned the concept of state distinctiveness. The court asserted:

> When contrasted with the just pride that our citizens feel in being Texans, perhaps this very writing by an Associate Professor at the Western New England College School of Law demonstrates how truly diverse this nation remains. Texans value our institutions and heritage, and our citizens would certainly dispute that their concerns are identical to those of the people of Rhode Island or North Dakota.[16]

In support of its claim for a unique Texas free speech tradition, the court recited historical episodes in which heroes of the Texas past had demonstrated a fearless devotion to free expression, even in the face of great personal risk.[17] The tradition of such courageous outspokenness, the court asserted, justified interpreting Texas's free speech guarantees more broadly than those contained in the federal charter.

Three justices rejected the majority's decision to interpret the Texas Constitution more expansively than the federal. These justices, though, accepted the premise of the majority. They agreed that distinctiveness provided a necessary and sufficient condition for deviating from federal doctrine.[18] However, they asserted that the particular right at issue, freedom of speech, could not properly be claimed as a Texas treasure. Rather, the value "transcend[ed]

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15. Davenport v. Garcia, 834 S.W.2d 4, 20 (Tex. 1992).

16. *Id.* at 16 n.33. Though unexpectedly apt for purposes of this Symposium, the court's choice of geographic comparisons has intrigued me. Was Rhode Island chosen because its position as the state with the smallest area contrasted nicely with Texas's distinction as the largest of the contiguous states? Or was Rhode Island selected for its proximity to Professor Gardner's academic home in (Western) New England?

17. *See id.* at 7 & n.5.

18. *See id.* at 38-39 (Hecht, J., concurring in judgment).

state lines."[19] Because Texas did not demonstrate a unique concern for freedom of expression, these justices concluded, the Texas Constitution should not be construed more broadly than the federal First Amendment.[20]

A similar debate arose when the New York Court of Appeals contemplated whether to interpret the search and seizure provision of the state constitution more broadly than the Fourth Amendment.[21] The majority justified deviation from federal doctrine by citing New York's traditional "tolerance of the unconventional and of what may appear bizarre or even offensive."[22] The opinion occasioned a dissent rejecting the asserted New York tradition, while leaving unquestioned the premise that only distinctive features of the state could justify diverging from federal doctrine.[23]

As these opinions indicate, the federal Constitution exerts a strong and not always salutary influence on state constitutional interpretation. Although judicial and academic arguments for state distinctiveness are colorful and provocative, they tend not to be wholly persuasive. The attempt to prove a unique state character leads courts into rather broad and unconvincing generalizations about the history and culture of a state.[24] If the hunt for distinctive state values proves unavailing, then courts defer to federal precedent, robbing the state constitution of independent significance. Whatever the attractiveness of federal doctrine, the assumption that the state constitution does not merit independent

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19. *Id.* at 33 (Hecht, J., concurring in judgment).

20. *See id.* (Hecht, J., concurring in judgment).

21. *See* People v. Scott, 593 N.E.2d 1328 (N.Y. 1992).

22. *Id.* at 1337.

23. *See id.* at 1350-55 (Bellacosa, J., dissenting). Other commentators, too, have questioned the assertion of a distinct New York tradition of tolerance. *See* Eve Cary & Mary R. Falk, People v. Scott & People v. Keta: *"Democracy Begins in Conversation,"* 58 Brook. L. Rev. 1279, 1350 (1993) ("The court of appeals's out-of-context invocation in *Scott* of New York's 'traditional' acceptance of the bizarre and offensive [is] a dubious proposition that might well surprise the residents of, say, Elmira . . . ."); Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 Brook. L. Rev. 1, 273, 276 (1996). Professor Gardner points out that some of the United States Supreme Court's most significant free expression cases involve striking down New York laws restricting speech. *See* James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 Tex. L. Rev. 1219, 1225-26 (1998).

24. *See* Schapiro, *supra* note 4, at 411-14.

interpretation seems an unwarranted abdication of a court's interpretive duty.[25] Presuming that the state constitution adds no protection to the federal baseline seems especially odd in states, such as Rhode Island, in which the state constitution contains a specific assertion of interpretive independence: "The rights guaranteed by this Constitution are not dependent on those guaranteed by the Constitution of the United States."[26]

Even when courts break out of the community interpretive model, the pull of the federal Constitution remains powerful. As an alternative to citing distinctive state values to justify independent interpretation, courts sometimes rely on specific textual or historical differences between the state and federal charters.[27] The perceived need to justify divergence keeps courts focused narrowly on particular markers of difference, rather than relying on broader structural or explicitly value-based approaches.[28] The anxiety over deviating from federal doctrine limits the interpretive horizons.

## II. Independent Interpretation of Separation of Powers

As in the individual rights area, the federal Constitution exerts a strong influence in the interpretation of separation of powers provisions of state constitutions. As Professor Devlin and Professor Gardner, in particular, have pointed out, state courts often rely heavily on federal precedent and modes of analysis in addressing the distribution of powers under state constitutions.[29]

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25. *See* Hon. James D. Heiple & Kraig James Powell, *Presumed Innocent: The Legitimacy of Independent State Constitutional Interpretation*, 61 Alb. L. Rev. 1507, 1520 (1998).

26. R.I. Const. art. I, § 24.

27. Some courts employ a "criteria" or "factors" approach that focuses on a variety of potential differences between the state and federal constitutions, including text and history. *See, e.g.*, State v. Hunt, 450 A.2d 952, 965-67 (N.J. 1982) (Handler, J., concurring); *see also* Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 Notre Dame L. Rev. 1015, 1021-64 (1997) (discussing criteria approach).

28. *See* Kahn, *supra* note 14, at 1152; G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 Rutgers L.J. 841, 848-50 (1991).

29. *See* John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 Temp. L. Rev. 1205, 1219-21 (1993); James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 Roger Williams U. L. Rev. 109 (1998).

### A. *Prominence of Federal Doctrine*

State courts clearly recognize that federal precedent does not bind them, but they frequently adopt it nevertheless. The Supreme Court of Washington illustrated this position in its recent decision in *State v. Blilie*.[30] The court stated: "When separation of powers challenges are raised involving different branches of state government, only the state constitution is implicated. However, this court relies on federal principles regarding the separation of powers doctrine in interpreting and applying the state's separation of powers doctrine."[31] The Supreme Court of Missouri demonstrated perhaps an even greater regard for federal authority in relying on a *concurring* opinion of the United States Supreme Court to explain its separation of powers holding.[32] Confronted with a state statute authorizing legislative audits of executive agencies, the Missouri court advised that the challenged provisions "violate article II, section 2 in each of the ways Justice Powell describes in *Chadha*."[33] Similar statements abound in the decisions of other states.[34]

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30. 939 P.2d 691 (Wash. 1997) (en banc).

31. *Id.* at 693 (citations omitted).

32. *See* State Auditor v. Joint Comm'n on Legislative Research, 956 S.W.2d 228, 231 (Mo. 1997) (en banc) (citing INS v. Chadha, 462 U.S. 919, 963 (1983) (Powell, J., concurring)).

33. *Id.*; *see also* City of Pawtucket v. Sundlun, 662 A.2d 40, 58 (R.I. 1995) (relying on separation of powers principles articulated in Justice Powell's concurrence in *Chadha*). The Missouri Supreme Court's reference to "Article II, section 2" presents something of a puzzle. Article II of the Missouri Constitution contains no section 2. *See* Mo. Const. art. II. The intended reference is likely section 1 of Article II, the separation of powers provision of the Missouri Constitution. *See* Mo. Const. art. II, § 1. *Chadha* does discuss Article II, Section 2 of the United States Constitution, but the Missouri Supreme Court does not appear to hold that the statute violates the federal Constitution.

34. *See, e.g.*, *Ex parte* Jenkins, Nos. 1961520 & 1961531, 1998 WL 399866, at *32 n.21 (Ala. July 17, 1998) (Cook, J., concurring in part and dissenting in part) ("Of course, the separation-of-powers decisions of federal courts do not control the application of this principle in cases based on the Alabama Constitution. Because the concept has the same genesis, however, whether applied in the court system of the United States or in the court system of Alabama, decisions of the United States Supreme Court are highly persuasive."); National Paint & Coatings Ass'n Inc. v. State, 68 Cal. Rptr. 2d 360, 366 (Cal. Ct. App. 1997) ("California separation of powers analysis essentially follows the federal framework."); Quinton v. General Motors Corp., 551 N.W.2d 677, 683 (Mich. 1996) ("Although this Court is not bound by Justice Scalia's analysis for the Court in *Plaut*, where, as here, state separation of powers concerns are implicated, we acknowledge the weight a decision of the highest court in the land carries."); Thomas v. North Carolina Dep't of

Equally striking is the fact that such statements rarely occasion disagreement, even among judges who dissent from the holding of a particular case. In *Ex parte Jenkins*,[35] for example, the Alabama Supreme Court addressed the constitutionality of state legislation that arguably reopened final judgments of paternity.[36] The case raised the question whether the legislature had encroached on the judicial power to render final judgments, violating the separation of powers principles embodied in the Alabama Constitution.[37] The court produced five opinions. The lead opinion relied heavily on Madison and Montesquieu in explicating state separation of powers doctrine.[38] In holding the legislation unconstitutional, the opinion also quoted extensively from the United State Supreme Court's decision in *Plaut v. Spendthrift Farm, Inc.*[39] While criticizing the lead opinion in various respects, none of the other four opinions disagreed that *Plaut* stated the applicable separation of powers principles.[40] Similarly, in *Quinton v. General Motors Corporation*,[41] the Michigan Supreme Court produced four opinions concerning the constitutionality of legislation that al-

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Human Resources, 478 S.E.2d 816, 822 (N.C. Ct. App. 1996) ("This commitment to the principal [sic] of separation of powers exemplified in our State constitution is virtually identical in practice to that shown at the federal level."), *aff'd*, 485 S.E.2d 295 (N.C. 1997); *In re* D.L., 669 A.2d 1172, 1176 n.3 (Vt. 1995) ("We have often relied upon federal separation of powers jurisprudence in developing our own . . . ."). Older statements of similar themes include *State ex rel. Anderson v. State Office Bldg. Comm'n*, 345 P.2d 674, 680 (Kan. 1959) ("Turning first to the material on the federal constitution, which we have shown to be almost identical to the Kansas constitution as to the principle of separation of powers . . . .") and *In re Opinion of the Justices*, 64 A.2d 169, 172 (Vt. 1949) ("The judicial power, as conferred by the Constitution of this State upon this Court, is the same as that given to the Federal Supreme Court by the United States Constitution . . . ."); *see also* Devlin, *supra* note 29, at 1221 n.57 (citing cases); Gardner, *supra* note 29 (same).

35. Nos. 1961520 & 1961531, 1998 WL 399866 (Ala. July 17, 1998).

36. *See id.* at *1.

37. *See id.* at *3.

38. *See id.* at *3-*4.

39. *See id. at* *5-*6 (quoting Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 218-19, 227, 234 (1995)).

40. *See id.* at *11 (Maddox, J., concurring in part, concurring in the result in part and dissenting in part) (accepting *Plaut* but finding it distinguishable); *see also id.* at *12-*13 (Almon, J., concurring in part and dissenting in part) (concurring in portion of opinion resting on *Plaut*); *id.* at *17 (Kennedy, J., concurring in part and dissenting in part) (relying on *Plaut*); *id.* at *22-*26, *32 n.21 (Cook, J., concurring in part and dissenting in part) (applying and distinguishing federal cases including *Plaut*).

41. 551 N.W.2d 677 (Mich. 1996).

legedly reopened final judgments.[42] The lead opinion took *Plaut* as its baseline,[43] and while not necessarily agreeing with that opinion's interpretation of *Plaut*, none of the other justices disavowed *Plaut* as a statement of the appropriate legal standard.[44] Adoption of federal separation of powers doctrine is widespread and largely unquestioned.

When courts do depart from federal doctrine, they generally do not stray far. They commonly seek to ground their divergence on quite specific textual differences between the state and federal charters. Because separation of powers principles often derive from structural inferences, rather than particular textual commands,[45] reliance on specific language will not generate a broadly distinctive state separation of powers jurisprudence. If courts instead noted the important structural distinctions between state and federal governments, they would be more likely to craft an independent state separation of powers doctrine.[46]

A line of Kansas cases illustrates the judicial resistance to relying on such broad structural differences. In *Sedlak v. Dick*,[47] the Kansas Supreme Court addressed the constitutionality of legislation establishing a Workers Compensation Board, whose members were chosen by private organizations.[48] Relying on federal case law, the claimants asserted that depriving the executive of the power to appoint the Board violated the separation of powers.[49] The court rejected the argument, citing a provision of the Kansas Constitution that explicitly granted the legislature broad authority over appointments.[50] This provision stands in marked contrast to the Appointments Clause of the United States Constitution, which

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42. *See id.* at 677.

43. *See id.* at 683.

44. *See id.* at 693 (Boyle, J., concurring); *see also id.* at 696 (Riley, J., dissenting) (accusing court of "result-oriented" reading of *Plaut*).

45. *See, e.g.*, Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 277 n.23 (1991) (relying on "basic separation-of-powers principles," rather than specific constitutional text).

46. *See infra* Part IV; Devlin, *supra* note 29, at 1226-28.

47. 887 P.2d 1119 (Kan. 1995).

48. *See id.* at 1125.

49. *See id.* at 1128-29.

50. *See id.* at 1130 ("[T]he Kansas Constitution provides that the legislature may appoint officers not otherwise provided for in the constitution." (citing Kan. Const. art. 2, § 18)); *see also* Parcell v. Kansas, 468 F. Supp. 1274, 1277-78 (D. Kan. 1979) (relying on different appointment provisions in the Kansas and federal constitutions), *aff'd*, 639 F.2d 628 (10th Cir. 1980).

confers residual appointment authority on the President and prohibits legislative appointments.[51] *Sedlak* further contains broader language, contrasting the enumerated powers of Congress with the plenary power of state legislatures.[52] This kind of theoretical distinction might ground broad divergence from federal precedent in a variety of separation of powers contexts.

A subsequent Kansas Supreme Court case, however, closed, or at least ignored, this interpretive opening. In *Gleason v. Samaritan Home*,[53] decided the year following *Sedlak*, the court confronted a separation of powers issue arising from state legislation that allegedly reopened judicial judgments. Citing to *Sedlak*, the court asserted that the state and federal governments differed "profoundly."[54] As if frightened by the potential interpretive freedom granted by this statement, however, the court in its very next sentence doubled back into the federal fold: "As to the doctrine of separation of powers, *however*, the Kansas Constitution is almost identical to the federal Constitution. The doctrine of separation of powers is an inherent and integral element of the republican form of government and is expressly guaranteed to the states by the federal Constitution."[55] The statement reads as if the court seeks to assert that the broad language of *Sedlak* has no application in the separation of powers area, a difficult proposition to understand in that *Sedlak*, itself, was clearly a separation of powers case. The court in *Gleason* proceeded to address the separation of powers issue by citing extensively to the United States Supreme Court's decision in *Plaut v. Spendthrift Farm*.[56]

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51. The Appointments Clause states:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2; *see* Buckley v. Valeo, 424 U.S. 1, 127-36 (1976) (per curiam) (stating that the Constitution prohibits Congress from assuming appointment authority).

52. *See Sedlak*, 887 P.2d at 1129 (citing Leek v. Theis, 539 P.2d 304, 319 (Kan. 1975)).

53. 926 P.2d 1349 (Kan. 1996).

54. *Id.* at 1359.

55. *Id.* (citations omitted) (emphasis added).

56. *See id.* at 1360 (citing *Plaut*, 514 U.S. at 213).

North Carolina provides another example of a refusal to rely on an acknowledged, and seemingly significant, structural divergence between state and federal governmental systems. In *State ex rel. Wallace v. Bone*,[57] the Supreme Court of North Carolina considered legislation providing that four members of the General Assembly would serve on the Environmental Management Commission. The opinion discussed the importance of the principle of separation of powers to the federal Constitution, buttressing its position with quotations from Alexander Hamilton and George Washington.[58] The court then noted that North Carolina's allocation of governmental authority deviated from the standard American model by failing to provide for a gubernatorial veto.[59] Rather than viewing this difference as a warrant for crafting a state-specific concept of separation of powers, though, the court took the absence of veto authority as an indicator of "strictly" adhering to the principle of separation of powers.[60] The court apparently understood such "strict" adherence to mean following the lead of federal and most state authority, notwithstanding the significant divergence in veto power.[61] Rejecting a more nuanced approach, the court adopted a rigid notion of the division of governmental authority and held unconstitutional the General Assembly's effort to retain some control over the implementation of legislation.[62]

### B. *Absence of Pragmatic and Institutional Advantages of Following Federal Doctrine*

The widespread adoption of federal separation of powers principles might seem surprising. Key differences between the realms of individual rights and of separation of powers would appear to render federal authority much less attractive. One especially important distinction is that, unlike federal individual rights precedent, federal separation of powers doctrine does not apply directly to the states. This factor, in particular, means that the pragmatic

57. 286 S.E.2d 79 (N.C. 1982).

58. *See id.* at 83.

59. *See id.*

60. *Id.*

61. *Id.* at 84-87 (citing to several state and federal cases).

62. *See id.* at 88-89; *see also* John V. Orth, *"Forever Separate and Distinct": Separation of Powers in North Carolina*, 62 N.C. L. Rev. 1, 16-17, 23-28 (1983) (criticizing *Wallace*).

and institutional benefits of following federal individual rights case law do not apply in the separation of powers area.

The Republican Guarantee Clause[63] may impose some limits on internal state political organization,[64] and principles of due process and equal protection might be implicated as well.[65] The federal Incompatibility Clause[66] has not been incorporated, though, nor has the United States Supreme Court sought to apply its general separation of powers doctrine to state governmental organization. As a result, not only do fewer federal precedents exist, but state courts have little experience applying federal authority. Unlike individual rights provisions that may arise in the course of state criminal prosecutions, a state court would rarely have occasion to grapple with federal separation of powers principles. Federal precedents do not supply a broad and familiar backdrop for state court adjudication. With regard to separation of powers, then, concerns for clarity supply only limited support for adhering to federal doctrine.

For similar reasons, interpreting state constitutions in lockstep with federal separation of powers law would not further the cause of uniformity. Because federal doctrine in this realm does not apply to the states, only one body of separation of powers law will exist. Whether or not states follow the federal lead, the separation of powers doctrine developed by state courts alone will bind the action of state officials. Moreover, while the easy comprehensibility of law may always be desirable, clarity and uniformity are less significant in the area of separation of powers, which involves intergovernmental relations, rather than relationships between the state and individuals. While police officers may need to make snap judgments about when a search is permissible, disputes about governmental appointment powers usually can abide definitive judicial determination.

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63. U.S. Const. art. IV, § 4.

64. For a collection of recent articles discussing the Guarantee Clause, see *Ira C. Rothgerber, Jr. Conference on Constitutional Law: Guaranteeing a Republican Form of Government*, 65 U. Colo. L. Rev. 709 (1994); *see also* Edward A. Stelzer, Note, *Bearing the Judicial Mantle: State Court Enforcement of the Guarantee Clause*, 68 N.Y.U. L. Rev. 870 (1993) (providing state courts with guidance in deciding Guarantee Clause cases).

65. *Cf.* Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 Roger Williams U. L. Rev. 51 (1998) (discussing implied federal constitutional limitations on state governmental organization).

66. U.S. Const. art. I, § 6, cl. 2.

The unincorporated status of federal separation of powers law also means that judicial restraint does not counsel lockstep interpretation. Diverging from federal doctrine will not impose additional restraints on state officers; nor will following federal doctrine minimize judicial regulation of other branches of state government. To put it slightly differently, in the separation of powers area state courts have nowhere to hide. Federal law provides no constitutional floor. Responsibility for the restrictions the court imposes cannot be laid at the feet of the United States Supreme Court. Morever, because of the relatively strict separation of powers principles enforced by the United States Supreme Court, following the federal lead would mean that state courts might well impose significant restrictions on the actions of other state governmental actors. Deviating from federal doctrine and adopting a more flexible approach might better advance the goal of judicial restraint.

### C. *Community and Separation of Powers*

Although these pragmatic and institutional factors do not support adhering to federal doctrine, the community theory of interpretation suggests that the absence of distinctive state separation of powers values will incline states to follow the federal lead. Although the centripetal concerns of clarity, uniformity and restraint do not draw state doctrine toward the federal Constitution, the difficulty in locating state-specific principles translates into a reduced centrifugal force pulling the state out of the federal orbit and into the realm of independent constitutional interpretation.

In the case of individual rights provisions, debates about independent interpretation focus on unique state values. It is the distinctive features of state character that legitimate deviation from the federal norm. Such arguments about the unique characteristics of states are more difficult to make about structural principles, such as the separation of powers. Separation of powers is a second-order principle.[67] It is not an end in itself, but a means of achieving other ends, such as preventing tyranny and ensuring ef-

67. *Cf.* Quinton v. General Motors Corp., 551 N.W.2d 677, 688 (Mich. 1996) (terming separation of powers a "prophylactic device"); Larry Alexander & Ken Kress, *Replies to Our Critics*, 82 Iowa L. Rev. 923, 934-35 n.64, 941 (1997) (discussing the view of separation of powers as a second-order principle).

ficient government.[68] The problem of separation of powers is essentially a problem of technology: what is the best means for attaining specified goals. While individual rights provisions may represent the values of the people of a particular state, separation of powers principles appear less subjective, more a matter of objective scientific inquiry.[69] Debates about individual rights invoke Romantic historical narratives, revealing the particular character of the people of the state. Separation of powers debates, by contrast, sound in an Enlightenment faith in universal principles of human nature, including natural human ambition and the concomitant need for structural safeguards. Montesquieu and Madison could know nothing of the frontier courage of Stephen Austin or the creative license of Greenwich Village, but they could study and understand how government could best channel basic human instincts.[70] States may have developed individual cultures giving rise to enhanced appreciation for free expression or privacy, but the basic mechanics of governmental power have not changed since the framers erected the federal constitutional system. Karen Finley may have been unanticipated; Huey Long was not. More concretely, separation of powers may appear to be an area in which there exists a standard American solution, owing to our shared political heritage and the rough convergence of the tripartite state

68. *See* Jessica Korn, The Power of Separation 14-26 (1996) (emphasizing effective governance, as well as preventing tyranny, as goals of separation of powers); Geoffrey R. Stone et al., Constitutional Law 388 (3d ed. 1996) (describing efficiency and prevention of tyranny as goals of separation of powers); Devlin, *supra* note 29, at 1229-32 (listing goals of separation of powers, including preventing tyranny and ensuring efficiency); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 432-33 (1987) (describing efficiency and prevention of tyranny as two chief purposes of separation of powers). *But cf.* Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power."); Devlin, *supra* note 29, at 1231 & n.92 (noting that the United States Supreme Court occasionally rejects the notion that separation of powers should promote efficiency).

69. *See, e.g.*, State *ex. rel.* Wallace v. Bone, 286 S.E.2d 79, 84 (N.C. 1982) (terming separation of powers "one of the distinct American contributions to the science of government" (quoting State v. Bell, 115 S.E. 190, 199 (N.C. 1922) (Stacy, J., dissenting)) (internal quotation marks omitted).

70. *See, e.g.*, The Federalist No. 51, at 262 (James Madison) (Gary Wills ed., 1982) ("Ambition must be made to counteract ambition . . . . It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature?").

and federal political systems.[71] As will become clear, I contest this static and universalist conception of separation of powers, but such a view helps to explain why courts would be unable to ground an independent state separation of powers jurisprudence on distinctive features of a state community.

## III. Separation of Powers Controversy in Rhode Island

The current separation of powers controversy in Rhode Island provides a further example of the dominance of federal doctrine and of the limited resources available to urge deviation from the federal model. An examination of the briefs of two of the chief antagonists will help to illustrate the character of arguments in state separation of powers disputes.

Under existing practice, the Rhode Island General Assembly not only creates public boards and commissions, but often designates the members of these bodies. The members may include current legislators. On November 20, 1997, the Governor of Rhode Island, Lincoln C. Almond, requested that the Rhode Island Supreme Court adjudicate the constitutionality of such legislative appointments.[72] This opening salvo clearly demonstrated that federal doctrine would figure centrally in the arguments about the meaning of separation of powers under the Rhode Island Constitution. One of the questions proposed by the Governor directly invoked federal precedent: "Is the principle of separation of powers contained in the Rhode Island Constitution properly interpreted in the same fashion as it has been interpreted in the United States Constitution with respect to appointments . . . ?"[73] Much of Governor Almond's brief in the case explains the importance of the principle of separation of powers as embodied in the federal Constitution. The brief makes liberal reference to James Madison and to the federal case law that has elaborated a federal theory of separation of powers.[74] The basic argument of the brief is that the current practice of legislative appointments would violate federal separation of powers doctrine and that no reason justifies deviat-

71. *Cf.* Dorf, *supra* note 65 (distinguishing between generalized concepts of liberty and those specifically rooted in the American legal tradition).

72. *See* Brief for Governor Lincoln C. Almond at 1, *In re* Advisory Opinion to the Governor (Separation of Powers) (No. 97-572-M.P.).

73. *Id.* at 2.

74. *See, e.g., id.* at 11-20.

ing from federal precedent. The brief asserts: "There is no sound constitutional basis for Rhode Island to be a sorry aberration in the American constitutional landscape and every reason to follow federal jurisprudence and the teaching of the framers."[75]

The opposing position is exemplified by the brief filed on behalf of the Majority Leader of the Rhode Island Senate, Paul S. Kelly. This brief asserts that Rhode Island always has diverged from federal separation of powers doctrine.[76] The brief highlights the textual differences between the Rhode Island and federal charters, but the argument relies mainly on the long-standing practice of legislative appointments in Rhode Island. In essence, the brief asserts that a page of history is worth a volume of Montesquieu: "This Court has *always* recognized that the authority of the Rhode Island General Assembly is *not* limited to functions which might be considered–by Montesquieu, or by Madison, or by the Rhode Island Ethics Commission–to be 'legislative' in theory or in 'nature.'"[77]

The briefs employ standard arguments of state constitutional disputes. The Governor rests on the presumption that courts should defer to federal doctrine absent a compelling reason for deviation. The Majority Leader asserts that long-standing practice, including refusal to conform the state constitution to the federal, justifies continuing the state's divergent policy. Invoking an argument common in all constitutional discourse, the Majority Leader claims that the status quo constitutes a presumptively constitutional baseline.[78] In the individual rights context, these arguments are familiar, though they might well be aligned rather than opposed. If plaintiffs assert state constitutional challenges to long-standing practices, the defendants may well offer a dual response that (1) the practice conforms to federal constitutional requirements (as it must in the case of incorporated constitutional guarantees) and that (2) the long duration of the practice supports its

75. *Id.* at 6.

76. *See* Brief of *Amicus Curiae* The Honorable Paul S. Kelly, Majority Leader, Rhode Island Senate at 24, *In re* Advisory Opinion to the Governor (Separation of Powers) (No. 97-572-M.P.).

77. *Id.* at 48.

78. The constitutionalization of the status quo is a common argumentative move in both federal and state constitutional discourse. *See* Sunstein, *supra* note 68, at 504 (criticizing use of status quo baselines that necessarily validate existing practices); *see, e.g.*, Board of Educ. v. Nyquist, 439 N.E.2d 359, 366-70 (N.Y. 1982) (justifying existing school finance system by reference to longstanding history), *appeal dismissed*, 459 U.S. 1138 (1983).

validity. The unincorporated status of separation of powers law allows these arguments to diverge.

Where this debate differs markedly from the individual rights discourse is in the absence of arguments based on the unique values of the people of the state. In the case of individual rights provisions, courts and commentators rely on distinctive aspects of state history to reveal special features of state character that justify diverging from federal doctrine. As discussed above, separation of powers may be viewed as less about distinctive features of the state than about universal principles of human nature. If separation of powers is understood in this manner, state distinctiveness may be shunned as an idiosyncratic deviation from right reason. State history might still justify divergence from federal practice, but such history would generally be relevant for its precedential effect, rather than as a theoretical justification for independent state interpretation. The history merely reveals legal tradition. Under the community model of constitutional interpretation, such historical arguments retain some force, but they do not enjoy the self-validating quality of references to the ultimate matrix of constitutional legitimacy–the fundamental values of the state community.

If separation of powers history does not reflect the unique character of the people of the state, the touchstone of constitutional meaning under the community model, advocates of adhering to federal authority need not dispute the existence of a distinctive historical tradition. Rather, they can deny the normative force of that history.[79] If separation of powers is viewed as a generalized principle of good governance, then, distinctive state history might represent a form of pathology, rather than a shining exemplar of a fresh and authentic perspective on constitutional principles. The Governor's brief, for example, makes some effort to downplay the extent of the historical practice of legislative appointments to boards and commissions. For the most part, though, the Governor's position is that the state's peculiar history constitutes an ob-

79. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 944-59 (1983) (holding one-house veto unconstitutional, while noting long-standing history of practice); *In re* King v. Cuomo, 613 N.E.2d 950, 953 (N.Y. 1993) (holding the New York legislature's long established practice of "recalling" legislation from the Governor unconstitutional and noting that "[t]he New York Legislature's long-standing recall practice has little more than time and expediency to sustain it").

ject of opprobrium, rather than veneration. The Governor's brief concludes with the following plea for a break with the state's past:

> One road leads to the broad and sunlit uplands of federal precedent, and is constructed on the basic and vital principles of our country's founding . . . . The state road, on the other hand, comes from an obscure and troubled origin . . . and it leads back into the great swamps of a political history from which we are still struggling to emerge.[80]

In a reversal of the individual rights discourse, it is the very distinctiveness of the state path that renders it suspect.

These briefs illustrate the central place of federal doctrine in state separation of powers arguments and show how in this context historical narratives lack the self-validating force of revelations of authentic state character. As compared with the realm of individual rights, advocates of independent interpretation of separation of powers principles have fewer resources to justify divergence from federal doctrine. The absence of arguments based on distinctive state values may help to explain why states often follow federal doctrine in this area, even though the pragmatic and institutional concerns that helped explain deference to federal doctrine in the individual rights realm apply quite differently. As in the individual rights area, appeals to text and long-standing practice remain possible. As the next Part discusses, though, such sources may provide unsatisfying guides to understanding the broad structural principles implicated by the separation of powers.[81]

## IV. THE CONTINGENCY OF SEPARATION OF POWERS DOCTRINE

In the remainder of the article, I contest the view that states should align their separation of powers law with federal doctrine.

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80. Brief of Governor Lincoln C. Almond at 82-83, *In re Advisory Opinion* (No. 97-572-M.P.) (quoting Sheldon Whitehouse, *Appointments by the Legislature Under the Rhode Island Separation of Powers Doctrine: The Hazards of the Road Less Traveled*, 1 Roger Williams U. L. Rev. 1, 28 (1996) (quotation marks omitted)).

81. My point is not that the attraction of federal doctrine renders impossible nuanced discussion of state separation of powers questions. For example, drawing heavily on Professor Devlin's work, *see supra* note 29, the Brief of the Rhode Island House of Representatives assesses the implications of the distinctive state and federal political structures. *See* Brief and Appendix of the Rhode Island House of Representatives Through Its Speaker, John B. Harwood at 42-48, *In re* Advisory Opinion to the Governor (Separation of Powers) (No. 97-572-M.P.). Concern with federal doctrine, however, influences the overall shape of separation of powers arguments and may well distract from more penetrating structural analysis.

First, I suggest that significant differences between states and the federal government render lockstep interpretation questionable. Second, I move on to the broader point that separation of powers must be understood as a contingent principle that has different applications in different settings. Even if the general goals of avoiding tyranny and ensuring effective governance could be ascribed to separation of powers in both the state and federal systems, the meaning of these ends and how best to achieve them will likely vary widely. Taking doctrine created in one governmental system and applying it in a different context will be unlikely to lead to the best allocation of political power. Because of the changing nature of separation of powers problems, deference to the historical status quo also represents an inadequate response. The growth of the modern administrative state provides the context for understanding the inadequacy of either aping federal doctrine or conferring normative authority on long-standing practice. Drawing in particular on the work of Cass Sunstein,[82] the following discussion identifies some of the evolving separation of powers concerns and suggests why neither the federal present nor the state past offers reliable guidance.

### A. *Power and Structure in State and Federal Governmental Systems*

Federal separation of powers doctrine has been subject to much criticism, particularly for being overly rigid and formalistic,[83] though it is sometimes faulted instead for oscillating unpredictably between formalism and functionalism.[84] Whatever its strengths and weaknesses, I wish to emphasize here why that doctrine would not be easily transplanted to a state political system. Federal doctrine reflects in part specific textual commitments not

82. *See* Sunstein, *supra* note 68; Cass R. Sunstein, Lochner's *Legacy*, 87 Colum. L. Rev. 873 (1987).

83. *See* Sunstein, *supra* note 68, at 493-94.

84. *See, e.g.*, Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 Duke L.J. 679, 689-716 (1997) (discussing formal and functional approaches to separation of powers); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 Cornell L. Rev. 488 (1987) (same); Keith Werhan, *Normalizing the Separation of Powers*, 70 Tul. L. Rev. 2681 (1996) (same).

duplicated in state constitutions.[85] More importantly, federal separation of powers principles embody particular structural imperatives of a specific political system. One could debate the relative balance of power among executive, legislative and judicial branches at the state and federal level.[86] For present purposes, I wish to stress a different kind of comparison between state and federal governmental systems. Whatever the *relative* strength of the executive, legislative, and judicial departments, a striking feature of the national government is the overall strength of each branch.[87] Because, as I will explain, separation of powers doctrine today must focus not only on limiting certain kinds of power, but also on ensuring the sufficiency of governmental power, the strength of each department of government constitutes a crucial concern.

The President controls the executive branch, and the growth of the administrative state has endowed the executive branch with great power.[88] With vast administrative resources at their disposal, Presidents can set the country's policy agenda.[89] The reach of the national media affords Presidents great power to publicize and pursue their priorities. At the same time, the United States Congress enjoys broad legislative authority. The Supreme Court recently has sought to remind Congress that the powers of the national government are limited, not plenary.[90] Cases like *United States v. Lopez*,[91] however, reveal the vast extent of permissible federal regulation, even as they enforce some limits on congres-

85. The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and Incompatibility Clause, U.S. Const. art. I, § 6, cl. 2, provide two salient examples.

86. *See, e.g.*, Robert F. Williams, *State Constitutional Law Processes*, 24 Wm. & Mary L. Rev. 169, 201-16 (1983) (analyzing branches of state governments).

87. *See, e.g.*, Sunstein, *supra* note 68, at 483-91 (describing growth of executive, legislative and judicial control over government agencies).

88. *See* Korn, *supra* note 68, at 23 (citing "president's uniquely broad executive prerogative powers"); Theodore J. Lowi, The Personal President 56-58 (1985); Arthur M. Schlesinger, Jr., The Imperial Presidency 210-12 (1973); Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725, 1727 (1996); Stanley H. Friedelbaum, *State Courts and the Separation of Powers: A Venerable Doctrine in Varied Contexts*, 61 Alb. L. Rev. 1417, 1418 (1998); Sunstein, *supra* note 68, at 440, 444.

89. *See* Sunstein, *supra* note 68, at 494 (describing policy-making role of the President).

90. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 566-68 (1995).

91. 514 U.S. 549 (1995).

sional activity.[92] The third branch, the federal judiciary, also has assumed broad powers. Protected by life tenure, federal judges have confronted divisive issues of public policy. The courts' efforts have garnered criticism,[93] and some scholars have claimed that the courts' intrusion into social policy has been ineffectual.[94] The courts, however, have acknowledged few legal limits on their authority to interpret and to enforce the federal Constitution.[95]

By contrast, significant, additional checks thwart the exercise of power by each part of state government.[96] Executive branches of state governments often have a more diffused assignment of authority. States commonly elect several members of the executive branch, affording independence to other executive officers in addition to the governor.[97] This dispersal acts as an internal check on the state executive power.[98] State constitutions also place significant substantive and procedural limits on state legislatures. To say that the United States Congress enjoys only enumerated powers, while state legislatures exercise plenary power, would be to emphasize theory over practice.[99] The chief limitations on Congress's legislative authority are the external limits established by the Bill of Rights.[100] In addition to these strictures, state legislatures often face additional requirements, such as prohibitions on

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92. *See* Jesse H. Choper, *Did Last Term Reveal "A Revolutionary States' Rights Movement Within The Supreme Court"?*, 46 Case W. Res. L. Rev. 663, 664-66 (1996); Judge Louis H. Pollak, *Reflections on* United States v. Lopez: *Foreword*, 94 Mich. L. Rev. 533, 550-53 (1995).

93. *See, e.g.*, David J. Armor, Forced Justice: School Desegregation and the Law (1995); Donald L. Horowitz, The Courts and Social Policy (1977).

94. *See, e.g.*, Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991).

95. *See, e.g.*, Missouri v. Jenkins, 495 U.S. 33, 51 (1990) (affirming courts' power to ignore state taxation limits when necessary to enforce a remedy).

96. *See* Devlin, *supra* note 29, at 1225-26.

97. *See* The Council of State Governments, The Book of the States 1998-99, at 35 tbl. 2.10 (1998); Devlin, *supra* note 29, at 1226-28 & n.79; Patrick C. McGinley, *Separation of Powers, State Constitutions & the Attorney General: Who Represents the State?*, 99 W. Va. L. Rev. 721, 722 (1997).

98. *See* Devlin, *supra* note 29, at 1226-28; Malcolm B. Johnson, *Why We Should Keep Florida's Elected Cabinet*, 6 Fla. St. U. L. Rev. 603, 603 (1978); McGinley, *supra* note 97, at 757.

99. *See* Friedelbaum, *supra* note 88, at 1421 (describing difference "in theory" between enumerated powers of Federal Government and reserved power of state governments).

100. *See* Erwin Chemerinsky, Constitutional Law § 3.1, at 166 (1997) (contrasting classical formulation of limited federal powers with "reality" of broad federal powers).

local or special legislation or germaneness requirements.[101] Further, substantive due process limits on state legislatures' economic and social policies have outlived *Lochner*'s demise[102] in the federal system.[103] Finally, state courts have tended to be less assertive in defining and enforcing constitutional rights. This reluctance may be traceable to the courts' greater electoral accountability.[104] Indeed, the reluctance to engage in independent interpretation of the state constitution exemplifies the relative passivity of state courts. Another prominent sign of the state courts' modesty is the imposition of a heightened burden for declaring acts unconstitutional. North Dakota's supermajority requirement is aberrational,[105] but

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101. *See* G. Alan Tarr, *State Constitutional Politics: An Historical Perspective*, *in* Constitutional Politics in the States 3, 9-11 (G. Alan Tarr ed., 1996) (describing historical evolution of restrictions on legislatures).

102. *See* Chemerinsky, *supra* note 100, § 8.2.3, at 489 (noting that *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) indicated abandonment of principles of *Lochner v. New York*, 198 U.S. 45 (1905)).

103. *See, e.g.*, James C. Kirby, Jr., *Expansive Judicial Review of Economic Regulation Under State Constitutions*, *in* Developments in State Constitutional Law *supra* note 8, at 94; Developments in the Law—*The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1463 (1982); Lawrence M. Friedman, *State Constitutions in Historical Perspective*, 496 Annals Am. Acad. Pol. & Soc. Sci. 33, 40-41 (1988); Peter J. Galie, *State Courts and Economic Rights*, 496 Annals Am. Acad. Pol. & Soc. Sci. 76 (1988); A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va. L. Rev. 873, 879-91 (1976); Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 Val. U. L. Rev. 459, 472-74 (1996).

104. *See* Daniel R. Pinello, the Impact of Judicial-Selection Method on State-Supreme-Court Policy: Innovation, Reaction and Atrophy 130 (1995) ("[T]he data here show the conventional wisdom of the 1980s among professional political scientists that selection method has no meaningful impact on judicial policy is mistaken."); Paul Albert Kramer, Analyzing the Determinants of State Constitutional Activism: A Search for State Court Independence in the American Federal System 158-63, 206-07 (1995) ("States with either a merit-based appointment system or direct judicial appointment produce state courts that are more activist relative to courts in states where justices face electoral reprisal.") (unpublished Ph.D. dissertation, University of Minnesota); *see also* Susan P. Fino, The Role of State Supreme Courts in the New Judicial Federalism 116-17 (1987) (noting the link between courts' insulation from majoritarian pressures and their protection of minority rights); Friedelbaum, *supra* note 88, at 1458-59 (suggesting electoral dependence of judges as cause of "instability" in state courts). *But see* Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. Miami L. Rev. 1, 43-45 (1994) (reporting studies finding little connection between selection method and judicial decisions).

105. *See* N.D. Const. art. VI, § 4 (requiring concurrence of four judges to hold legislation unconstitutional); *see also* Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 250 (N.D. 1994) (upholding constitutionality of school finance system

the standard that legislation must be found unconstitutional beyond a reasonable doubt is more common.[106] To be sure, state courts have asserted significant independent authority in certain areas, especially matters pertaining to the courts, themselves. For example, state courts have resisted encroachment on their regulatory authority[107] and even have safeguarded their own budgets under a theory of inherent constitutional authority to protect their functioning.[108] The absence of strict justiciability requirements in certain states also may confer greater power on state courts.[109]

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despite conclusion by the majority of the Court that system violated state constitution).

106. *See, e.g.*, People v. Geyer, 942 P.2d 1297, 1299 (Colo. Ct. App. 1996); Biscoe v. Tanaka, 878 P.2d 719, 723 (Haw. 1994); Olson v. Ford Motor Co., 558 N.W.2d 491, 496 (Minn. 1997); City of Pawtucket v. Sundlun, 662 A.2d 40, 45 (R.I. 1995); Island County v. State, 955 P.2d 377, 380 (Wash. 1998); State v. Janssen, 580 N.W.2d 260, 263 (Wis. 1998). James Bradley Thayer, among others, advocated that federal courts adopt such a heightened standard for judicial review. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 140 (1893); *see also* G. Edward White, *Revisiting James Bradley Thayer*, 88 Nw. U. L. Rev. 48, 73-83 (1993) (discussing Thayer's proposal). In this regard, it appears that Thayer has triumphed in state courts.

107. *See, e.g.*, Kunkel v. Walton, 689 N.E.2d 1047, 1051-56 (Ill. 1997) (holding unconstitutional legislature's attempt to promulgate rules of judicial procedure); Whitehead v. Nevada Comm'n on Judicial Discipline, 878 P.2d 913, 916-20 (Nev. 1994) (holding unconstitutional executive participation in judicial discipline process); Commonwealth v. Stern, 701 A.2d 568, 570-73 (Pa. 1997) (holding unconstitutional legislature's attempt to supervise conduct of lawyers); Lloyd v. Fishinger, 605 A.2d 1193 (Pa. 1992) (same); *see also* Murmeigh v. Gainer, 685 N.E.2d 1357, 1364-67 (Ill. 1997) (holding unconstitutional legislative regulation of the judiciary's contempt power).

108. *See* Felix F. Stumpf, Inherent Powers of the Courts: Sword and Shield of the Judiciary 4-5 (1994) (collecting references to definitions of "inherent powers" doctrine); *see also* Board of County Comm'rs v. Nineteenth Judicial Dist., 895 P.2d 545, 547-49 (Colo. 1995) (en banc) (discussing "inherent powers" doctrine); *In re* 1987 Essex County Judicial Budget Impasse, 533 A.2d 961, 970 (N.J. 1987) (ordering county to increase judicial funding by nearly $2 million).

109. For example, as the current proceeding in Rhode Island illustrates, the courts in some states offer advisory opinions. *See* Mel A. Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, 2 Roger Williams U. L. Rev. 207, 213-14 (1997); *see also* Margaret M. Bledsoe, Comment, *The Advisory Opinion in North Carolina: 1947 to 1991*, 70 N.C. L. Rev. 1853 (1992) (describing the declining use of advisory opinions in North Carolina). There would seem to be some irony in arguing in the context of an advisory opinion proceeding that Rhode Island must apply federal separation of powers doctrine. Federal courts are constitutionally prohibited from issuing advisory opinions, in part because such opinions would violate separation of powers principles. *See* Flast v. Cohen, 392 U.S. 83, 96 (1968); *see also* Erwin Chemerinsky, Federal Jurisdiction § 2.2, at 48 (2d ed. 1994) (stating

The largely unfulfilled promise of school finance reform, though, stands as a representative example of the relative weakness of state courts, especially in confrontations with other centers of state power.[110] The Rhode Island case of *City of Pawtucket v. Sundlun*[111] illustrates the reluctance of state courts to intervene in school finance matters. In the face of claims for greater equity in the allocation of educational resources, the Rhode Island Supreme Court relied on separation of powers, among other grounds, in upholding the constitutionality of the state's property tax-based school funding system.[112] To bolster its position, the court cited one chapter of the long-running federal school desegregation case in Kansas City, Missouri.[113] Despite *Sundlun*'s reference to Kansas City, that very case, considered as a whole, provides an illuminating contrast to state constitutional litigation. In the decision relied on in *Sundlun*, the United States Supreme Court did find that the federal district court had employed a remedy of impermissible scope.[114] Five years previously, though, when considering efforts to fund a comprehensive court-ordered remedy of vast dimensions, the Supreme Court had approved a district court's ordering the school board to raise taxes, even in excess of the level permissible under state law.[115] That kind of aggressive judicial enforcement of constitutional commands is rare in state constitutional litigation.

The weakness of each branch of the state government provides an important context for state separation of powers jurisprudence. Because of the manifold human needs threatened by complex modern society, an absence of governmental power can be as great a

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"separation of powers is maintained by keeping the courts out of the legislative process").

110. *See* Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 Harv. L. Rev. 1072, 1082-83 (1991). At least one recent commentator has found that state constitutional litigation may have significant effects on the distribution of educational resources in a state. *See* Douglas S. Reed, *Twenty-Five Years After* Rodriguez*: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 L. & Soc'y Rev. 175 (1998). There seems little dispute, though, that state courts have been less assertive in imposing intrusive remedies than federal courts have been in the civil rights area. *See, e.g.*, *id.* at 213 (noting the small number of "aggressive, activist decisions" in state school finance litigation).

111. 662 A.2d at 40.

112. *See id.* at 57-59.

113. *See id.* at 59 (citing Missouri v. Jenkins, 515 U.S. 70, 100 (1995)).

114. *See Jenkins*, 515 U.S. at 100.

115. *See* Missouri v. Jenkins, 495 U.S. 33, 50-51 (1990).

threat as a surfeit. One of the lessons of the Progressive Era and the New Deal, legally recognized in the overruling of *Lochner*, is that tyranny may have private, as well as public sources. For a worker in an unsafe plant or for a citizen in a polluted neighborhood, government regulation may represent a reprieve from the potential abuses of ("private") power.[116] In this regard, governmental inaction may lead to tyranny.[117]

The challenges posed by government inaction take on different forms in the states, given the quite different constellations of power. To give one example, it is an old saw that "[n]o man's life, liberty or property are safe while the Legislature is in session."[118] Because of the regulatory needs of modern society, however, a more accurate rendition might be that no person's life, liberty, or property are safe while the legislature is *out of* session. And unlike Congress, state legislatures are out of session a great deal. Adhering to federal doctrine will not allow a court to take account of such important structural differences. States might well need to adopt innovative institutional patterns to address emerging regulatory needs.

The modern administrative state arose because the existing framework of government proved inadequate to create and enforce a legal environment to meet the challenges of the growing national economy. While answering an important need, administrative agencies present important accountability concerns. In the federal system, though, strong executive, legislative and judicial branches can serve as a powerful check on regulatory bodies. In the state system, oversight and control may need to assume different forms. Strong administrative boards, including sitting legislators, may fill a power vacuum, while providing a practical means of democratic supervision.

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116. *See* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. Chi. L. Rev. 653, 683 (1985) ("The rise of the modern regulatory state results in large part from an understanding that government 'inaction' is itself a decision and may have serious adverse consequences for affected citizens.").

117. *See* Robert A. Dahl, A Preface to Democratic Theory 12 & n.21, 29 (1956) (referring to James Madison's idea of the consequences of tyranny as "the severe deprivation of natural rights" and describing tyranny inflicted by private individuals); Sunstein, *supra* note 68, at 501-04 (describing New Deal critique of government inaction); Sunstein, *supra* note 82, at 902-19 (same).

118. Gary L. Starkman, *State Legislators, Speech or Debate, and the Search for Truth*, 11 Loy. U. Chi. L.J. 69, 69 (1979) (quoting The Final Accounting in the Estate of A.B., 1 Tucker (N.Y. Sur. Rep.) 247, 249 (1866)).

B. *Contingency and Historicity*

The foregoing discussion of the significant differences between the state and federal systems casts doubt on simply following federal separation of powers authority. The example of the growth of the modern administrative state further suggests why an alternative strategy of resting on state tradition also may represent an inadequate response to state separation of powers questions.

Preventing tyranny and ensuring effective governance may be the chief aims of separation of powers law. The meaning of the these goals, though, takes shape with the particular exigencies of the relevant political system. Just as the state and federal governmental systems differ greatly, so do the political structures in a state today, as opposed to 100 years ago. Governments do more today, and administrative agencies and other innovative bodies have arisen in response to those needs. In Rhode Island, for example, the number of boards and commissions more than doubled between 1936 and 1986.[119] At some point, the multiplication of such bodies may present new kinds of challenges requiring different forms of supervision. The need to coordinate the varied agencies and to ensure a coherent administrative agenda may require more centralized control. Letting a dozen commissions bloom may represent a creative response to regulatory requirements. Letting a thousand commissions bloom may produce chaos, without some central organizing mechanism. The argument for asserting executive control over the administrative state changes when the regulatory framework becomes so large and complex.[120]

These observations are perforce very general. Different states will find their own solutions. Large states and small states may face divergent challenges, and the problems will vary also depending on the particular characteristics of the state and its general division of governmental authority. The main point, though, is that neither today's federal doctrine, nor yesterday's state practices represent compelling sources of separation of powers principles.

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119. *See* Brief of Governor Lincoln C. Almond at 77-78, *In re* Advisory Opinion to the Governor (Separation of Powers) (No. 97-572-M.P.).

120. *See* Sunstein, *supra* note 68, at 509 (noting role of executive, legislature and judiciary in supervising administrative agencies).

## V. CONCLUSION

My goal in this essay has not been to offer a comprehensive theory of state separation of powers law, much less to suggest that Rhode Island should adopt a particular distribution of appointment responsibility. My more modest aim was to point out some of the potential pitfalls in answering separation of powers questions. In particular, I have tried to caution against the wholesale adoption of federal doctrine.

As in the domain of individual rights, states commonly follow federal separation of powers precedent. Indeed, given the link between independent state constitutional interpretation and the existence of distinctive state communities, deference to federal law may be more likely in the separation of powers area. The nature of separation of powers principles present more possibilities for universalist pretensions. If Madison and Montesquieu understood how governmental systems could adapt to human nature, then distinctive state traditions might only lead astray. To deviate would be to err.

This essay has suggested how separation of powers might be understood as a more contingent concept, fostering different distributions of power in different settings and at different times. This interpretive freedom has its perils. When judges resist following existing case law, even law of a different system, they open themselves to charges of being politically motivated or result oriented.[121] On the other hand, state judges often have intimate knowledge of the workings of their state's government and of the practical implications of different arrangements of governmental authority. Freed from the shackles of federal doctrine (and of state doctrine developed in a very different historical period), state judges can use their experience to develop independent and robust separation of powers principles.

121. *See* Schapiro, *supra* note 4, at 422 n.127 (giving examples of independent interpretation being criticized as unprincipled).