

Fall 1998

The Positivist Revolution That Wasn't: Constitutional Universalism in the States

James A. Gardner

Western New England College School of Law

Follow this and additional works at: http://docs.rwu.edu/rwu_LR

Recommended Citation

Gardner, James A. (1998) "The Positivist Revolution That Wasn't: Constitutional Universalism in the States," *Roger Williams University Law Review*: Vol. 4: Iss. 1, Article 5.

Available at: http://docs.rwu.edu/rwu_LR/vol4/iss1/5

This Symposium is brought to you for free and open access by the Journals at DOCS@RWU. It has been accepted for inclusion in Roger Williams University Law Review by an authorized administrator of DOCS@RWU. For more information, please contact mwu@rwu.edu.

The Positivist Revolution That Wasn't: Constitutional Universalism in the States

James A. Gardner*

One of the most striking features of state constitutional law is the degree to which it seems interchangeable with federal constitutional law at the doctrinal level. The state and federal enterprises of constitutional self-government are similar in many ways and draw to some extent on a common core of American experience and tradition, so a certain degree of similarity is to be expected. Yet the doctrinal convergence stamping these bodies of law goes well beyond the kind of family resemblance that their common ancestry and purpose might be expected to produce. Instead, state courts frequently rely heavily on federal decisions, overtly appropriate federal standards and analyses, and, in general, approach the adjudication of questions arising under the state constitution with an attitude of profound dependence on the work of federal tribunals—an approach that has been widely condemned in the academic community¹ and has been rejected in principle by the loose movement

* Professor of Law, Western New England College School of Law. My thanks for superb research assistance to Frank Celico and, very belatedly, Lauren Galliker. I learned much from a very useful discussion with Pat Gudridge. An earlier version of this paper was presented on April 25, 1998 at a symposium on *Separation of Powers in State Constitutional Law* at Roger Williams University School of Law.

1. See, e.g., Ronald K.L. Collins, *Reliance on State Constitutions—Away From a Reactionary Approach*, 9 Hastings Const. L.Q. 1, 2-3 (1981); George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 Hastings Const. L.Q. 975 (1979); Peter J. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 Syracuse L. Rev. 731, 779, 786 (1982); Ken Gormley, *Ten Adventures in State Constitutional Law*, in 1 Emerging Issues in State Constitutional Law 29, 35 (1988); A.E. Dick Howard, *The Renaissance of State Constitutional Law*, in 1 Emerging Issues in State Constitutional Law, *supra*, at 1, 12-13; Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63

of scholars and judges sometimes known as the New Judicial Federalism.²

My purpose in this paper is neither to praise nor condemn this doctrinal congruity or the approach to state constitutional adjudication that produces it, but to offer an explanation. My thesis, in brief, is this: the widespread convergence of state and federal constitutional doctrine can be explained in part as the natural continuation of a long, powerful tradition on the state level of constitutional universalism—the belief that all American constitutions are drawn from the same set of universal principles of justice and good government.

I. DOCTRINAL CONVERGENCE IN SEPARATION OF POWERS JURISPRUDENCE

The doctrinal similarity of state and federal constitutional law has been most often remarked in the area of individual rights. It was, after all, concern over the United States Supreme Court's treatment of individual rights during the early 1970s that prompted Justice Brennan to issue his now-famous call to state courts to use state constitutions as sources of heightened protection for individual rights,³ an invitation that more than any other single event gave birth to the New Judicial Federalism. Although some courts have occasionally heeded the call, most have not; doctrinal convergence is still the rule when it comes to the protection of constitutional liberties.⁴

Denv. U. L. Rev. 85, 95 (1985); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 St. John's L. Rev. 399, 417-18 (1987); Robin B. Johansen, Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 Stan. L. Rev. 297, 300 (1977).

2. For a historical overview of the development of this movement, see James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 771-77 (1992); G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 Notre Dame L. Rev. 1097 (1997). Numerous recent symposia have been devoted to the topic. For a recent example, see Symposium, *The New Judicial Federalism: A New Generation*, 30 Val. U. L. Rev. 421 (1996).

3. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

4. See Barry Latzer, *State Constitutions and Criminal Justice* 158 (1991); Gardner, *supra* note 2, at 788-93; Michael E. Solimine & James L. Walker, *Federalism, Liberty and State Constitutional Law*, 23 Ohio N.U. L. Rev. 1457, 1467 & nn.68-70 (1997).

Less often remarked is the equally pronounced tendency toward doctrinal convergence in other substantive areas of constitutional law, including structural areas such as the separation of powers. For example, just within the last fifteen years courts in at least eight states have issued major separation of powers rulings relying extensively on federal authority.⁵ Some flavor for the degree of this reliance can be gleaned from the recent decision of the New Jersey Court of Appeals in *In the Matter of the Adoption of Regulations Governing the State Health Plan*.⁶ In that case, the court upheld a state law against a challenge that the legislature had delegated excessive authority to the New Jersey Department of Health.⁷ In analyzing the separation of powers under the New Jersey Constitution, the court relied heavily on major decisions of the United States Supreme Court construing the federal Constitution⁸ — and, strangely, Professor Kenneth Culp Davis's leading treatise on administrative law⁹ — a work that addresses *federal* administrative law almost exclusively.¹⁰

During the same period, courts in at least six states have gone beyond mere reliance to outright adoption of federal separation of powers doctrine for purposes of fashioning a rule of decision for separation of powers cases arising under the state constitution.¹¹ For example, a 1984 decision of the Connecticut Supreme Court

5. See *Paisner v. Attorney General*, 458 N.E.2d 734 (Mass. 1983); *People v. Raihala*, 502 N.W.2d 755 (Mich. Ct. App. 1993); *State v. Di Frisco*, 571 A.2d 914 (N.J. 1990); *Under 21 v. City of New York*, 482 N.E.2d 1 (N.Y. 1985); *Commonwealth v. Jubelirer*, 567 A.2d 741 (Pa. Commw. Ct. 1989); *In re House of Representatives*, 575 A.2d 176 (R.I. 1990); *State v. De La Cruz*, 393 S.E.2d 184 (S.C. 1990); *Carrick v. Locke*, 882 P.2d 173 (Wash. 1994).

6. 621 A.2d 484 (N.J. Super. Ct. App. Div. 1993).

7. See *id.* at 492-93.

8. See *id.* at 488 (citing *Mistretta v. United States*, 488 U.S. 361 (1989); *INS v. Chadha*, 462 U.S. 919 (1983); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *Schecter Poultry Co. v. United States*, 295 U.S. 495 (1935)).

9. See *id.* (citing Kenneth Culp Davis, 1 *Administrative Law Treatise* § 2:4, at 71-72 (2d ed. 1978)).

10. In five volumes, Davis devotes a total of sixteen pages to state administrative procedure acts. Davis, *supra* note 9, §§ 1:10-1:11, at 36-51. The New Jersey court did not even cite to these pages. See *Adoption of Regulations*, 621 A.2d at 488.

11. See *Pellegrino v. O'Neill*, 480 A.2d 476, 481-83 (Conn. 1984); *Department of Transp. v. Armacost*, 532 A.2d 1056, 1062-65 (Md. 1987); *Commonwealth v. Sesoms*, 532 A.2d 775, 778-79 (Pa. 1987); *In re Advisory from the Governor*, 633 A.2d 664, 674-75 (R.I. 1993); *Common Cause of W. Va. v. Tomblin*, 413 S.E.2d 358, 360-61, 364 (W. Va. 1991); *Billis v. State*, 800 P.2d 401, 413-15 (Wyo. 1990).

adopted the federal political question doctrine, a doctrine holding that Article III of the United States Constitution limits the power of federal courts to adjudicate certain kinds of disputes.¹² The Connecticut court applied the political question doctrine to conclude that Connecticut courts lacked authority under the state constitution to adjudicate the constitutionality of legislative appropriations decisions relating to funding for the judicial branch.¹³ In a 1993 opinion, the Rhode Island Supreme Court adopted the majority opinion in *INS v. Chadha*¹⁴ in the course of upholding revolving-door restrictions on state employment.¹⁵ Conversely, in 1991, the West Virginia Supreme Court adopted Justice White's *dissenting* opinion in *Chadha* to decide the validity under the state constitution of a statute requiring prosecutorial consent to the judicial practice of deferring criminal proceedings and placing defendants on probation without entering judgment of conviction.¹⁶

Some recent state rulings have gone even further. In these cases, courts have gone beyond mere reliance on federal authority or appropriation of federal doctrine to hold that the doctrinal principles of separation of powers form a common body of shared law upon which the state and federal constitutions independently draw. For example, in an opinion tracing separation of powers principles to thinkers such as Montesquieu and Locke, the Florida Supreme Court recently said: "The principles underlying the governmental separation of powers antedate our Florida Constitution and were collectively adopted by the union of states in our federal

12. See *Pellegrino*, 480 A.2d at 481-83; see also *State ex rel. Oberly v. Troise*, 526 A.2d 898, 904-05 (Del. 1987) (citing *Baker v. Carr*, 369 U.S. 186, 210, 217 (1962) to determine if a nonjusticiable political question exists); *Trustees of Hawaiian Affairs v. Yamasaki*, 737 P.2d 446, 455-57 (Haw. 1987) (deferring to United States Supreme Court precedents when political questions are involved); *Kluk v. Lang*, 531 N.E.2d 790, 796-97 (Ill. 1988) (relying on the *Baker v. Carr* political question test to deny a challenge to a declaratory judgment based on the political question exception). Earlier cases are collected in Nat Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. Rev. 405, 408-23 (1984).

13. See *Pellegrino*, 480 A.2d at 481-82.

14. 462 U.S. 919 (1983).

15. See *In re Advisory from the Governor*, 633 A.2d at 674-75 (citing *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980), *aff'd*, 462 U.S. 919 (1983)).

16. See *Common Cause of W. Va.*, 413 S.E.2d at 363-64 (quoting *Chadha*, 462 U.S. at 967-68 (White, J., dissenting)).

constitution."¹⁷ The Maryland Court of Appeals has reached a similar conclusion:

The delegation doctrine . . . is a corollary of the separation of powers doctrine which underlies both the Maryland and Federal Constitutions. Steeped in the political theories of Montesquieu and Locke, those who framed the constitutions of our states and of the federal government believed that separating the functions of government . . . was fundamental to good government and the preservation of civil liberties.¹⁸

The Kansas Supreme Court has described the separation of powers as a feature of "the American constitutional system"¹⁹—as though the court were somehow called upon to construe such a thing rather than "the Kansas constitutional system" or "the United States constitutional system."

Probably the most extreme kind of doctrinal convergence in this area can be found in the recent decision of the Hawaii Supreme Court in *State v. Bernades*.²⁰ There, a criminal defendant challenged state sentencing guidelines as a violation of the Hawaii Constitution's separation of powers.²¹ In rejecting that challenge, the Hawaii Supreme Court ruled that the guidelines did not violate "the separation of powers doctrine under the Hawaii and United States Constitutions"²²—as though the federal Constitution actually controlled the outcome, an obvious error as a matter of positive law.

One reason why this doctrinal congruity seems striking is that it is so unexpected. The appeal of congruity in the area of individual rights is easy to understand. Constitutionally protected individual rights are often said to be fundamental²³ or to arise from universal principles of justice, human nature or natural law.²⁴ Where liberties protected by the United States Constitution are understood to rest on such impressive foundations, it is surely

17. *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260, 263 (Fla. 1991) (citing *Mistretta v. United States*, 488 U.S. 361, 380 (1989)).

18. *Department of Transp. v. Armacost*, 532 A.2d 1056, 1062 (Md. 1987).

19. *State ex rel. Stephan v. Kansas House of Representatives*, 687 P.2d 622, 634 (Kan. 1984).

20. 795 P.2d 842 (Haw. 1990).

21. *See id.* at 843.

22. *Id.* at 845 (emphasis added).

23. *See Ira C. Lupu, Untangling the Strands of the Fourteenth Amendment*, 77 Mich. L. Rev. 981 (1979).

24. *See infra* Section II.

tempting to assume that facially similar provisions of state constitutions share this derivation and should be similarly interpreted. The structural details of the separation of powers, however, do not typically purport to rest on fundamental or universal principles. Unlike the God-given "unalienable rights" mentioned in the Declaration of Independence,²⁵ the separation of governmental powers is usually understood to be a *means* of protecting liberty rather than a liberty itself entitled to constitutional protection. I will show below that the belief in the universality of constitutional principles reached its zenith during the middle and late nineteenth century. Yet even one of the most influential jurists of that period, Massachusetts Chief Justice Lemuel Shaw, himself a strong believer in the universality of constitutional principles, did not consider the constitutional separation of powers to reflect any fundamental principle of constitutional law. As he wrote in 1849: "The proper province of a declaration of rights and constitution of government, *after* directing its form, regulating its organization and the distribution of its powers, is to declare great principles and fundamental truths."²⁶ Shaw thus excluded the distribution of powers from the constitution's declaration of fundamental principles.²⁷

State courts' enthusiasm for relying on and appropriating federal decisional law concerning the separation of powers is also surprising given the many differences between the state and federal constitutions in this area. For example, unlike the United States Constitution, some state constitutions have provisions specifically addressing the separation of powers that might suggest the need for a different approach.²⁸ State constitutions also frequently dif-

25. The Declaration of Independence para. 2 (U.S. 1776).

26. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206 (1849) (emphasis added).

27. Professor Sherry has argued that courts of this period tended to consult natural law in cases dealing with individual rights, but not in cases dealing with structural issues such as the separation of powers. See Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127, 1132-33, 1167-70 (1987). This conclusion, with which I generally agree, in no way impugns my contention that state courts interpreting structural aspects of state constitutions borrowed indiscriminately from federal decisions and from each other, even during this early period. See, e.g., *G. & D. Taylor & Co. v. R.G. & J.T. Place*, 4 R.I. 324 (1856) (relying heavily on federal separation of powers decisions as an aid to deciding the constitutionality of the state legislature's setting aside of a civil jury verdict and ordering a new trial).

28. For example, the Rhode Island Constitution provides: "The powers of the government shall be distributed into three departments: the legislative, executive

fer structurally from the federal Constitution. All but four states provide for independent popular election of lower executive branch officials such as the state's attorney general or chief financial officer,²⁹ and many provide for popular election to numerous executive offices, up to as many as ten.³⁰ The independent election of these officials gives them an autonomy that lower executive branch officials of the United States lack, thereby removing from the governor significant powers that the President of the United States retains. In addition, the constitutions of 41 states provide for popular election of at least some state judges, diminishing their independence but increasing their accountability in ways unknown under the federal system.³¹ These differences surely have ramifications for the precise ways in which the balance of power among the branches of government ought to be struck, yet they are almost universally ignored in judicial analyses of the separation of powers under state constitutions.

Many other differences between the state and federal constitutions might also be relevant to a separation of powers analysis. State power under state constitutions is generally understood to be

and judicial." R.I. Const. art. V. Courts in some states that have such provisions have interpreted them to require a stricter separation of powers than does the United States Constitution. *See Alexander v. State*, 441 So. 2d 1329, 1335 (Miss. 1983). Others have not attached great significance to such language. *See Department of Transp. v. Armacost*, 532 A.2d 1056, 1064-65 (Md. 1987).

29. *See Council of State Governments, The Book of the States* 33-34 tbl. 2.9 (1996-97). The exceptions are Maine, New Hampshire, New Jersey and Tennessee. *See id.*

30. *See, e.g., id.* at 33. In North Carolina and North Dakota the Governor, Lieutenant Governor, Secretary of State, Attorney General, Treasurer, Auditor, and Commissioners of Education, Agriculture, Labor and Insurance are all elected. *See id.*

31. *See Ala. Const. art. VI, § 152; Alaska Const. art. IV, § 6; Ariz. Const. art. VI, § 12; Ark. Const. art. VII, §§ 6, 17; Cal. Const. art. VI, § 16; Colo. Const. art. VI, § 25; Conn. Const. art. V, § 2; Fla. Const. art. V, § 10; Ga. Const. art. VI, § 7, para. 1; Idaho Const. art. V, § 6; Ill. Const. art. VI, § 12(a); Ind. Const. art. VII, § 11; Iowa Const. art. V, § 17; Kan. Const. art. III, §§ 5(a), 6(a); Ky. Const. § 117; La. Const. art. V, § 22(A); Me. Const. art. VI, § 6; Md. Const. art. IV, § 3; Mich. Const. art. VI, §§ 2, 8, 12; Minn. Const. art. VI, § 7; Miss. Const. art. VI, § 145; Mo. Const. art. V, § 16; Mont. Const. art. VII, § 8(1); Neb. Const. art. V, § 21(3); Nev. Const. art. VI, § 3; N.M. Const. art. VI, §§ 4, 10, 14, 16 (amended Nov. 8, 1988); N.Y. Const. art. VI, §§ 6(c), 10(a); N.C. Const. art. IV, § 9(1); N.D. Const. art. VI, § 7; Ohio Const. art. IV, § 6(A)(1)-(4); Okla. Const. art. VII, § 3; Or. Const. art. VII, § 2; S.D. Const. art. V, § 7; Tenn. Const. art. VI, § 3; Tex. Const. art. V, § 2; Utah Const. art. VIII, § 9; Vt. Const. ch. II, § 50; Wash. Const. art. IV, § 3; W. Va. Const. art. VIII, §§ 2, 5; Wis. Const. art. VII, § 4(1); Wyo. Const. art. V, § 4(g).*

plenary except as limited, while power under the United States Constitution is withheld except as specifically granted.³² This might provide the state legislature with an advantage in inter-branch disputes that on the federal level Congress would be unable to claim. Conversely, governors often have an item veto, increasing gubernatorial power in comparison to presidential power.³³ State legislatures are also typically less professionalized than Congress and have fewer resources,³⁴ potentially giving the governor another advantage as compared to the President. Local traditions, such as Rhode Island's tradition of legislative appointment to the executive and judicial branches,³⁵ might also be relevant to the analysis of separation of powers under the state constitution. Finally, the fact that federal separation of powers doctrine, unlike the federal analysis of individual rights incorporated through the Fourteenth Amendment, provides no binding "floor" to the distribution of powers under the state constitution, might also make the federal analyses less directly relevant.³⁶

Given the many strong reasons for expecting state separation of powers analysis to proceed independently of its federal counterpart, what can account for the striking record of heavy and widespread state court reliance on federal separation of powers

32. This principle was established comparatively early in the history of American constitutional adjudication. Compare *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404 (1819) (holding that the U.S. Constitution grants the government only enumerated powers), with *Pratt v. Allen*, 13 Conn. 119, 124-25 (1839) (distinguishing between the limited powers conferred to the federal government and the extensive powers of state government).

33. See Richard Briffault, *The Item Veto in State Courts*, 66 Temp. L. Rev. 1171 (1993).

34. See Rogan Kersh et al., "More a Distinction of Words than Things": *The Evolution of Separated Powers in the American States*, 4 Roger Williams U. L. Rev. 5 (1998).

35. See Richard A. Hogarty, *When Legislators Become Administrators: The Problem of Plural Office-Holding*, 4 Roger Williams U. L. Rev. 133 (1998); 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, 19-23 (1996).

36. For a more complete discussion of the potentially analytically relevant differences, see John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 Temp. L. Rev. 1205 (1993). See also Hon. Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 Minn. L. Rev. 1543, 1548 (1997) (identifying three major sources of differences between state and federal courts).

decisions, standards and analyses? In my view, much can be learned from an examination of a frequently overlooked aspect of the history of state constitutionalism: a long and powerful tradition of "American constitutional universalism."

II. AMERICAN CONSTITUTIONAL UNIVERSALISM

Constitutional universalism, as I use the term here, refers to the belief that all American constitutions are drawn from the same set of universal principles of constitutional self-governance. In constitutional adjudication, this belief typically manifests itself in at least one of three ways. First, universalist premises may manifest themselves in a lack of judicial attention to or discussion of the constitutional text, case authority, framers' intent, or relevant history including history specific to the provision under review.³⁷ Second, when courts rely on authority, its use is characterized by indiscriminate borrowing from other jurisdictions, whether federal or state, and from the common law. The third and most obvious manifestation of constitutional universalism, although today the rarest, is overt reliance on either natural law or so-called "general principles" of law.

With these concepts in mind, I turn now to a very brief overview of the career of constitutional universalism on the state and federal levels. An examination of this history shows that universalism has been largely overthrown in the federal courts by a positivist revolution that took hold in the early part of this century. However, on the state level, constitutional universalism's roots are much deeper and stronger, and the forces of positivism have not yet succeeded in dislodging them.

A. *Legal Universalism in the Federal Courts*

The early history of legal universalism in the federal courts is reasonably well known. One of the earliest hints of universalism can be found in the famous debate between Justices Chase and Iredell in *Calder v. Bull*³⁸ about the propriety of recognizing natural law as a judicially cognizable restraint on legislative power that

37. See Gardner, *supra* note 2, at 780-94 (providing a more thorough discussion and documentation of these adjudicatory practices in state constitutional decision-making).

38. 3 U.S. (3 Dall.) 386 (1798).

exists independent of any limitations written into constitutions. Another early bow toward universalism appears in *Fletcher v. Peck*,³⁹ where Justice Marshall wrote: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power [States are restrained] either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States."⁴⁰

In the federal courts, however, legal universalism came into full flower with the Supreme Court's 1842 decision in *Swift v. Tyson*.⁴¹ In *Swift*, a commercial dispute arising under New York law, the Supreme Court rejected the authority of state courts to declare state law authoritatively for purposes of furnishing rules for federal courts to apply in diversity suits.⁴² The Court went on to hold that the New York courts had misconstrued "general principles" of commercial law.⁴³ Rather than apply the New York courts' misinterpretation of this law, the Court identified the "correct" rule and proceeded to apply it to the facts.⁴⁴

The federal trend toward universalism reached its peak during the 1860s and 1870s in a set of now obscure rulings concerning municipal bonds.⁴⁵ In *Gelpcke v. City of Dubuque*,⁴⁶ decided in 1864, the Court was required in a diversity suit to rule upon the validity of a set of bonds issued by the city of Dubuque, Iowa to finance the construction of railroad lines.⁴⁷ The Iowa Constitution then in force contained provisions that raised some question about the constitutionality of such a municipal investment.⁴⁸ In several earlier cases the Iowa courts had not construed the state constitution to prohibit the issuance of these kinds of bonds, but in 1862

39. 10 U.S. (6 Cranch) 87 (1810).

40. *Id.* at 135-39.

41. 41 U.S. (16 Pet.) 1 (1842).

42. *Id.* at 18-19.

43. *Id.* at 19.

44. *See id.* at 19-22.

45. For an extremely thorough and informative discussion of these cases and their historical context, see Charles Fairman, 1 *Reconstruction and Reunion 1864-88* chs. 17-18 (1971).

46. 68 U.S. (1 Wall.) 175 (1864).

47. The intense competition among towns for access to rail lines is detailed in Fairman, *supra* note 45, at ch. 17.

48. *See Gelpcke*, 68 U.S. (1 Wall.) at 204 (quoting Iowa Const. art. I, § 6; art. III, § 1; art. VII; art. VIII, § 2).

the Iowa Supreme Court reversed itself and held that the Iowa Constitution prohibited the taxation of citizens for purposes of aiding a railroad.⁴⁹ The United States Supreme Court refused to follow this ruling.⁵⁰ "It cannot be," the Justices said, "that this court will follow every . . . oscillation" in the rulings of state tribunals.⁵¹

The earlier decisions, we think, are sustained by reason and authority. They are in harmony with the adjudications of sixteen States of the Union. Many of the cases in the other States are marked by the profoundest legal ability.

The late case in Iowa, and two other cases of a kindred character in another State, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety.⁵²

Consequently, the Court declined to follow the Iowa Supreme Court's construction of the Iowa Constitution, and applied instead an opposite rule which, the Court observed, "rests upon the plainest principles of justice."⁵³ The Court made a bow toward "the importance of uniformity in the decisions of this court, and those of the highest local courts, giving constructions to the laws and constitutions of their own States."⁵⁴ But, said the Court, from time to time "exceptional cases" arise.⁵⁵ In such cases, "[w]e shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice."⁵⁶

The Court reached a similar result eight years later in *Olcott v. The Supervisors*,⁵⁷ a case involving notes issued by a Wisconsin county for railroad improvements. In an earlier case, the Wisconsin Supreme Court had ruled this practice unconstitutional on the ground that it was not a "public purpose" within the meaning of the Wisconsin Constitution.⁵⁸ When the same issue reached the United States Supreme Court in a diversity case, it refused to fol-

49. See *id.* at 205 (citing *State of Iowa ex rel. Burlington & Missouri R.R. Co. v. County of Wapello*, 13 Iowa 388 (1862)).

50. See *id.*

51. *Id.*

52. *Id.* at 205-06.

53. *Id.* at 206.

54. *Id.*

55. *Id.*

56. *Id.* at 206-07.

57. 83 U.S. (16 Wall.) 678 (1872).

58. *Id.* at 679-81 (citing *Whiting v. Sheboygan & Fond du Lac R.R. Co.*, 25 Wis. 167, 188 (1870)).

low the Wisconsin court's ruling. "The nature of taxation," the Court held, "what uses are public and what are private, and the extent of unrestricted legislative power, are matters which . . . no State court can conclusively determine for us."⁵⁹

This trend culminated in *Township of Pine Grove v. Talcott*,⁶⁰ a nearly identical case from Michigan decided the following year. Once again, the Michigan Supreme Court had ruled—ironically, as will soon be seen, in an opinion written by Justice Thomas Cooley—that taxation for assisting the construction of railroads was not a public purpose and was thus barred by the state constitution.⁶¹ When the issue reached the United States Supreme Court in a subsequent diversity case, the Court went well beyond its prior rulings; here, the Court conducted an *independent* review of the Michigan Constitution and rejected the Michigan Supreme Court's interpretation of it.⁶² In an interesting reversal of the contemporary practice by which state courts occasionally adopt a dissent from a federal case, the Supreme Court decided to adopt the dissent from a state case: "[w]ith all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. We think the dissenting opinion in [*Salem*] is unanswered."⁶³

Of course, unlike the contemporary practice, in which state courts adopt decisions of the Supreme Court construing a *different* constitution, the Court in *Pine Grove* adopted a dissenting view in the course of construing the *same* constitution—the state constitution. The Court went on to observe that twenty-one other states permitted such laws, and that the question before it "belongs to the domain of general jurisprudence," a class of cases in which "this court is not bound by the judgment of the courts of the States where the cases arise."⁶⁴

From here, we arrive once again at familiar territory. The universalist trend was broadened and solidified in the area of federal

59. *Id.* at 690.

60. 86 U.S. (19 Wall.) 666 (1873).

61. *See id.* at 668 (citing *People ex rel. Detroit & Howell R.R. Co. v. Township Bd. of Salem*, 20 Mich. 452 (1870)). For an account of the importance of this decision in Cooley's career, see Alan R. Jones, *The Constitutional Conservatism of Thomas McIntyre Cooley* 172-84 (1987).

62. *See Township of Pine Grove*, 86 U.S. (19 Wall.) at 673-77.

63. *Id.* at 677.

64. *Id.*

constitutional law during the *Lochner*⁶⁵ era of substantive due process decisions. During this period, which lasted roughly from the 1890s well into the 1930s, the Court's due process jurisprudence was often built around two characteristic features of universalism: heavy borrowing from the common law for purposes of establishing constitutional rules of decision;⁶⁶ and reliance on broad, extremely general and mostly unsubstantiated statements about the law, often accompanied by a noticeable lack of deference toward the legislature.⁶⁷

In the federal courts, the universalist approach was eventually overthrown by a kind of positivist revolution. By "positivist," I mean the Austinian notion that law, far from being some body of general principles upon which courts and legislators draw, is better understood as the specific commands of specific sovereigns.⁶⁸ In the area of ordinary law, this positivist revolution occurred essentially with a single stroke: the Supreme Court's 1938 decision in *Erie Railroad Co. v. Tompkins*.⁶⁹ There, the Court overruled *Swift v. Tyson* and held that state courts are authoritative and fi-

65. See *Lochner v. New York*, 198 U.S. 45 (1905). *Lochner* is often used as a shorthand way of referring to a period of the Supreme Court's due process jurisprudence. See, e.g., Cass Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873 (1987).

66. See Sunstein, *supra* note 65, at 879, 882, 885, 903-04.

67. Professor Sherry describes the *Lochner* era as a "brief flirtation[] with decisionmaking on the basis of natural law," a practice she views as having all but disappeared from United States Supreme Court jurisprudence by the 1820s. Sherry, *supra* note 27, at 1176 & n.221.

68. See John Austin, *The Province of Jurisprudence Determined* (1832); Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 Vand. L. Rev. 1387 (1997). The distinction between positivism and universalism may be a good deal less clear than we are ordinarily inclined to think:

Law shows us many paradoxes. Perhaps the strangest of all is that, on the one hand, a people's law can be regarded as being special to it, indeed a sign of that people's identity, and it is in fact remarkable how different in important detail even two closely related systems might be; on the other hand, legal transplants—the moving of a rule or a system of law from one country to another, or from one people to another—have been common since the earliest recorded history.

Alan Watson, *Legal Transplants* 21 (1974). This kind of borrowing in a positivist system may thus mimic universalism in ways that blur the distinctions between the two regimes.

69. 304 U.S. 64 (1938). It has been suggested that the speed of this revolution is deceptive in that it represented merely the final ratification of a slowly evolving Kuhnian paradigm shift. See William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 Tul. L. Rev. 907 (1988).

nal interpreters of state law.⁷⁰ After *Erie*, federal courts were no longer permitted to reach independent judgments about the content of state law. The only permissible ground upon which federal courts could ignore or set aside state law was that it violated some provision of the United States Constitution or federal law applicable by virtue of the Supremacy Clause.⁷¹

The parallel move to positivism in federal constitutional law has been a bit slower in coming. Evidence of this shift can be found in the intense reaction against *Lochner*, and in the embrace of textualism and originalism exemplified by their leading contemporary practitioners, Justices Scalia and Thomas. However, universalism, especially in the area of substantive due process, has exercised a continuing appeal, particularly in the hands of influential recent practitioners such as Justices Douglas and Brennan.

B. *State Constitutional Universalism*

As strong as it was on the federal level during the nineteenth century, constitutional universalism was far more powerful, persistent and explicit on the state level than it was in the federal courts. Of no period was this more true than the period preceding the Civil War. One of the most vivid examples of state constitutional universalism is the 1852 decision of the Georgia Supreme Court in *Campbell v. State*.⁷² In *Campbell*, a criminal defendant convicted of manslaughter challenged his conviction on the ground that admission into evidence of the dying declaration of the victim violated his right to confront witnesses under the Sixth Amendment of the United States Constitution.⁷³ The Georgia Constitution then in effect contained no equivalent provision.⁷⁴ The state argued, logically enough, that the federal Bill of Rights did not restrain state power—a point settled by the United States Supreme Court nineteen years earlier⁷⁵—and that in the absence of any binding constitutional restriction the state was free to do as it pleased.⁷⁶

70. See *Erie R.R. Co.*, 304 U.S. at 77-80.

71. U.S. Const. art. VI.

72. 11 Ga. 353 (1852).

73. See *id.* at 364.

74. See Ga. Const. of 1798.

75. See *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

76. See *Campbell*, 11 Ga. at 364-65.

The Georgia Supreme Court rejected this argument. According to the court, the question was not whether the amendments in the federal Bill of Rights "were intended to operate as a restriction upon the government of the United States, but whether it is competent for a State Legislature . . . to pass an Act directly impairing the great principles of protection to person and property, embraced in these amendments?"⁷⁷ The court continued:

That the power to pass any law infringing on these principles is taken from the Federal Government, no one denies. But is it a part of the reserved rights of a State to do this? May the Legislature of a State, for example, unless restrained by its own Constitution, pass a law "respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press . . . ?" If so, of what avail . . . is the negation of these powers to the General Government? . . . Now, the doctrine is [argued], that Congress may not exercise this power, but that each State Legislature may do so for itself. As if a National religion and State religion, a National press and State press, were quite separate and distinct from each other; and that the one might be subject to control, but the other not!⁷⁸

Any such doctrine, the court concludes, is to be rejected because notwithstanding we may have different governments, a nation within a nation, *imperium in imperio*, we have but one people; . . . it is in [vain] to shield them from a blow aimed by the Federal arm, if they are liable to be prostrated by one dealt with equal fatality by their own [state].⁷⁹

The federal Bill of Rights, then, is not merely a restraint on federal power; its purpose was "to *declare* to the world the fixed and unalterable determination of our people, that these invaluable rights . . . should never be disturbed by *any* government."⁸⁰ The Bill of Rights thus does not merely establish positive restrictions on the national government but rather acknowledges "that independently of written constitutions, there are restrictions upon the legislative power, growing out of the nature of the civil compact and the natural rights of man."⁸¹ It is these underlying principles,

77. *Id.* at 365.

78. *Id.* at 365-66.

79. *Id.* at 366.

80. *Id.* at 367.

81. *Id.* at 369.

principles shared in common by all Americans, that "constitute a limit to all legislative power, Federal or State, beyond which it cannot go."⁸²

A similar approach was taken by the Arkansas Supreme Court. In one of its earliest cases, the court characterized the constitutions of the states as "so many bills of rights, declaratory of the great and essential principles of civil and political justice."⁸³ The court soon made good on this proposition in its 1853 decision in *Ex parte Martin*.⁸⁴ There, the court struck down a state law providing for reclamation of swampland and levee construction because the law failed to compensate landowners. "The constitution of this state," the court conceded, "contains no provisions that private property shall not be taken for public use, without just compensation."⁸⁵ Nevertheless, the court continued, "[t]he duty of making compensation may be regarded as a law of natural justice, which has its sanction in every man's sense of right, and is recognized in the most arbitrary of governments."⁸⁶ New York's highest court reached a similar conclusion in 1835: "It is now considered an universal and fundamental proposition, in every well regulated and properly administered government, whether embodied in a constitutional form or not, that private property cannot be taken for strictly private purposes at all, nor for public without a just compensation."⁸⁷

In another case displaying universalist tendencies, the Tennessee Supreme Court in 1831 invalidated a state law having a "retrospective effect." Although nothing in the state constitution barred such laws, the court set out various principles of English common law, and ruled that these common law principles governed the case because they were "*eternal principles of justice* which no government has a right to disregard."⁸⁸ The legislature, the court concluded, is not free to do everything not forbidden by the state

82. *Id.* at 372.

83. *State v. Ashley*, 1 Ark. 513, 538 (1839), see also *Ex parte Allis*, 12 Ark. 101, 105 (1851) (ruling that the state constitution must be interpreted "in connection with known political truths"); *Gibson v. City of Pulaski*, 2 Ark. 309 (1840) (invalidating a tax on the keeping of stallions as violating a "common right").

84. 13 Ark. 198 (1853).

85. *Id.* at 206.

86. *Id.*

87. *People v. Morris*, 13 Wend. 325, 328 (N.Y. 1835).

88. *Bank of the State v. Cooper*, 10 Tenn. 599, 603 (1831) (opinion of Green, J.) (emphasis added).

constitution: "some acts, although not expressly forbidden, may be *against the plain and obvious dictates of reason*."⁸⁹ The Connecticut Supreme Court had independently reached just this conclusion in 1822: "It is universally admitted," the court held in an opinion by Chief Justice Hosmer, "and unsusceptible of dispute, that there may be retrospective laws impairing vested rights, which are unjust, neither according with sound legislation, nor the fundamental principles of the social compact."⁹⁰ But, wrote the Chief Justice, "[w]ith those judges who assert the omnipotence of the legislature, in all cases, where the constitution has not interposed an explicit restraint, I cannot agree . . . I could not avoid considering it as a violation of the social compact."⁹¹

Massachusetts Chief Justice Lemuel Shaw may well have summed up this point of view when he wrote in an 1857 case:

In considering constitutional provisions, especially those embraced in the Declaration of Rights, and the amendments of the Constitution of the United States, in the nature of a bill of rights, we are rather to regard them as the annunciation of great and fundamental principles, . . . than as precise and positive directions and rules of action . . . Many of them are so obviously dictated by natural justice and common sense, and would be so plainly obligatory upon the consciences of legislators and judges, without any express declaration, that some of the framers of state constitutions, and even the convention which formed the Constitution of the United States, did not originally prefix a declaration of rights.⁹²

89. *Id.* (emphasis added); see also *Jeffers v. Fair*, 33 Ga. 347, 365-66 (1862) ("There are certain first principles which underlie all governments and all organized society, the violation of which the framers of governments are not supposed to intend.").

90. *Town of Goshen v. Town of Stonington*, 4 Conn. 209, 221 (1822).

91. *Id.* at 225.

92. *Jones v. Robbins*, 74 Mass. (8 Gray) 329, 340 (1857). Other courts elsewhere in New England held similar views. For example, the New Hampshire Supreme Judicial Court held that the state constitution's explicit prohibition of retrospective laws "is but an assertion of a general principle, which was understood to be of universal application in all free governments; a principle which should be, and it is believed has been, applied in all the States of this Union, without regard to the particular form of their constitution." *Rich v. Flanders*, 39 N.H. 304, 335 (1859); see also *Concord R.R. v. Greely*, 17 N.H. 47, 56 (1845) (holding that an uncompensated taking of private property "would not be so much in repugnance to the constitution as it would be to the principles which hold human society together"); *Trustees of Dartmouth College v. Woodward*, 1 N.H. 111, 114 (1817), (holding that the state legislature's power is limited "only by our constitutions and

This universalist approach to state constitutional adjudication was given a strong and lasting boost by Thomas Cooley as the result of the 1868 publication of his influential treatise, *Constitutional Limitations*.⁹³ Although prior treatises had been devoted to the federal Constitution, Cooley's work was the first systematic treatment of state constitutional law as a distinct subject. Some sense of the content of this work may be gleaned simply by examining some of the chapter headings. There is a chapter, for example, entitled "The Powers Which the Legislative Department May Exercise."⁹⁴ Another chapter sets out "The Circumstances Under Which a Legislative Enactment May Be Declared Unconstitutional."⁹⁵ Another deals with "The Constitutional Protections to Personal Liberty,"⁹⁶ and others with "Religious Liberty"⁹⁷ and "The Power of Taxation."⁹⁸ One of the most remarkable things about the treatise, however, is that it is largely devoid of any discussion of, or even citation to, the actual constitutions or judicial decisions of any state. This reveals much about what Cooley's important work purports to be. It is neither a survey nor a comparative analysis; it is, rather, a discussion of "the" principles of state constitutional law.

With this treatise, Cooley essentially invented—or certainly formalized—the field of "state constitutional law." In his hands, it was a distinctly anti-positivist invention. It treated its subject not in the positivist sense of a body of particular commands issued by the sovereign people of particular states, but in the universalist sense of an undifferentiated body of general principles existing in-

by the fundamental principles of all government and the unalienable rights of mankind") *rev'd on other grounds*, 17 U.S. (4 Wheat.) 518 (1819). The Rhode Island Supreme Court also suggested the interchangeability of constitutional doctrine when it referred to the United States Constitution as "the great exemplar of constitutional law." *G. & D. Taylor & Co. v. R.G. & J.T. Place*, 4 R.I. 324, 336 (1856). That court has continued to this day the practice of regarding the state and federal constitutions as doctrinally identical in a wide variety of areas. See *In re House of Representatives*, 575 A.2d 176 (R.I. 1990); *Chang v. University of R.I.*, 375 A.2d 925 (R.I. 1977).

93. Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (6th ed. 1890) (1868).

94. *Id.* ch. V, at 102.

95. *Id.* ch. VII, at 192.

96. *Id.* ch. X, at 359.

97. *Id.* ch. XIII, at 571.

98. *Id.* ch. XIV, at 587.

dependent of any particular constitution and available to courts construing individual constitutions whenever useful to decision in individual cases.⁹⁹ This, incidentally, accounts for the irony in the United States Supreme Court's refusal in *Township of Pine Grove v. Talcott* to follow a Michigan Supreme Court opinion written by Justice Cooley on the ground that it misconstrued the applicable general principles of constitutional law.¹⁰⁰

The influence of Cooley's treatise long outlived Cooley himself, who died in 1898. The eighth and last edition of *Constitutional Limitations* was published in 1927, yet the treatise is still being cited, frequently, to this day. A recently performed electronic search for citations to Cooley's treatise within the last decade by the United States Supreme Court turned up twelve citations,¹⁰¹ but all of these came in the course of historical discussions that referred to Cooley for the purpose of examining how the law was formerly understood.¹⁰² The same search among state high courts turned up 82 citations. The larger number is to be expected, but the character of the citations differed markedly. Rather than citing to Cooley's treatise for historical background, most of these citations relied on Cooley directly as authority relevant to the resolution of present legal issues.¹⁰³ Thus, for state courts, Cooley

99. On the bench, Cooley carried on the work he began in the treatise. As a Justice of the Michigan Supreme Court, Cooley became strongly associated with a kind of conservative constitutional universalism oriented toward the common law. For example, in a case arising under the Michigan Constitution's Due Process Clause, Cooley wrote:

The truth is, the bills of rights in the American Constitution, have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation.

Weimar v. Bunbury, 30 Mich. 201, 214 (1874).

100. See *Township of Pine Grove v. Talcott*, 86 U.S. (19 Wall.) 677-78 (1873).

101. My search, performed in the Lexis database on May 5, 1998, was "Cooley w/5 constitutional limitations and date aft 1987." I performed the search first in the "genfed/US" file and then in the "states/highct" file.

102. See, e.g., *City of Boerne v. Flores*, 117 S. Ct. 2157, 2165 (1997) (turning to Cooley to shed light on the early understanding of the meaning of the Fourteenth Amendment); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 224 (1995) (citing Cooley in the course of a discussion of the nineteenth century understanding of separation of powers in state courts).

103. See, e.g., *Ex parte Southern Ry. Co.*, 556 So. 2d 1082, 1090 (Ala. 1989); *Ficarra v. Department of Regulatory Agencies*, 849 P.2d 6, 16 (Colo. 1993); *Gol-*

ley's treatise remains a living presence and important source of doctrinal authority.

III. THE POSITIVIST REVOLUTION THAT WASN'T

The history and tradition of state constitutional universalism puts contemporary debates about state constitutional law in a rather different light. In many respects, the New Judicial Federalism movement amounts to a call to positivism in state constitutional law. Its proponents invite state courts to cease their reflexive following of federal law and to depart from federal constitutional doctrine, especially for the purpose of providing heightened protection of individual rights. Yet the supporters of New Judicial Federalism invite state courts to do so not merely by announcing some disagreement with federal results, but by developing an independent state constitutional jurisprudence. And how should state courts develop such an independent jurisprudence? Proponents of the New Judicial Federalism are clear on this point: state courts should develop an independent constitutional jurisprudence by looking to the state constitution's text, history and structure and the underlying values of the state polity that the constitution reflects¹⁰⁴—in other words, to the kinds of sources that would be relevant under a positivist approach to constitutional adjudication. New Judicial Federalism is thus, in a sense, a call to complete the positivist revolution begun on the federal level by replicating it on the state level.¹⁰⁵

drush II v. City of Marietta, 482 S.E.2d 347, 360 (Ga. 1997); Michigan Bell Tel. Co. v. Department of Treasury, 518 N.W.2d 808, 815 (Mich. 1994).

104. See, e.g., Hans A. Linde, *E Pluribus — Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 178-81 (1984); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379, 380, 392 (1980); see also *State v. Hunt*, 450 A.2d 952, 965-67 (N.J. 1982) (identifying standards to decide whether to defer to the state constitution in protecting individual rights); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 Rutgers L. Rev. 707, 718 (1983) (arguing "[r]eliance on state constitutions can better reflect circumstances peculiar to a given state").

105. There is thick irony in the call of New Judicial Federalism to use state constitutions to reach different results than has the United States Supreme Court, but to do so by adopting the standard methodology of federal constitutional jurisprudence. This would make state constitutional adjudication look more like its federal counterpart in every way but in the results. This is no doubt why some see the New Judicial Federalism as a fundamentally ideological, result-oriented movement covered by a transparent methodological fig leaf. See, e.g., Earl M. Maltz,

Yet the positivist revolution on the state level has gone badly. Doctrinal convergence is still overwhelmingly the rule, and universalist adjudicatory practices are still commonplace in state courts. Why, if the positivist revolution has been so vigorous on the federal level has it failed to catch fire in the states?

Former Oregon Supreme Court Justice Hans Linde, one of the most consistent and forceful voices for positivism in state constitutional adjudication, has argued that we should expect (and hope for) just the opposite trend. Positivism, Linde claims, is the most appropriate methodology for the interpretation of state constitutions.¹⁰⁶ The very multiplicity of state constitutions along with the frequent obscurity and technicality of their substance, he argues, prevents any kind of plausible appeal to fundamental or universal norms.¹⁰⁷ States have no mythological founders, according to Linde, no distinctive characters or values, no "claim as a 'civil religion' or as the perfect embodiment of justice, when there are forty-nine others."¹⁰⁸ In this environment, about the only resources to which a judge can resort are the text and its legislative history—the barebones materials of a positivist interpretive approach.

As I have argued elsewhere, this situation puts state courts in a dilemma. They are required to interpret documents purporting to be "constitutions," yet those documents lack the epic character and unique, self-conscious polity typically understood to underlie constitutions in the American tradition.¹⁰⁹ Yet state courts have not by and large chosen to resolve the dilemma as Linde proposes, by turning to a text-based positivism. In fact, they have been driven in exactly the opposite direction. Apparently feeling the need for a shared social epic and a unique constituting polity, state courts seem to have embraced the larger American narrative and polity and appropriated them for the use of the state in state constitutional adjudication.¹¹⁰ Today, state courts show this in their

The Political Dynamic of the "New Judicial Federalism," in 2 Emerging Issues in State Constitutional Law 233 (1989).

106. See Hans A. Linde, *Are State Constitutions Common Law?*, 34 Ariz. L. Rev. 215, 228-29 (1992).

107. See Linde, *E Pluribus*, *supra* note 104, at 196-97.

108. *Id.* at 197 (citing Sanford Levinson, "The Constitution" in *American Civil Religion*, 1979 Sup. Ct. Rev. 123).

109. See Gardner, *supra* note 2, at 812-32.

110. 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, 1260-82 (1998).

persistent practice of indiscriminate pilfering from the constitutional doctrine of the United States and sister states, and from the common law. And this, in turn, has been easy for state courts to do because it requires them to do nothing more than what they have been doing for a long time. The indiscriminate appropriation of constitutional doctrine from federal courts and from other states and the common law—the use, that is, of universalist adjudicatory practices—represents nothing more than a perfectly natural and undoubtedly comfortable continuation of two centuries of unbroken universalist assumptions and practices.

IV. UNIVERSALISM IN SEPARATION OF POWERS JURISPRUDENCE

In light of this history, the convergence of state and federal separation of powers doctrine that I described earlier should come as no surprise. Indeed, those inclined toward such an approach can easily find natural law roots to the separation of powers doctrine that predate any American constitution. Locke and Montesquieu, for example, both speak in these terms,¹¹¹ and some scholars have traced contemporary ideas about the separation of powers to Aristotelian notions of mixed government.¹¹² As noted earlier, some courts have taken exactly this approach, finding their state constitutional principles of separation of powers to be derived from venerable principles of natural law.¹¹³

But constitutional universalism need not resort to natural law to justify a universalist approach to separation of powers jurisprudence. James Madison is probably the theorist whose ideas most directly shape American understandings of separation of powers. Yet Madison did not derive the separation of powers from prior principles of natural law; rather, he came to believe that the separation of powers was a practical necessity because of certain char-

111. See John Locke, *Second Treatise of Government* paras. 3-4, 87-88, 128, 130-31, 145-48, 159 (Thomas P. Peardon ed., 1952) (1690); Baron De Montesquieu, *The Spirit of the Laws* pt. 2, bk. 11, ch. 6, at 157 (Thomas Nugent trans., 1949) (1748).

112. See M.J.C. Vile, *Constitutionalism and the Separation of Powers* ch. 2, at 21 (1967).

113. See *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260, 263-64 (Fla. 1991); *Department of Transp. v. Armacost*, 532 A.2d 1056, 1062 (Md. 1987). For a firm embrace of a contrary, positivist approach, see *Dye v. State*, 507 So. 2d 332, 346 (Miss. 1987) ("[T]here is no natural law of separation of powers. Rather, the powers of government are separate only insofar as the Constitution makes them separate.").

acteristics of human psychology and motivation that he believed to be universal—namely, the tendency toward tyranny of those who hold power sufficient to tyrannize.¹¹⁴ But even a universal human psychology is unnecessary to support a universalist approach to separation of powers jurisprudence: the mere fact of widespread commonalities in structures and practices in all the states and the federal government suggest an entirely pragmatic, but equally serviceable basis for beginning from the assumption of doctrinal congruence.

Where we see this tendency most starkly, of course, is not in the theoretical analyses of scholars, but on the ground—in the briefs and arguments of practicing lawyers. The Rhode Island Supreme Court will soon decide the constitutionality of the legislature's practice of making appointments, including self-appointments, to state executive branch agencies. In his brief, the Governor's counsel places himself in a long line of predecessors who have argued that separation of powers principles under the state and federal constitutions are identical.¹¹⁵ The lengthy, unbroken tradition of state constitutional universalism suggests at the very least that we should not be surprised if the Rhode Island Supreme Court agrees.

114. See *The Federalist* No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

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

