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Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation

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FINDING THE CONSTITUTION: AN ECONOMIC ANALYSIS OF TRADITION'S ROLE IN CONSTITUTIONAL INTERPRETATION

A.C. PRITCHARD* & TODD J. ZYWICKI**

In this Article, Professor Pritchard and Professor Zywicki examine the role of tradition in constitutional interpretation, a topic that has received significant attention in recent years. After outlining the current debate over the use of tradition, the authors discuss the efficiency purposes of constitutionalism—precommitment and the reduction of agency costs—and demonstrate how the use of tradition in constitutional interpretation can serve these purposes. Rejecting both Justice Scalia's majoritarian model, which focuses on legislative sources of tradition, and Justice Souter's common-law model, which focuses on Supreme Court precedent as a source of tradition, the authors propose an alternative model—the "finding model"—from which constitutionally significant traditions can be identified. This model looks to the common law and state constitutional law as its sources of tradition. Finally, using specific examples, the authors demonstrate how this model can aid the Court in two specific contexts: construing ambiguous but enumerated federal constitutional rights and recognizing unenumerated rights.

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This Article is followed by a brief reply written by Professor John O. McGinnis in which he comments on the normative claims made by the authors. Specifically, Professor McGinnis argues that the use of state constitutional law may not lead to a more decentralized lawmaking system—in his view, the key to developing efficient traditions—and, on the contrary, might create inefficient rules in certain situations. Following Professor McGinnis's comment, Professor Pritchard and Professor Zywicki briefly address the concerns raised by Professor McGinnis.

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Tradition's role in constitutional interpretation has become a flashpoint of controversy in recent years. Critics have attacked the use of tradition as antidemocratic because it looks backward to the views of people long dead, rather than looking to the views of today's majorities.¹ Adherents have extolled tradition as a source of wisdom and a check against radical judicial innovations.² What tradition is, and how judges should use it, remain hotly contested issues.³

Since his elevation to the Supreme Court, Justice Antonin Scalia has articulated a distinctly majoritarian theory of the role tradition should play in reading the Constitution. That theory responds to

1. See *infra* Part I.A.

2. See *infra* Part I.C.2.a.

3. Participants in this debate cannot even agree on a definition of tradition. Compare Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551, 558 (1985), with Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 181-82 (1993). Perry states:

By tradition I mean a particular history or narrative, in which the central motif is an aspiration to a particular form of life, to certain projects, goals, ideals, and the central discourse (in the case of a *living* tradition) is an argument—in MacIntyre's terms, "an historically extended, socially embodied argument"—about how that form of life is to be cultivated and revised.

Perry, *supra*, at 558 (footnote omitted) (quoting A. MACINTYRE, *AFTER VIRTUE* 207 (1981)). However, Brown observes:

[T]radition encompasses any combination of acts or statements that together demonstrate a set of community values or illustrate a common belief system. This definition is necessarily broad. It includes acts of a legislature, government practices that might more comfortably fall under the rubric of "history," and even rhetorical statements by individuals that purport to capture the mores of society.

Brown, *supra*, at 181-82. Our model provides a determinate answer to the question of what constitutes a tradition.

tradition's critics who fear that the use of tradition in constitutional interpretation ignores America's commitment to democracy. Justice Scalia's theory of tradition defers to legislation as a source of tradition, reflecting his commitment to the centrality of democracy in the American constitutional scheme. But Scalia's majoritarian theory also has been criticized, both by his colleagues on the Court and by scholars, for its narrowness, susceptibility to manipulation, and backward-looking orientation.

Some of Scalia's critics look to the theory of tradition in Justice John Marshall Harlan's dissent in *Poe v. Ullman*⁴ as a model for the proper use of tradition in constitutional interpretation. The most prominent adherent to Harlan's theory of tradition is Justice David Souter. Souter's theory of tradition holds that new rights should be built upon the foundation of rights recognized in past Supreme Court decisions. Justice Souter's theory, grounded in the method, if not the substance, of the common law, offers judges considerably greater latitude than Scalia's theory in recognizing novel liberties. Not surprisingly, Souter and other Scalia critics have found ample room for their favored rights in Supreme Court tradition. The malleability of that tradition has in turn led to criticism that Souter's theory gives too much discretion to judges to dress their personal policy views in the garb of constitutional doctrine.

In this Article, we bring a fresh perspective to this debate: We analyze tradition's use in constitutional interpretation from an economic perspective.⁵ The efficiency goals of constitutionalism are precommitment and the reduction of agency costs. Constitutions allow majorities to precommit themselves against imposing costs on minorities by enshrining certain overwhelmingly accepted principles in a governing document. Constitutions also allow the people to restrain government actors from imposing agency costs on the citizenry by limiting the means by which government can act. We believe that tradition—properly understood—offers efficiency advantages for constitutional interpretation. Tradition serves the

4. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

5. Thus, we ground our argument in an expressly economic view of tradition and constitutionalism and do not examine alternate theories of constitutional law grounded in morality or sources of authority other than tradition. We gloss over some of the issues raised by the Constitution as an actual document, an approach which is consistent with much of the economic theory of constitutionalism but does not always cohere exactly. We also leave to one side debates over the normative value of the goal of efficiency in legal analysis, which have been well plowed elsewhere. See generally JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 65-150 (1988) (providing an economic analysis of law).

efficiency purposes of constitutionalism by helping to identify those rules that are supported by a broad societal consensus and have been tested over time. Those rules are most appropriate for incorporation into the constitutional scheme as precommitments or devices to reduce agency costs.

While we agree with Scalia's critics who contend that his approach is excessively majoritarian and insufficiently protects minority rights, we also agree with Souter's critics who contend that his open-ended theory of tradition provides no binding rule of law, allowing judges unfettered discretion to impose their own policy preferences. Unconstrained judicial decisionmaking does not meet the test for rules that are appropriate for enforcement as precommitments or as agency-cost reducing devices. That is, it is not tested over time and across disparate communities, nor is it likely to ascertain properly the goals supported by super-majority consensus. Thus, neither Scalia's nor Souter's theory of tradition can distinguish efficient from inefficient traditions. Indeed, they go even further, elevating inefficient traditions to constitutional status.

Both theories share a common flaw of relying on centralized decisionmaking processes to develop traditions. In both theories, constitutional law is *made* by a sovereign power, rather than *found* in the customs of society. Efficient traditions, by contrast, do not spring from the pen of any law-giver. Efficient traditions arise from the repeated interactions of many individuals across many generations testing, amending, and reaffirming those traditions. The traditions relied upon by Scalia and Souter, by contrast, are not subject to repeated and decentralized testing and feedback because they rely on a centralized law-giver. Consequently, both the Scalia and Souter theories manage to undermine the benefits of tradition and constitutionalism simultaneously, rendering both approaches inconsistent with the efficiency purposes of constitutionalism. While Scalia and Souter properly celebrate tradition, they celebrate the wrong traditions. In this Article, we offer an alternative to the Scalia and Souter theories of tradition. Our theory provides an efficiency-based model for choosing among different sources of tradition.

In Part I, we summarize the current debate among the antitraditionalists, the Scalia proponents, and the Souter adherents. In Part II, we discuss the efficiency purposes of constitutionalism—precommitment and the reduction of agency costs—and how traditions, if properly identified, can serve these purposes. We explore the characteristics of constitutionally efficient tradition by measuring the relative efficiency of legal sources of tradition in light

of tradition's virtues and the economic theory of constitutionalism. Tradition, diffuse by nature, defies direct measurement. Nonetheless, we can identify institutional structures that tend to maximize tradition's virtues and its compatibility with constitutionalism.

Having identified the characteristics of a constitutionally efficient tradition, in Part III we examine four sources of tradition: the common law, state constitutional law, statutes, and Supreme Court precedent. We conclude that only the first two sources of law have the potential to provide efficient traditions. As we explain in Parts III.A. and III.B., the common law and state constitutions exhibit institutional characteristics of decentralized development over time, which suggest that they will tend to produce efficient traditions. Statutes, we explain in Part III.C., are poor sources of tradition because legislation tends to be centralized, with interest groups trying to impose their will at the expense of more diffuse groups. In light of these defects, we conclude that Justice Scalia's reliance on legislative tradition is inefficient, and, therefore, misplaced. As we show in Part III.D., Supreme Court precedent also provides an inefficient source of tradition because its rules emanate from a body that is even more centralized than legislatures, leaving it completely out of touch with the customs of the people. Moreover, the Supreme Court's independence isolates it from popular feedback, leaving it with no effective mechanism for testing and refining its precedents. Consequently, Souter's reliance on Supreme Court precedent as tradition for constitutional interpretation will lead to constitutionally inefficient outcomes.

In Part IV, we sketch a possible alternative for the proper use of tradition in constitutional interpretation. This alternative uses the common law and state constitutions as its sources of tradition, the same sources the Framers relied on in drafting the Constitution and the Bill of Rights. The original Constitution and the Bill of Rights are generally regarded as highly successful applications of the principles of constitutional efficiency.

While the text, history, and structure of the Constitution may answer most constitutional questions, at some point these sources run out. Tradition can help provide at least part of the answer to the remaining constitutional questions. We stress that our model is not a comprehensive theory of constitutional law. We merely observe that the Supreme Court has regularly invoked tradition as part of its decisionmaking process; tradition, however, can enhance constitutional decision making only if the Court looks to the *correct*

traditions. Tradition, properly understood, aids constitutional interpretation in two contexts: in construing ambiguous but enumerated federal constitutional rights and in recognizing unenumerated rights. By adopting the consensus of common law and state constitutions for both enumerated and unenumerated rights, constitutional interpretation can foster efficiency without transforming federal judges into "efficiency police."

Although the model sketched in Part IV rejects reliance on legislation as a source of tradition, it nonetheless effectively confines the judiciary in interpreting the Constitution, the chief virtue of Scalia's model of tradition. By looking to established bodies of law created independently of the Supreme Court's will, our model mitigates the lawlessness inherent in theories of tradition such as Souter's, which aim to transform moral principles into the constitutional command of the sovereign by judicial slight of hand. Thus, the model allows for orderly constitutional growth outside the confines of Article V, without casting aside the virtues of the rule of law.⁶

We conclude with some thoughts about the efficiency purposes of constitutionalism and the role of the judiciary in fostering those purposes. In our view, the efficiency purposes of constitutionalism require vigorous judicial enforcement of limits on the power of the federal government. The model of tradition presented here shows how vigorous judicial protection of individual liberty can comport with the rule of law and our system of federalism.

I. THE CURRENT DEBATE OVER TRADITION

Contemporary legal scholars and judges have given considerable attention to the role of tradition in constitutional interpretation. We summarize that debate in this Part. We begin our discussion with the classic critique of the use of tradition in constitutionalism. That critique claims that tradition does not deserve a place in constitutional interpretation at all, arguing that it threatens our constitutional democracy because of its inherently antidemocratic nature.

A. *Tradition v. Democracy?*

John Hart Ely is among the more prominent scholars who

6. As Burke famously observed: "A state without the means of some change is without the means of its conservation." EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 21 (L.G. Mitchell ed., Oxford Univ. Press 1993) (1790).

express concern about tradition's compatibility with democracy.⁷ He concedes that "tradition is an obvious place to seek fundamental values," but argues that tradition is so malleable that it can "support almost any cause":

There is obvious room to maneuver, along continua of both space and time, on the subject of which tradition to invoke.... Top all this off with the tremendous uncertainties in ascertaining anything ... about the intellectual or moral climates of ages passed, and one is in a position to prove almost anything to those who are predisposed to have it proved or, more candidly, to admit that tradition does not really generate an answer, at least not an answer sufficiently unequivocal to justify overturning the contrary judgment of a legislative body.⁸

To Ely, tradition cannot justify the judiciary's displacement of legislative decisions. But tradition's problems go well beyond its indeterminacy. Tradition fails as a source of rights because "its overly backward-looking character" makes it "obviously undemocratic."⁹ Ely believes the assertion "that yesterday's majority (assuming it was a majority) should control today's" conflicts with democratic principles.¹⁰ The open-ended provisions of the Constitution do not bind today's majorities to past majority decisions, but instead invite judges to seek constitutional growth.¹¹

Ely's views are founded in legal positivism, which sees law as emanating from the sovereign, meaning a hierarchical authority, such as a centralized legislature or a supreme court. For Ely, fairly represented majorities acting through the legislature are the proper source of sovereign commands. The role of constitutional interpretation is to ensure that democratic majorities are the source of those sovereign commands. In order to fulfill the Constitution's promise of continually expanding democracy, judges sometimes must assume the role of sovereign in order to remove obstacles to complete democracy.¹²

Legal positivism is generally hostile to tradition. For positivists,

7. See John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).

8. *Id.* at 39-40 (footnotes omitted).

9. *Id.* at 42.

10. *Id.*

11. See *id.*

12. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (advocating a "representation-reinforcing theory of judicial review," whereby the Supreme Court is limited to correcting failures in representation).

power emanates from the top down. A positivist legal system relies exclusively on the experience of those who have decisionmaking power at any given time. David Luban's attacks on tradition are representative. He argues that law merely reflects past political decisions, and that it has no normative force for future political actors, who remain free to make their own political decisions.¹³ Tradition cannot guide policy because earlier generations could not have anticipated current political questions.¹⁴ The complexity of modern society requires that policymakers find new solutions for new problems.¹⁵ Indeed, Luban argues, our nation's founding generation rejected traditionalism in favor of rationalism.¹⁶ From Luban's rationalist perspective, "[l]egislatures are vehicles of political action and political change, and the attitude of legislatures is properly forward-looking and consequentialist, not traditionalist."¹⁷ Tradition merely slows the progress of rational public policy. Tradition is not merely ignorant in Luban's view; in its worst form, it is pernicious.

13. See David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1045 (1991) ("Law simply is a device whereby we stipulate the undiminished authority of past political decisions until new decisions take their place.").

14. See *id.* at 1055. Luban observes:

Our forbearers were not prophets; they could not be expected to foresee the problems that we now confront or the political configurations that constrain our efforts to solve these problems. We must . . . be permitted to shake ourselves free of our heritage as the need arises, just as they shook themselves free of the traditions that their ancestors bequeathed to them.

Id.

15. See *id.* at 1050 ("Figuring prominently among those 'social complexities' must be the highly rationalized character of our contemporary economy, the power of modern technology, and the rapidity of social change. All of these call for legislative and administrative regulation that is actively intrusive, firmly consequentialist, and forward-looking in character." (footnote omitted)).

16. See *id.* at 1050. On this point, Luban comments: "[T]he American Revolution and Constitution were profoundly rationalist, rather than traditionalist, in character. Ironically, to be truly a traditionalist in America, one must give the rationalism that infuses our political culture its due." *Id.*; see also BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 20 (1991) ("Whatever else may be said about the Founders, they were hardly content with the Burkean arts of muddling through crises. They were children of the Enlightenment, eager to use the best political science of their time to prove to a doubting world that republican self-government was no utopian dream."); Michael S. Moore, *The Dead Hand of Constitutional Tradition*, 19 HARV. J.L. & PUB. POL'Y 263, 268-69 (1996) ("[In talking] about the traditions needed for knowledge, one can at least say that our tradition, descended to us from Locke through Hamilton and Madison (who both read Locke assiduously), is one in which individual reason is not so puny, and abstract right not so difficult to grasp." (footnote omitted)). But see RUSSELL KIRK, *RIGHTS AND DUTIES: REFLECTIONS ON OUR CONSERVATIVE CONSTITUTION*, at vii-viii (Mitchell S. Muncy ed., 1997) (arguing that Burke "was much more in the mind of the Framers than was John Locke").

17. Luban, *supra* note 13, at 1048-49.

Some traditions followed by past generations, such as racial discrimination, should be discarded rather than followed.¹⁸

Rebecca Brown levies a similar attack. She contends that tradition provides a refuge for those unwilling to make judgments of their own,¹⁹ and that reliance on tradition reflects "complacency" rather than prudence.²⁰ Brown complains that traditionalists offer no persuasive justification for relying on the judgment of "people long dead."²¹ In her view, "[a]ny use of tradition that forces the polity to look backward for its own aspirations and truths seems fundamentally at odds with the enterprise of establishing a constitutional system of government."²² Brown, like Luban, views the past as an impediment to progress.

Legal positivism sees no role for the past; today's legislature must be free to govern in accordance with democratic preferences. Only explicit constitutional commands should displace that presumption. Thus, legal positivists generally view tradition as an obstacle to reform, rather than a source of wisdom.

B. Justice Scalia's Majoritarian Theory of Tradition

Justice Scalia accepts legal positivism,²³ but believes that

18. See *id.* at 1056 ("[R]acial segregation was a multigenerational project that depended for its survival on the next generation pitching in to preserve it; yet it had no value, or rather, negative value."); see also David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1713 (1991) (noting that the tradition of gender, in addition to racial, discrimination should be discarded). Strauss observes:

Racial discrimination is, of course, not the only deeply rooted tradition that should not survive. Even Justice Scalia will have a difficult time explaining how the fourteenth amendment "leaves no doubt" that discrimination against women is unconstitutional. (Section two of the fourteenth amendment contains gender discrimination.) And that is a deeply rooted tradition indeed.

Id.

19. See Brown, *supra* note 3, at 179 ("To the extent that traditions represent judgments that others in other times have made, they can provide an attractive resource to those uncomfortable with making judgments of their own.").

20. *Id.* at 204 ("[R]eliance on tradition as a basis for the definition of constitutional protection is a societal statement of complacency.").

21. *Id.* at 179 ("The traditionalists have not told us why the actions or decisions of people long dead should determine the resolution of present-day constitutional inquiries."); see also Cass R. Sunstein, *Against Tradition*, in THE COMMUNITARIAN CHALLENGE TO LIBERALISM 207, 220 (Ellen Frankel Paul et al. eds., 1996) ("[S]ome practices persist not because of their salutary functions, but because of inertia, myopia, bias, power, confusion, or indeed far from salutary functions.").

22. Brown, *supra* note 3, at 207.

23. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 10 (Amy Gutmann ed., 1997). Scalia states:

tradition—properly defined—can be squared with democracy. According to Scalia, it is “essential to democratic government” that “the basic policy decisions governing society . . . be made by the Legislature.”²⁴ Congress and the state legislatures, as the most democratic branches of government, have primary responsibility for revising law to keep pace with society: “A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect ‘current values.’ Elections take care of that quite well.”²⁵ Courts play a more passive role; the judiciary must not innovate, but only preserve those consensuses reflected in longstanding legislation.²⁶ In Scalia’s view, the Constitution commands judges to preserve rights supported by a *past* social consensus.²⁷ The Constitution confers no special role on judges to

It is only in this century, with the rise of legal realism, that we came to acknowledge that judges in fact “make” the common law, and that each state has its own.

. . . [O]nce we have taken this realistic view of what common-law courts do, the uncomfortable relationship of common-law lawmaking to democracy (if not to the technical doctrine of separation of powers) becomes apparent.

Id.

24. *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

25. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989); see also *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 39 (1990) (Scalia, J., concurring in the judgment) (discussing legislative and judicial means by which legal procedures evolve). In *Haslip*, Scalia stated:

State legislatures and courts have the power to restrict or abolish the common-law practice of punitive damages, and in recent years have increasingly done so. It is through these means—State by State, and, at the federal level, by Congress—that the legal procedures affecting our citizens are improved.

Id. (Scalia, J., concurring in the judgment) (citations omitted).

26. See *Haslip*, 499 U.S. at 39 (Scalia, J., concurring in the judgment) (“Perhaps, when the operation of [the legislative] process has purged a historically approved practice from our national life, the Due Process Clause would permit this Court to announce that it is no longer in accord with the law of the land.”).

27. See Scalia, *supra* note 25, at 862. Scalia states:

The purpose of constitutional guarantees—and in particular those constitutional guarantees of individual rights that are at the center of this controversy—is precisely to prevent the law from reflecting certain *changes* in original values that the society adopting the Constitution thinks fundamentally undesirable. Or, more precisely, to require the society to devote to the subject the long and hard consideration required for a constitutional amendment before those particular values can be cast aside.

Id.; see also Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 30 (1994) (quoting Justice Scalia). Gerhardt quotes Scalia as follows:

“Judges should be restricted to the text in front of them. . . . According to my judicial philosophy, I feel bound not by what I think the tradition is, but by what the text and tradition actually say. The Constitution is an anchor. I don’t need it to create change. It’s a rock to hold on to.”

determine the values supported by a *current* social consensus; that determination is a legislative task.²⁸

In short, "tradition" for Scalia is more accurately characterized simply as "history": a collection of facts regarding past patterns of legislative regulation, rather than an ongoing source of wisdom and contextual understanding. Scalia's tradition is not merely the hand of the past guiding the decisions of the present and future; it is the *dead* hand of the past, relevant only in understanding the intent of past constitutional decision-makers. Historic legislative practice offers guidance as to the original meaning of the constitutional text and little else.²⁹

Given the centrality of democracy in Scalia's vision of the constitutional order, the function of interpretation is to discern the command of the Constitution's ratifiers. Accordingly, tradition aids constitutional theory by restraining judges from substituting their own policy preferences for those of democratically elected legislatures.³⁰ Tradition, of course, cannot trump the clear command of the text.³¹ But where the text of the Constitution is ambiguous,

Id. (quoting an interview with Justice Scalia in Dan Izenberg, *Clinging to the Constitution*, JERUSALEM POST, Feb. 19, 1990, at 5).

28. See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring). In *Cruzan*, Scalia observed:

[T]he point at which life becomes "worthless," and the point at which the means necessary to preserve it become "extraordinary" or "inappropriate," are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory

Id. (Scalia, J., concurring).

29. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 372 (1995) (Scalia, J., dissenting). In *McIntyre*, Scalia argued:

That technique is simple of application when government conduct that is claimed to violate the Bill of Rights or the Fourteenth Amendment is shown, upon investigation, to have been engaged in without objection at the very time the Bill of Rights or the Fourteenth Amendment was adopted. There is no doubt, for example, that laws against libel and obscenity do not violate "the freedom of speech" to which the First Amendment refers; they existed and were universally approved in 1791.

Id. (Scalia, J., dissenting).

30. See Scalia, *supra* note 25, at 863 ("[T]he main danger in judicial interpretation of the Constitution—or for that matter, in judicial interpretation of any law—is that judges will mistake their own predilections for the law.").

31. See *Planned Parenthood v. Casey*, 505 U.S. 833, 980 n.1 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). In *Casey*, Scalia stated:

The Court's suggestion that adherence to tradition would require us to uphold laws against interracial marriage is entirely wrong. Any tradition in that case was contradicted by a text—an Equal Protection Clause that explicitly establishes racial equality as a constitutional value. . . . The enterprise launched in *Roe* . . . , by contrast, sought to *establish*—in the teeth of a clear, contrary

tradition allows judges to fill in the gaps with reasonably objective truths rather than their own policy preferences.³² Absent text or tradition, Scalia is left with no law to apply because there is no sovereign command.³³ By giving a sovereign command to judges, tradition enables judges to be consistent in protecting constitutional rights, thus ensuring respect for the judiciary's role in protecting liberty against transient majorities.³⁴

Legislative tradition is paramount in Scalia's hierarchy of sources of tradition. When neither text nor tradition recognizes a claimed right, Scalia defers to the decisions reached by legislative majorities. Thus, by implication, democratically elected legislatures are in the best position to identify and articulate traditions. The common law is relevant only through a theory of legislative abeyance—it reflects wisdom and popular consent *only* because the legislature has not chosen to overrule it. For example, in *Burnham v. Superior Court*,³⁵ Scalia thoroughly explicated the long common-law

tradition—a value found nowhere in the constitutional text.

Id. (Scalia, J., concurring in the judgment in part and dissenting in part); *see also McIntyre*, 514 U.S. at 378 (Scalia, J., dissenting) (“[P]ostadoption tradition cannot alter the core meaning of a constitutional guarantee.”).

32. *See* Timothy L. Raschke Shattuck, Note, *Justice Scalia's Due Process Methodology: Examining Specific Traditions*, 65 S. CAL. L. REV. 2743, 2766 (1992). Shattuck observes:

By examining tradition [Scalia] hopes to reduce the danger of judges substituting their own values for society's. He observes that one way to “reduce this danger [is] by insisting that the new ‘fundamental values’ invoked to replace original meaning be clearly and objectively manifested in the laws of the society.”

Id. (quoting Scalia, *supra* note 25, at 863).

33. *Cf.* David B. Anders, *Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O'Connor and Justice Scalia over Unenumerated Fundamental Rights*, 61 FORDHAM L. REV. 895, 906 (1993) (“[Scalia's] source of tradition is history as it is recorded in law books; . . . His approach is positivistic or legal as opposed to normative or sociological—tradition is simply what laws existed, not what people thought about the substantive right . . .”).

34. *See* *Lee v. Weisman*, 505 U.S. 577, 631-32 (1992) (Scalia, J., dissenting). In *Weisman*, Scalia argued:

In holding that the Establishment Clause prohibits invocations and benedictions at public school graduation ceremonies, the Court—with nary a mention that it is doing so—lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally. . . . Today's opinion shows more forcefully than volumes of argumentation why our Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.

Id. (Scalia, J., dissenting).

35. 495 U.S. 604 (1990).

history of the power to exercise personal jurisdiction based on service on the defendant while in the state.³⁶ But in the end, it was legislative acquiescence in this tradition that mattered. The Court "conducted no independent inquiry into the desirability or fairness of the prevailing in-state service rule, *leaving that judgment to the legislatures that are free to amend it*; . . . its validation is its pedigree, as the phrase '*traditional notions of fair play and substantial justice*' make clear."³⁷ Thus, even in deciding *not* to act, the legislature provides a sovereign command.

The primacy of legislative tradition over other traditions is highlighted by the abortion rights cases. As Scalia noted in *Planned Parenthood v. Casey*,³⁸ his opposition to a constitutional right to abortion is rooted in the silence of the Constitution on the matter and in "the longstanding traditions of American society [that] have permitted it to be legally proscribed."³⁹ Although Scalia referred to the longstanding traditions of American society, he actually meant only legislative traditions. Justice Blackmun's opinion in *Roe v. Wade*⁴⁰ nineteen years before noted that it was "undisputed" that there was a right to abortion under the common law.⁴¹ Moreover, the common-law rule was the prevailing law of almost all American states until the mid-nineteenth century.⁴² Even then, most early abortion legislation merely codified the common-law rule.⁴³ Thus, at least until the Civil War, abortion was governed by the common-law rule, or by state statutes codifying that common-law rule.⁴⁴ Justice

36. See *id.* at 611-16.

37. *Id.* at 621 (emphasis added).

38. 505 U.S. 833 (1992).

39. *Id.* at 980 (Scalia, J., concurring in the judgment in part and dissenting in part) (citing *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 520 (1990) (Scalia, J., concurring)).

40. 410 U.S. 113 (1973).

41. *Id.* at 132. Under the common law, Blackmun noted, there was a right to abortion performed before "quickening," which was defined as "the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy." *Id.*

42. See *id.* at 138 ("In this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law.").

43. See *id.* at 138-39.

44. See *id.* at 140-41. Blackmun stated:

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century.

Scalia, however, implicitly rejected the decades of state acquiescence in and endorsement of the common-law rule, instead deferring to more recent legislative restrictions on abortion.

In some situations, Justice Scalia's reliance on state legislative traditions to discern the original meaning of the text begs a critical question: Why are *state* legislative practices relevant to construing the First Amendment at all when the Bill of Rights originally applied only to the *federal* government? Simply because a *state* could regulate libel or obscenity consistent with the First Amendment, which did not apply to the states anyway, tells us nothing about whether regulation by the *federal* government would be consistent with the First Amendment. Indeed, as Scalia's example of state regulation of libel and obscenity in *McIntyre* indicates,⁴⁵ the federal government was specifically forbidden from regulating speech that the state governments specifically could regulate.

But Justice Scalia often seems to have a different, non-originalist conception of tradition in mind. For instance, in *McIntyre*, the Court was confronted with the question of whether states could ban anonymous pamphletting—an issue on which Scalia confessed the historical record was both sparse and ambiguous, both in 1791 when the First Amendment was ratified, as well as in 1868 when the Fourteenth Amendment was ratified.⁴⁶ Nonetheless, Scalia argued that tradition sustained the propriety of the law.⁴⁷ More fundamentally, Scalia argued that a tradition of longstanding and pervasive *legislative* regulation of such speech created a “strong presumption of constitutionality” because it reflected “the widespread and longstanding traditions of our people.”⁴⁸ Scalia continued:

Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness. A *governmental* practice that has become general throughout the United

Id.

45. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 372 (1995) (Scalia, J., dissenting).

46. See *id.* at 372-74 (Scalia, J., dissenting).

47. See *id.* at 375 (Scalia, J., dissenting). Scalia specifically noted that history alone does not determine the question: “No accepted existence of governmental restrictions of the sort at issue here demonstrates their constitutionality, but neither can their nonexistence clearly be attributed to constitutional objections. In such a case, constitutional adjudication necessarily involves not just history but judgment . . .” *Id.* (Scalia, J., dissenting).

48. *Id.* (Scalia, J., dissenting).

States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality. And that is what we have before us here.⁴⁹

Scalia then noted that similar statutes dated to at least 1890, and that by the time of *McIntyre* every state except California, as well as the District of Columbia and the federal government, had enacted similar statutes.⁵⁰ Scalia concluded that "[s]uch a universal and long-established American legislative practice must be given precedence, I think, over historical and academic speculation regarding a restriction that assuredly does not go to the heart of free speech."⁵¹

Scalia's reliance on legislative tradition turns out to be dispositive: "Where the meaning of a constitutional text (such as 'the freedom of speech') is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine."⁵² Legislative tradition is seen as the *best* evidence of political consensus. Thus, Scalia rejected Justice Thomas's evidence that the Framers understood anonymous speech to be protected and that laws forbidding such speech were actually late-nineteenth century innovations.⁵³ Scalia's argument is a one-way ratchet: A practice of regulation proves the constitutional power to regulate, but an absence of regulation is ambiguous because it provides no evidence as to whether the government has the (previously unexercised) *power*

49. *Id.* (Scalia, J., dissenting) (emphasis added).

50. *See id.* at 375-77 (Scalia, J., dissenting).

51. *Id.* at 377 (Scalia, J., dissenting). The centrality of legislative tradition for Scalia as evidence of popular consent and accumulated wisdom is even more apparent in other cases. For instance, consider his concurring opinion in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in part and concurring in the judgment). There, he observed that while contemporaneous legislative practice at the time of the First and Fourteenth Amendments is relevant to determining the constitutional protection for commercial speech, he noted that "any national consensus that had formed regarding state regulation of advertising *after* the Fourteenth Amendment, and before this Court's entry into the field," is also relevant, because "it is rare that any nationwide practice would develop contrary to a proper understanding of the First Amendment itself." *Id.* at 517-18 (Scalia, J., concurring in part and concurring in the judgment).

52. *McIntyre*, 514 U.S. at 378 (Scalia, J., dissenting); *see also* *Rutan v. Republican Party*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting) ("Thus, when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.").

53. *See McIntyre*, 514 U.S. at 359-67 (Thomas, J., concurring in the judgment); *see also Rutan*, 497 U.S. at 96 (Scalia, J., dissenting) (noting that the tradition of regulation defines the core protections of ambiguous constitutional protections).

to regulate.⁵⁴

Moreover, Justice Scalia viewed the widespread implementation of regulation as evidencing the wisdom and utilitarian value of regulation. As Justice Scalia phrased the issue: "The third and last question relevant to our decision is whether the prohibition of anonymous campaigning is effective in protecting and enhancing democratic elections."⁵⁵ In answering that question, Scalia pointed to the history of state regulation as evidence of the wisdom of such regulations: "[T]he Justices of the majority set their own views—on a practical matter that bears closely upon the real-life experience of elected politicians and *not* upon that of unelected judges—up against the views of 49 (and perhaps all 50) state legislatures and the federal Congress." Scalia continued, "We might also add to the list on the other side the legislatures of foreign democracies: Australia, Canada, and England, for example, all have prohibitions upon anonymous campaigning."⁵⁶

Scalia contrasted the wisdom in these regulations with the majority's decision by questioning how elected legislators from around the nation and world "could not see what six Justices of this Court see so clearly that they are willing to require the entire Nation to act upon it: that requiring identification of the source of campaign literature does not improve the quality of the campaign?"⁵⁷ Originalism takes a back seat to deference to legislative majorities.

This non-originalist prong of Justice Scalia's tradition jurisprudence is evident in his concurrence in *Burson v. Freeman*.⁵⁸ *Burson* dealt with laws prohibiting electioneering within 100 feet of a polling place—regulations that Justice Scalia admitted *didn't even exist* until the late nineteenth century, and thus could not have been contemplated by the Framers.⁵⁹ Nonetheless, he concluded that such

54. See *McIntyre*, 514 U.S. at 375 (Scalia, J., dissenting).

55. *Id.* at 381 (Scalia, J., dissenting).

56. *Id.* (Scalia, J., dissenting). Justice Scalia usually limits his inquiry to *American* tradition because he is usually seeking the original meaning of the text. See Shattuck, *supra* note 32, at 2771 ("Justice Scalia thus far has consistently limited his analysis to the American legal tradition. He begins his inquiry with the common law adopted by the American colonies and ends with current status of the law."). Here, however, his observations regarding the traditions of other countries were presumably intended to illustrate the wisdom of the state regulations at issue.

57. *McIntyre*, 514 U.S. at 381-82 (Scalia, J., dissenting).

58. 504 U.S. 191, 214 (1992) (Scalia, J., concurring in the judgment).

59. See *id.* (Scalia, J., concurring in the judgment). Scalia observed that the regulation was a response to the adoption of the secret ballot in the late-nineteenth century, thereby suggesting that the regulation embodied some sort of wisdom. See *id.* at 214-16 (Scalia, J., concurring in the judgment).

statutes "have an impressively long history of general use,"⁶⁰ and that nothing "warrants disregard of this longstanding tradition."⁶¹ Thus, even though the Framers could not have imagined such regulations, Scalia concluded that a practice of regulation dating only to the late-nineteenth century constituted a tradition sufficient to create a presumption of constitutionality. Moreover, in reaching this conclusion, Justice Scalia apparently found irrelevant more than a century of history prior to the adoption of the secret ballot, a period when no such regulations existed.

C. *Majoritarian Tradition v. Minority Rights?*

Scalia's theory of tradition answers the critique of those who decry tradition as inherently antidemocratic. This theory has been attacked, however, by others who decry his model as hostile to minority rights. This criticism was brought forth in the colloquy between the plurality opinion of Justice Scalia and the dissent of Justice William F. Brennan, Jr. in *Michael H. v. Gerald D.*⁶²

1. *Michael H. v. Gerald D.*

In *Michael H.*, Justices Scalia and Brennan debated the proper relationship between tradition and unenumerated rights. At issue was a natural father's substantive due process claim to visitation rights with the child he had conceived in the course of an adulterous relationship.⁶³ Justice Scalia concluded that the natural father had no such rights because of the longstanding presumption—recognized in both statutory and common law—that the mother's husband was the child's father.⁶⁴ In reaching this conclusion, Justice Scalia outlined a method for determining whether a right not explicitly set forth in the constitutional text should nonetheless be recognized as a constitutional right. In order to establish an unenumerated right, Justice Scalia read the Court's precedents to require that the right in question be one that society had traditionally recognized: "[W]e have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society."⁶⁵

60. *Id.* at 214 (Scalia, J., concurring in the judgment).

61. *Id.* at 216 (Scalia, J., concurring in the judgment).

62. 491 U.S. 110 (1989).

63. *See id.* at 116 (opinion of Scalia, J.).

64. *See id.* at 124-26 (opinion of Scalia, J.).

65. *Id.* at 122 (opinion of Scalia, J.) (footnotes omitted); *see also* Gregory C. Cook, Note, Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due

Legislative enactments infringing upon a right are strong evidence that society has not recognized that right.⁶⁶ Because there was a longstanding legal tradition denying the right claimed by the adulterous father, his constitutional claim failed.

Justice Brennan disagreed with Justice Scalia's attempt to limit constitutional recognition to only traditionally recognized rights. In particular, Brennan strongly objected to Scalia's backward-looking approach:

[T]he plurality acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States. . . .

....

The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This* Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations.⁶⁷

In Brennan's view, the Due Process Clause is a charter for expanding liberty, not merely protecting established freedoms. Moreover, judges should discard traditions that have outlived their usefulness; they certainly need not accord such traditions constitutional recognition.⁶⁸ Brennan disagreed that tradition

Process, 14 HARV. J.L. & PUB. POL'Y 853, 862 (1991) ("Justice Scalia is correct that the Supreme Court has almost invariably invoked tradition as a consideration in deciding whether a fundamental right exists." (citations omitted)).

66. See *Michael H.*, 491 U.S. at 122 n.2 (opinion of Scalia, J.). In *Michael H.*, Scalia stated:

We do not understand what Justice Brennan has in mind by an interest "that society traditionally has thought important . . . without protecting it." The protection need not take the form of an explicit constitutional provision or statutory guarantee, but it must at least exclude (all that is necessary to decide the present case) a societal tradition of enacting laws *denying* the interest.

Id. (opinion of Scalia, J.) (alteration in original) (quoting *id.* at 140 (Brennan, J., dissenting))); see also Cook, *supra* note 65, at 877. Cook states:

[T]he enactment of a law would establish a tradition. If states have enacted laws protecting a right, the Court could decide that a tradition of *protecting* that right exists. By contrast, if many state legislatures have passed laws outlawing an activity, it seems clear that a tradition exists that *denies protection* of that right.

Id.

67. *Michael H.*, 491 U.S. at 140-41 (Brennan, J., dissenting). Justice O'Connor was also unwilling to be confined to Justice Scalia's historical approach. See *id.* at 132 (O'Connor, J., concurring in part) ("I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.").

68. See *id.* at 138 (Brennan, J., dissenting). Justice Brennan argued:

confines judges in defining unenumerated rights.⁶⁹ He also disagreed that positive law could objectively define tradition: "[W]herever I would begin to look for an interest 'deeply rooted in the country's traditions,' one thing is certain: I would not stop (as does the plurality) at Bracton, or Blackstone, or Kent, or even the American Law Reports in conducting my search."⁷⁰ Tradition's content cannot be determined by "poring through dusty volumes on American history."⁷¹

Justice Scalia responded that tradition must be limited to the most specific identifiable level: "Justice Brennan criticizes our methodology in using historical traditions specifically relating to the rights of an adulterous natural father, rather than inquiring more generally 'whether parenthood is an interest that historically has received our attention and protection.'" ⁷² Scalia continued, "Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."⁷³

In Scalia's view, this approach made tradition a reasonably objective command that could govern judicial decisionmaking. Brennan's approach, by contrast, would illegitimately allow judges to play the role of sovereign, imposing their own policy views in the guise of constitutional law:

Because such general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views. . . . Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that

Even if we could agree, moreover, on the content and significance of particular traditions, we still would be forced to identify the point at which a tradition becomes firm enough to be relevant to our definition of liberty and the moment at which it becomes too obsolete to be relevant any longer. . . .

. . . Just as common-law notions no longer define the "property" that the Constitution protects, neither do they circumscribe the "liberty" that it guarantees.

Id. (Brennan, J., dissenting) (citations omitted).

69. See *id.* at 137 (Brennan, J., dissenting) ("Apparently oblivious to the fact that this concept can be as malleable and as elusive as 'liberty' itself, the plurality pretends that tradition places a discernible border around the Constitution.").

70. *Id.* (Brennan, J., dissenting) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 549 (1977) (White, J., dissenting)).

71. *Id.* (Brennan, J., dissenting).

72. *Id.* at 127-28 n.6 (opinion of Scalia, J.) (citation omitted) (quoting *id.* at 139 (Brennan, J., dissenting)).

73. *Id.* (opinion of Scalia, J.) (citations omitted).

binds neither by text nor by any particular, identifiable tradition is no rule of law at all.⁷⁴

Reliance on a specific tradition is again grounded in the need to confine judicial discretion. Absent a rule determining which tradition governs, tradition could be a guise for judicial assumption of the role of sovereign. For Scalia, such a result would be equivalent to the abrogation of democracy itself.

2. The Academic Debate

a. Proponents of Majoritarian Tradition

The debate between Justices Scalia and Brennan over tradition's role in constitutional interpretation has, not surprisingly, spilled over into the academic realm. Advocates of Scalia's view, while conceding that tradition can be manipulated to justify almost any conclusion,⁷⁵ believe that his reliance on the most specific tradition identifiable adequately reduces the risk of judges arbitrarily creating rights.⁷⁶

74. *Id.* at 128 n.6 (opinion of Scalia, J.).

75. See Shattuck, *supra* note 32, at 2767. Shattuck states:

Justice Scalia, however, recognizes that general traditions can be elusive and malleable. Accordingly, he has adopted the per se rule of examining tradition at the most specific level of generality at which a relevant one can be identified. Without this per se rule, judges can manipulate the level of generality to reach any desired outcome. If the relevant tradition is defined abstractly enough—for example, as protecting freedom and liberty—almost any personal interest can be characterized as fundamental and, therefore, protected.

Id. (footnotes omitted); see also Cook, *supra* note 65, at 863. Cook observes:

To be sure, it is not clear exactly what qualifies as tradition. At one extreme, tradition could be defined only as that found in positive law. But would this include only laws at the national level, or at the state and local levels, too? Would longstanding social practices, customs, or beliefs in a majority of the country suffice? In a small community? In many situations, each party can find a tradition to support its argument, either by varying the level of generality or recharacterizing the issue.

Id. (footnotes omitted).

76. See Shattuck, *supra* note 32, at 2778 (“For Justice Scalia, tradition objectively defines the respective spheres of majority and minority freedom. Tradition, not the personal values of the Justices, tells the Court when government has infringed upon the due process rights of its citizens.”); see also Cook, *supra* note 65, at 854 (“Scalia’s approach, while not overly rigid, is sufficiently binding so as to make substantive due process compatible with the rule of law.”); *id.* at 865 (“By putting forth explicitly a rule requiring courts to look to the most specific level of tradition, he has created a rule of law and thus answered those critics who claim the Court simply uses tradition as a tool for rationalization.”); Robin West, *The Ideal of Liberty: A Comment on Michael H. v. Gerald D.*, 139 U. PA. L. REV. 1373, 1388 (1991) (arguing that in Scalia’s view narrow interpretations control judicial overreaching). West observes:

Insistence on narrow rather than broad understandings of the general clauses of the Constitution, in Scalia’s mind, is the surest way to protect against not only

Scalia's supporters claim that his reliance on specific tradition is not only more objective, it is more democratic. According to one supporter, "Justice Scalia has captured the major advantage of tradition: its inherently democratic nature. If such a tradition exists, society has made a conscious choice. . . . [F]ollowing specific tradition will force the Court to consult the nation's morality rather than its own."⁷⁷ Thus, Scalia's tradition requires judges to follow democratically sanctioned legislative commands.

Michael McConnell urges that democracy will not tolerate the judiciary assuming the role of sovereign. Should the judiciary assume that role, democracy will change the nature of the judiciary itself.⁷⁸ Like Justice Scalia, McConnell believes that judicial interpretation of the Constitution should not be a catalyst of change: "That is the task of legislation. Ample powers to pass laws for the public good have been vested in state legislatures and (within certain enumerated areas) in Congress."⁷⁹ According to McConnell, "[t]hese powers are to be used to promote evolving notions of the good society. The Constitution and the power of judicial review, by contrast, exist to

arbitrary or whimsical decisions, but also against the judicial tyranny of judges acting as super-legislators in pursuit of their own political values rather than justice.

Id.

77. Cook, *supra* note 65, at 865-66. Cook states:

Perhaps the strongest argument for the Supreme Court's use of tradition is its inherently democratic character. When testing a particular law, it is more democratic for the Court to consult the laws, customs, and practices prevailing throughout the majority of the country than it is for the Court to decide solely by its members' own moral guidelines.

Id. at 869 (footnote omitted).

78. See Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1538 (1989). McConnell observes:

Democracy will not tolerate an aristocracy. If judges assume powers of a legislative nature, we must expect the selection of judges to descend to the level of sound-bite, litmus test, character assassination, media blitz, issue simplification, celebrity endorsement, platitude, and distortion that we know and love in the electoral arena. We may not gain an aristocracy; we may lose an independent judiciary.

Id. But see ROBERT H. BORK, *THE TEMPTING OF AMERICA* 77 (Touchstone ed., Simon & Schuster 1990) (arguing that the Court is "virtually invulnerable" and "can do as it wishes"). Bork states:

Scholars used to worry that the Court would damage its authority if it acted politically. I have written a few such naive lines myself. The fact is quite the contrary. The Court is virtually invulnerable, and *Brown* proved it. The Court can do what it wishes, and there is almost no way to stop it, provided its result has a significant political constituency.

Id.

79. McConnell, *supra* note 78, at 1532.

ensure that our elected officials do not step beyond the limits prescribed for them.”⁸⁰ The Constitution was intended not as a vehicle for judges to remake society, but to protect well-established rights.⁸¹ The judiciary must protect these rights because temporary majorities may infringe upon such rights, contrary to the long-term interest of the people.⁸²

Longstanding legislative majorities reflect political and social consensus:

Constitutional text was formally adopted by a supermajority of the people, and deserves respect for that reason. Longstanding consensus similarly reflects a supermajority of the people, expressed through decentralized institutions. No single vote, no single electoral victory, no single jurisdiction suffices to establish a tradition: it requires the acquiescence of many different decision makers over a considerable period of time, subject to popular approval or disapproval. When judges base their decisions either on constitutional text or on longstanding consensus, they do not usurp the right of the people to self-government, but hold the representatives of the people accountable to the deepest and most fundamental commitments of the people.⁸³

80. *Id.* Michael Perry argues that constitutional amendment is the proper method for displacing an established tradition. See Perry, *supra* note 3, at 571. Perry states:

Constitutional amendment is a principal means by which the present can participate in that dialogic and critical encounter with the tradition, in that ongoing interpretation of the tradition, which mediates past and present. For example, it is one way the present can decisively reject an aspect of the tradition and establish instead a new aspiration more consonant with what the present sees as the central, constitutive aspirations of the tradition.

Id.

81. See McConnell, *supra* note 78, at 1532-33 (“The people of 1789 did not devote their attention to innovative liberties when they insisted upon a Bill of Rights; they protected the most fundamental liberties they enjoyed in their states at the time.”); see also *id.* at 1531 (arguing that most constitutional amendments “are better understood as bulwarks against change rather than aspirations to further change”).

82. See *id.* at 1528. McConnell states:

That the people are disenchanted with a constitutional principle (freedom of speech during the McCarthy era, perhaps; or the contracts clause during the New Deal) can hardly be deemed sufficient reason to cease to enforce it: the very purpose of a Constitution is to protect certain fundamental principles from temporary majorities.

Id.

83. Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 682; see also *id.* at 698 (arguing that if “a substantial consensus of the states . . . recognize[] the right for a period long enough” then it can be deemed “to represent the will of the Nation”).

McConnell also agrees with Scalia that longstanding legislative regulation attests to the wisdom and utilitarian value of certain solutions to practical problems: "If a practice is adopted by many different communities, and maintained for a considerable period of time, this provides strong evidence that the practice contributes to the common good and accords with the spirit and mores of the people."⁸⁴

b. Critics of Majoritarian Tradition

Scalia's academic critics far outnumber his supporters. The critics believe that Scalia's narrowly defined theory of tradition does not afford judges enough latitude in the creation of constitutional rights.⁸⁵ In particular, Scalia's critics decry the majoritarianism driving his theory.⁸⁶ Judges cannot defer to majority sovereignty if they are to protect minority rights, which many of Justice Scalia's

84. *Id.* at 683.

85. See Luban, *supra* note 13, at 1039 ("[Scalia's] approach [is] designed to limit drastically the Court's authority to reinterpret tradition. This is the voice of conservative traditionalism protesting contemporary Enlightenment's penchant for moral revision."). One commentator has noted that:

[Scalia's approach] ignores the possibility of inconsistent traditions, and accepts specific prohibitions as determinative regardless of whether they accord with broader, historically recognized rights. This categorical preference for specific over general sanctifies historical practices that conflict with longstanding values, and represents a relinquishment of the Court's role in upholding fundamental rights.

The Supreme Court 1988 Term—Leading Cases, 103 HARV. L. REV. 137, 184 (1989).

86. See Brown, *supra* note 3, at 205 ("[T]he source of tradition is largely majoritarian. . . . [T]raditions arise from laws passed by legislatures and from practices recognized, approved, and absorbed by mainstream culture."); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1087 (1990) ("If judges generally choose to enforce majoritarian values, then one cannot comfortably look to tradition to bolster the judicial role as protector of individual rights against the state."); Edward Gary Spitko, Note, *A Critique of Justice Antonin Scalia's Approach to Fundamental Rights Adjudication*, 1990 DUKE L.J. 1337, 1353 ("[T]he conventional morality of the majority . . . defines tradition. Any analytical framework that entrusts the liberties of minorities solely to the conventional morality of the majority is constitutionally unsatisfactory because conventional morality is often hostile to the interests of minorities."); see also Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication Without Judgment*, 33 B.C. L. REV. 981, 1035 (1992) ("[Scalia's tradition] is highly majoritarian, emphasizing only those traditions which have achieved formal legal recognition."); Strauss, *supra* note 18, at 1708 ("Justice Scalia's traditionalism . . . is highly majoritarian. Unless the Constitution is clear, a majority can make any practice constitutional just by sustaining it for a time.").

Scalia's use of tradition is charged with being "antiegaliatarian" as well. See Strauss, *supra* note 18, at 1715.

critics see as the central role of the judiciary.⁸⁷ Scalia's traditionalism fails to protect the rights of minorities because it "makes societal prejudices *the* controlling factor in defining the scope of liberty to be enjoyed by minorities under the due process clause."⁸⁸ Scalia's critics would adopt an interpretive presumption empowering judges to create rights that protect minorities, not one constraining judges to follow past majorities.⁸⁹

Apart from objections to Scalia's majoritarianism, Scalia's critics contend that he has not justified his exclusive focus on the most specific tradition.⁹⁰ Specificity does not constrain the judiciary, but simply serves as a pretext for dismissing rights claims.⁹¹ Cass

87. See Tribe & Dorf, *supra* note 86, at 1086 ("Scalia's program . . . would achieve judicial neutrality by all but abdicating the judicial responsibility to protect individual rights."); see also West, *supra* note 76, at 1375 ("Scalia's position, if accepted, would undermine . . . virtually every major substantive due process case of the last twenty years.").

88. Spitko, *supra* note 86, at 1357.

89. See *id.* at 1347. Spitko observes:

If no constitutionally-justifiable means of pinpointing the proper level of generality at which to define a liberty interest exists, then the Court, when drawing an arbitrary line, should select a level of generality that errs on the side of those who need protection from majority tyranny, rather than on the side of those in the majority who claim oppression from judicial tyranny.

Id.; cf. Tribe & Dorf, *supra* note 86, at 1102 ("The Ninth Amendment . . . places the justificatory burden on those who would deny the existence of a given right.").

90. See Brown, *supra* note 3, at 203. Brown states:

Identifying which practice in the face of conflicting traditions will be the one legitimated and relied upon in interpreting the Constitution is simply impossible without a theory explaining why tradition is relevant in the first place. No one has provided such a theory, and thus no one has rescued this use of tradition from the mire of caprice.

Id.; see also Spitko, *supra* note 86, at 1344 (criticizing the arbitrariness of Scalia's method). Spitko observes:

Justice Scalia's approach fails as a limitation on arbitrary decisionmaking precisely because it is itself arbitrary. Justice Scalia selected his preferred level of generality, the most specific relevant tradition, without any basis grounded in the fourteenth amendment and without any justification at all beyond its utility as a harness on judicial activism.

Id.

91. See Anders, *supra* note 33, at 909 ("The level of generality element of Justice Scalia's theory enables him to address rights that can easily be dismissed through an originalist interpretation. By defining the right at issue narrowly, Scalia can reject the right for lack of specific constitutional support, without dealing with broader, more difficult, issues."); Brown, *supra* note 3, at 202. Brown states:

[Scalia's] use of tradition is but a thinly-veiled effort to cut off all possibility of progressive interpretation of the past. What is important is that the very tradition that can be read to support development of broader individual rights over time is vulnerable to being harnessed into a limitation on individual rights—a ratchet allowing constitutional interpretation to go backward but not forward.

Sunstein speculates:

Scalia believes that substantive due process is itself illegitimate, and that his understanding of tradition as a source of rights is designed to minimize the harm done by substantive due process—not by eliminating it altogether, but by understanding it in an exceedingly narrow way, so as to limit the interference with the Court's legitimacy that some perceive whenever the Court invalidates legislation on substantive due process grounds.⁹²

Scalia's critics also contend that the purported objectivity of identifying tradition at its most specific level is illusory.⁹³ Laurence

Id.; see also West, *supra* note 76, at 1375 (arguing that adopting Scalia's approach would undermine "virtually every major substantive due process case of the last twenty years"). West observes:

The claim that there exists a narrow, specific tradition protecting a liberty which is threatened by a challenged statute is fatally undermined by the existence of the statute itself. Obviously, it is difficult, if not impossible, to argue that Californians have a "tradition" protecting the rights of adulterous biological fathers when they have a statute granting a conclusive presumption of paternity to the husband of the child's mother.

Id.

92. Sunstein, *supra* note 21, at 218. Indeed, Justice Scalia may have retreated from even the limited substantive due process right he recognized in *Michael H.* See *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 470 (1993) (Scalia, J., concurring in the judgment). In *TXO*, Scalia stated:

I am willing to accept the proposition that the Due Process Clause of the Fourteenth Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights; but I do not accept the proposition that it is the secret repository of all sorts of other, unenumerated, substantive rights

Id. (Scalia, J. concurring in the judgment); see also Antonin Scalia, *Response, in A MATTER OF INTERPRETATION*, *supra* note 23, at 129, 143 & n.23 (criticizing the use of substantive due process). But if he meant to repudiate the reasoning in *Michael H.*, he has not done so expressly. Indeed, in *United States v. Virginia*, 116 S. Ct. 2264 (1996) (the VMI case), Scalia invoked his reasoning in *Michael H.* to determine the scope of "fundamental rights": "It is my position that the term 'fundamental rights' should be limited to 'interest[s] traditionally protected by our society'" *Id.* at 2292 (Scalia, J., dissenting) (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 122). If he had actually intended to reject any notion of non-textual rights, it is ambiguous, to say the least, to refer to "traditionally protected" rights, rather than some more obvious term such as "textually protected" rights. Moreover, he continues to rely on majoritarian tradition in interpreting enumerated rights. See *supra* notes 35-61 and accompanying text.

93. See Greenberger, *supra* note 86, at 1023 ("[T]raditionalism is not neutral on its own terms, because it cannot be applied without resort to the value-laden discretionary judgments it is said to eliminate."); Moore, *supra* note 16, at 272-73. Moore states:

[T]hose who pretend to be suspending their own critical judgments by deferring to the past have not, in fact, suspended their individual reason at all. Rather, our critical judgments coincide with the judgments implicit in our tradition, so that when we "defer" to the past we are in reality promoting our own political conclusions. There is nothing wrong with this, so long as we are all clear that

Tribe and Michael Dorf argue that Scalia's theory does not remove judges from the creative role of sovereign: "[T]he extraction of fundamental rights from societal traditions is no more value-neutral than the extraction of fundamental rights from legal precedent."⁹⁴ Furthermore, contend his critics, Scalia relies on traditions that have been rejected,⁹⁵ and ignores traditions that have not been incorporated into positive law.⁹⁶ In their view, a right need not be recognized legislatively to be fundamental.⁹⁷

this in no sense gives any authority to the past. A past that has authority only insofar as it agrees with present judgment has no authority at all.

Id.; see also Spitko, *supra* note 86, at 1349 ("[T]o the extent that a jurist's definition of 'tradition' depends upon his 'personal and private notions,' Justice Scalia's exclusive focus upon tradition ensures that his approach is a wholly illusory limitation on the judiciary."); Tribe & Dorf, *supra* note 86, at 1086 ("[T]here is no universal metric of specificity against which to measure an asserted right.").

94. Tribe & Dorf, *supra* note 86, at 1086; see also Sunstein, *supra* note 21, at 223 ("Justice Scalia seems to think that we can identify a 'most specific' tradition without making evaluations of any sort, and that we can 'read' traditions off practices without indulging in interpretive assumptions. But any reading of a tradition is constructive and to that extent evaluative.").

95. See L. Benjamin Young, Jr., Note, *Justice Scalia's History and Tradition: The Chief Nightmare in Professor Tribe's Anxiety Closet*, 78 VA. L. REV. 581, 590 (1992) ("Given the radical changes that have occurred in the law of domestic relations during the last two and a half decades, reference to sources as old as the ones upon which Justice Scalia relies can only be termed specious."); see also Greenberger, *supra* note 86, at 1035 ("[Scalia's theory] glosses over the unpleasant truth that many of our traditions are odious, unworthy of contemporary recognition or respect.").

96. See Tribe & Dorf, *supra* note 86, at 1087 ("[T]he law has never given its blessing to behavior simply because it is 'traditional.' If tradition sufficed, then the law would readily protect homosexuality, non-nuclear family arrangements, and any number of other behaviors that are widely practiced and longstanding. Legally cognizable 'traditions' instead tend to mirror majoritarian, middle-class conventions."); see also Greenberger, *supra* note 86, at 1022-23 (distinguishing between "law" and "tradition"). Greenberger states:

Much of what we call law is codified tradition, practice and belief turned into formal rules. At the same time, law and tradition are not congruent. Legal rules are, indeed, often fashioned precisely in order to regulate tradition, especially when it is noxious or abhorrent, the most obvious instance of such regulation being the criminal law.

Id. at 1022.

97. See Tribe & Dorf, *supra* note 86, at 1088. Tribe and Dorf argue:

[T]he presence of positive laws encroaching upon a right does not negate the fundamentality of that right. If it did, then governments could violate constitutional norms by persisting in a pattern of unconstitutional enactments. However, "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."

Id. (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970)).

D. Justice Souter's Common-Law Theory of Tradition

1. The Development of "Common-Law Constitutionalism"

The chief alternative to Scalia's theory of tradition has its genesis in Justice Harlan's opinions in *Poe v. Ullman*⁹⁸ and *Griswold v. Connecticut*.⁹⁹ At issue was the claim that the Due Process Clause barred enforcement of a statute banning the use of contraceptives, even by married couples. In an oft-cited passage from *Poe*, Harlan looked to history to guide judicial recognition of liberties:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.¹⁰⁰

Harlan seemed to believe that tradition restrained the Court; decisions departing from tradition would be repudiated quickly.

Harlan's approach to history relied heavily on the Court's precedents.¹⁰¹ In Harlan's view, those precedents showed that the "liberty guaranteed by the Due Process Clause" cannot be "limited by precise terms of the specific guarantees elsewhere provided in the

98. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

99. 381 U.S. 479, 499 (1965) (Harlan, J., concurring in the judgment).

100. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

101. See Charles Fried, *The Conservatism of Justice Harlan*, 36 N.Y.L. SCH. L. REV. 33, 39 (1991). Fried states:

I would identify one of the characteristics of the Justice's conservatism as simple humility—an unwillingness to think he possessed all of the insight into the resolution of a problem. To the Justice, there was wisdom in the precedent to be consulted and drawn upon, and there were limits beyond which the Court should not venture at all.

Id.

Constitution."¹⁰² Reason, not pure textualism, was his guide:

This "liberty" is not a series of isolated points. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.¹⁰³

Judicial restraint would come not from any incorporation formula, but rather "by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."¹⁰⁴

The Connecticut statute at issue in *Poe* and *Griswold* conflicted with "the teachings of history" because of its "utter novelty"; it had no parallel in other states.¹⁰⁵ In Harlan's view, the statute impermissibly intruded on the privacy of the home; that realm of privacy was derived not "merely from the sanctity of property rights.

102. *Poe*, 367 U.S. at 543 (Harlan, J., dissenting). In *Griswold*, Harlan stated:

[T]he thesis that by limiting the content of the Due Process Clause of the Fourteenth Amendment to the protection of rights which can be found elsewhere in the Constitution, in this instance in the Bill of Rights, judges will thus be confined to "interpretation" of specific constitutional provisions, and will thereby be restrained from introducing their own notions of constitutional right and wrong into the "vague contours of the Due Process Clause."

Griswold, 381 U.S. at 500-01 (Harlan, J., concurring in the judgment) (citations omitted) (quoting *Rochin v. People*, 342 U.S. 165, 170 (1952)). Harlan continued:

While I could not more heartily agree that judicial "self restraint" is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula suggested for achieving it is more hollow than real. "Specific" provisions of the Constitution, no less than "due process," lend themselves readily to "personal" interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed "tune with the times."

Id. at 501 (Harlan, J., concurring in the judgment) (quoting *id.* at 522 (Black, J., dissenting)).

103. *Poe*, 367 U.S. at 543 (Harlan, J., dissenting) (citations omitted).

104. *Griswold*, 381 U.S. at 501 (Harlan, J., concurring in the judgment).

105. *Poe*, 367 U.S. at 554-55 (Harlan, J., dissenting). In *Poe*, Harlan argued:

[C]onclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the use of contraceptives a crime. Indeed, a diligent search has revealed that no nation, including several which quite evidently share Connecticut's moral policy, has seen fit to effectuate that policy by the means presented here.

Id. (Harlan, J., dissenting).

The home derives its pre-eminence as the seat of family life."¹⁰⁶ The traditional legal protection afforded the family justified the constitutional recognition of the liberty claimed.

Justice Lewis Powell followed Harlan's model of tradition in *Moore v. City of East Cleveland*.¹⁰⁷ "Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful respect for the teachings of history [and] solid recognition of the basic values that underlie our society."¹⁰⁸ According to Powell, the Court's "decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."¹⁰⁹ For Powell, like Harlan, tradition is a "living thing," allowing room for evolution, but decisions such as *Lochner v. New York*¹¹⁰ that departed from that evolutionary path "could not long survive."¹¹¹ Powell believed that tradition, as revealed in precedent, produces a sovereign command from which judges can deduce a rule of law.¹¹²

106. *Id.* at 551 (Harlan, J., dissenting).

107. 431 U.S. 494 (1977). At issue in *Moore* was the right of a non-nuclear family to live together in public housing. *See id.* at 495-96.

108. *Id.* at 503-04.

109. *Id.* (citations omitted).

110. 198 U.S. 45 (1905).

111. *Moore*, 431 U.S. at 501 ("[T]radition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound." (quoting *Poe*, 367 U.S. at 542-43 (Harlan, J., dissenting))); *see also id.* at 501 n.8 ("*Meyer and Pierce* have survived and enjoyed frequent reaffirmance, while other substantive due process cases of the same era have been repudiated—including a number written, as were *Meyer and Pierce*, by Mr. Justice McReynolds.").

112. Justice White was not persuaded that Powell's test provided a meaningful restraint. White stated:

The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, and that much of the underpinning for the broad, substantive application of the Clause disappeared in the conflict between the Executive and the Judiciary in the 1930's and 1940's, the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare.

Id. at 544 (White, J., dissenting).

Justice White later relied heavily on tradition in rejecting a claim that homosexual sodomy was protected by the Due Process Clause. *See Bowers v. Hardwick*, 478 U.S. 186, 191-94 (1986). He noted that sodomy was a criminal offense at common law and was banned by the overwhelming majority of the states in 1868, when the Fourteenth Amendment was ratified. *See id.* at 192. White also stated: "Against this background, to

Among the current Justices, Justice Souter is the most explicit in his reliance on Justice Harlan's theory of tradition.¹¹³ In *Washington v. Glucksberg*,¹¹⁴ Justice Souter specifically adopted Harlan's approach in *Poe v. Ullman* as his own.¹¹⁵ At issue in *Glucksberg* was the claim of certain terminally ill individuals that the state could not interfere with their right to a physician-assisted suicide.¹¹⁶ In his concurring opinion, Souter recounted the history of judicial recognition of unenumerated rights at considerable length, concluding with Justice Harlan's dissent in *Poe*.¹¹⁷ Souter drew three lessons from Harlan's opinion:

(1) Justice Harlan's respect for the tradition of substantive due process review itself, and his acknowledgment of the Judiciary's obligation to carry it on.¹¹⁸

(2) [T]he business of such review is not the identification of extratextual absolutes but scrutiny of a legislative resolution (perhaps unconscious) of clashing principles, each quite possibly worthy in and of itself, but each to be weighed within the history of our values as a people. It is a comparison of the relative strengths of opposing claims that informs the judicial task, not a deduction from some first premise. Thus informed, judicial review still has no warrant to substitute one reasonable resolution of the contending positions for another, but authority to supplant the balance already struck between the contenders only when it falls outside the realm of the reasonable.¹¹⁹

(3) [E]xplicit attention to detail . . . is . . . essential to the intellectual discipline of substantive due process review

claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." *Id.* at 194.

113. Michael McConnell has argued that Harlan's views were actually closer to Scalia's and his own, in that Harlan's concurrence in *Poe* "was rooted in the actual decisions of state lawmakers in the fifty states" and was not an invitation to engage in "unguided speculation" about what freedoms are most important to human life." McConnell, *supra* note 83, at 697 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965)). McConnell contends that Justice Souter has "misappropriat[ed]" Justice Harlan's reasoning to justify a "more expansive judicial role in determining the substance of due process liberties." *Id.* at 698. Because Harlan's views are somewhat ambiguous, as he seems to look to both case law and legislative practice as sources of tradition, McConnell and Souter can both find support in Harlan. We will not take sides on the issue of whose view is more authentically true to Harlan's view.

114. 117 S. Ct. 2258 (1997).

115. *See id.* at 2280-81 (Souter, J., concurring in the judgment).

116. *See id.* at 2261-62.

117. *See id.* at 2277-81 (Souter, J., concurring in the judgment).

118. *Id.* at 2280 (Souter, J., concurring in the judgment).

119. *Id.* at 2281 (Souter, J., concurring in the judgment).

....¹²⁰

The second and third of the three lessons relied on what Souter described as the "common-law method."¹²¹ Judicial review of legislative resolutions of clashing principles "calls for a court to assess the relative 'weights' or dignities of the contending interests, and to this extent the judicial method is familiar to the common law."¹²² Attention to detail was also critical to the common-law method:

[T]he common law is suspicious of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles. Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples. The "tradition is a living thing," albeit one that moves by moderate steps carefully taken.¹²³

Thus, Souter looked to the common law for two essential features of his theory of constitutional interpretation—careful balancing of interests and attention to detail.

In determining the strength of the liberty interest asserted, Souter looked to prior decisions of the Court to help identify "fundamental" interests. Infringement of such interests required the state to shoulder the burden of showing a countervailing state interest sufficient to justify the infringement. From the Court's prior decisions Souter derived what he termed "the right to bodily integrity."¹²⁴ Most important were the Court's abortion cases, which provided "the most telling recognitions of the importance of bodily integrity and the concomitant tradition of medical assistance."¹²⁵ The analogy to the abortion cases persuaded Souter that a terminal patient's interest in physician-assisted suicide was strong enough to require the state to demonstrate a compelling countervailing interest. Souter found such an interest in "protecting patients from mistakenly and involuntarily deciding to end their lives, and in guarding against both voluntary and involuntary euthanasia."¹²⁶ In Souter's view, the state had made a compelling case for a "slippery slope . . . because there is a plausible case that the right claimed would not be readily

120. *Id.* (Souter, J., concurring in the judgment).

121. *Id.* at 2284 (Souter, J., concurring in the judgment).

122. *Id.* at 2283 (Souter, J., concurring in the judgment).

123. *Id.* at 2284 (Souter, J., concurring in the judgment) (citation omitted) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

124. *Id.* at 2288 (Souter, J., concurring in the judgment).

125. *Id.* (Souter, J., concurring in the judgment).

126. *Id.* at 2290 (Souter, J., concurring in the judgment).

containable by reference to facts about the mind that are matters of difficult judgment, or by gatekeepers who are subject to temptation, noble or not.”¹²⁷ Balancing the competing interests, Souter concluded that the state’s interest outweighed the interest of the patient, although he refused to rule out the recognition of a patient’s claim in the future.¹²⁸

Thus, Souter adopted a common-law method of constitutional interpretation, albeit one that does not rely on the substance of the common law. Instead, Souter looked only to the Court’s precedent (a fairly narrow source of tradition) for analogies to the issue currently before the Court.

2. The Academic Debate

a. Proponents of “Common-Law Constitutionalism”

Academics have endorsed the common-law model of constitutional decisionmaking as an alternative to the “narrow originalism” of Justice Scalia’s theory of tradition.¹²⁹ For these scholars, Harlan’s theory of “privacy” is a cornerstone for the expansion of liberty.¹³⁰ Bruce Ackerman outlines the common-law process by which judges extend rights beyond the constitutional text:

What counts for the common lawyer is not some fancy theory but the patterns of concrete decision built up by

127. *Id.* at 2291 (Souter, J., concurring in the judgment).

128. *See id.* at 2293 (Souter, J., concurring in the judgment).

129. James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 60 (1995) (“Justice Harlan’s dissent in *Poe* represents a classic formulation of the due process inquiry. Nowadays, liberal and conservative fundamental rights theorists alike, from Laurence Tribe to Charles Fried, celebrate it, perhaps because it offers a safe harbor from the narrow originalism of Scalia or Bork.”).

130. *See* Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5, 23 (1991). Ackerman states:

I have no doubt [Harlan] is right in suggesting that “privacy,” not “property,” provides the common law rhetoric that resonates best with the spirit of our age. If we are to rely on common law methods to preserve our constitutional freedoms, judges would be well advised to follow *Poe* and build where the foundations are deepest.

Id. James Fleming believes that the correctness of Harlan’s theory is confirmed by the status of *Griswold* as a litmus test for any potential Supreme Court nominee. On this subject, Fleming observes:

Griswold today is a case that any nominee, to stand a chance of being confirmed, has to say was rightly decided. Thus, Justices Kennedy, Souter, and Thomas were as scrupulous about saying that they recognized a constitutional right of privacy and accepted *Griswold* as they were about declining to say whether they recognized a right to abortion and accepted *Roe*.

Fleming, *supra* note 129, at 13.

courts and other practical decisionmakers over decades, generations, centuries. Slowly, often in a half-conscious and circuitous fashion, these decisions build upon one another to yield the constitutional rights that modern Americans take for granted, just as they slowly generate precedents that the President and Congress may use to claim new grants of constitutional authority.¹³¹

David Strauss has recently restated and embellished common-law constitutionalism.¹³² Professor Strauss contends that a model of common-law constitutionalism "restrains judges more effectively, is more justifiable in abstract terms than textualism or originalism, and provides a far better account of our practices."¹³³ Strauss argues that "rational traditionalism" would "give the benefit of the doubt to past practices" but would allow those practices to be "eroded or even discarded" if the Supreme Court was sufficiently confident that a practice is outweighed by countervailing moral or policy arguments.¹³⁴ He combines this "traditionalist" approach with a "conventionalist" argument that would allow reliance on the text to establish reflexive rules, so long as conventionalism was used only to resolve the "least important questions" of constitutional law.¹³⁵ "Important issues" should be resolved by examining Supreme Court precedent and applying the common-law method of case-by-case, analogical reasoning.¹³⁶ Souter's approach closely conforms to this model.

b. Critics of "Common-Law Constitutionalism"

While critics agree that common-law constitutionalism provides an accurate description of Supreme Court decisionmaking, they nevertheless criticize this development on normative grounds.¹³⁷ For

131. ACKERMAN, *supra* note 16, at 17.

132. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

133. *Id.* at 879; see also *id.* ("[I]t is the common law approach . . . that best explains, and best justifies, American constitutional law today."); *id.* at 888 ("Properly understood, then, the common law provides the best model for both understanding and justifying how we interpret the Constitution.").

134. *Id.* at 895. Strauss encourages the use of "[m]oral judgments—judgments about fairness, good policy, or social utility" to overrule precedent. *Id.* at 900. He further argues that the Court should determine which precedents to honor broadly or narrowly depending on "whether the precedent is a good idea as a matter of morality or social policy." *Id.* at 923.

135. *Id.* at 916. Strauss's distinction between what he considers to be important and unimportant constitutional rights is less than rigorously drawn.

136. See *id.* at 914-16.

137. Henry Monaghan concedes that regardless of the persuasiveness of the

example, Henry Monaghan worries that the common-law method of constitutional adjudication allows judges to substitute their own values for commands of the democratic sovereign.¹³⁸ The common-law method affords judges a policy-making role in constitutional interpretation because its “emphasis on precedent (albeit without the constraining influence of *stare decisis*) and analogical reasoning, brought with it a belief that the *substance* of the judicial task in each sphere is similar: balancing the interests at stake, with the constitutional guarantees assessed in functional, rather than historical, terms.”¹³⁹ Monaghan argues, however, that the Constitution is a “superstatute,” a discrete list of positive commands.¹⁴⁰

justifications, the Constitution has been interpreted consistently with the common-law theory now espoused by Souter. See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 393-94 (1981). Monaghan states:

[T]he common law approach, and not the statutory approach, best describes the development of constitutional law under the bill of rights. Substantive elaboration of the bill of rights has increasingly followed the incremental, case-by-case method employed by common law judges. Viewed retrospectively, this was perhaps inevitable. Courts have had to cope with the relative paucity and indeterminacy of the underlying historical materials, as well as the difficulty of relating ancient norms to a world radically different from that of the Framers. . . . [R]eliance upon original intent “has played a very small role compared to the elaboration of the Court’s own precedents.”

Id. (footnotes omitted) (quoting Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 234 (1980)).

138. See *id.* at 391. Monaghan observes:

Application of common law approaches to the constitutional law area has important consequences for interpretation. First, it invites the extraction of quite general political principles from the specific constitutional guarantees. Second, and more important, the common law method encourages the elaboration of supplemental, nontextually grounded principles of political morality to fill in any gaps. So supplemented, the constitution manifests a unified, coherent conception of political justice, and not simply a series of separate and incompletely related provisions which, taken together, are insufficiently expressive of the substantive values of a twentieth-century liberal democracy.

Id.

139. *Id.* at 393.

140. See *id.* at 392. Monaghan states:

Our constitutional origins suggest a different perspective: the constitution as superstatute. Like important statutes, the constitution emerged as a result of compromises struck after hard bargaining. In addition, its intellectual underpinnings invite a statutory perspective. The dominant conceptions of popular sovereignty and limited government realized by the device of a social compact suggest that the constitution be construed as a compact whose contents could not be altered by any organ of government. That is a great deal more like the way statutes are construed than the way common law is made.

Id.

Robert Bork echoes Monaghan: Common-law constitutionalism has allowed judges to displace the sovereign lawmaking authority of elected representatives, a result not intended by the Constitution's framers.¹⁴¹ Bork argues that the views of people long dead, unless these views were enacted as statutes, should not be allowed to control the destinies of those now living. Bork notes that "[s]ome lawyers of conservative disposition admire Harlan's *Poe* opinion for no better reason that it invokes 'tradition.' But not all traditions are admirable, and none of them confines judges to any particular range of results." For his part, Bork knows "of no reason that rises to the level of constitutional argument why today's majority may not decide that it wants to depart from the tradition left by a majority now buried. Laws made by those people bind us, but it is preposterous to say that their unenacted opinions do."¹⁴²

Bork also argues that the open-ended nature of Harlan's theory allows judges to define the existence of a tradition and then find rights within that tradition that further the judge's policy preferences.¹⁴³ Moreover, the evolutionary process by which decisions that depart from tradition will be discarded is murky at best. Bork caricatures this strand of Harlan's theory as a "version of Darwinism"¹⁴⁴ Souter's version of Harlan's common-law tradition

141. See BORK, *supra* note 78, at 4 ("There is no faintest hint in the Constitution, however, that the judiciary shares any of the legislative or executive power. The intended function of the federal courts is to apply the law as it comes to them from the hands of others.").

142. *Id.* at 235.

143. See *id.* at 119. Bork states:

Our history and tradition, like those of any nation, display not only adherence to great moral principles but also instances of profound immorality. Opinions about which is which will differ at any one time and change over time. The judge who states tradition and morality are his guides, therefore, leaves himself free to pick through them for those particular freedoms that he prefers. History and tradition are very capacious suitcases, and a judge may find a good deal pleasing to himself packed into them, if only because he has packed the bags himself.

Id.

144. *Id.* at 232. Bork observes:

The primary safeguard against judicial willfulness seems to be a theory of survival of the fittest decisions, a jurisprudential version of Darwinism. It is not explained what will kill off these constitutional mutations and how long that will take. By the same sort of reasoning, one might observe, there is no need for the judicial function described since it is even more plausible that, if a tradition is both real and valued, legislation that radically departs from it will not long survive the democratic process.

Id. Professor Strauss certainly seems to believe in some Darwinist engine that will separate good from bad precedents. See Strauss, *supra* note 132, at 892 ("[Precedents] reflect a kind of rough empiricism: they do not rest just on theoretical premises; rather,

theory may not yield a rule of law, but only a rhetorical device justifying the policy decisions of an untethered Supreme Court.

E. Summary of the Tradition Debate

Justice Scalia's jurisprudence has brought the role of tradition to the forefront of the debate over constitutional interpretation. Scalia claims that his theory, focusing on the most specific tradition identifiable, provides a workable rule of law for judges interpreting the Constitution. Scalia's critics counter that by relying on the outcomes of majoritarian institutions, Scalia jeopardizes judicial protection of the rights of minorities, who have historically been excluded from political power.¹⁴⁵ Majoritarian traditions may have been forged and nurtured during times when those minorities could not even participate in the political process.

Some of these critics point to Justice Harlan's theory of tradition as allowing greater judicial latitude in identifying constitutional rights. That theory, as articulated most recently by Justice Souter, looks to prior decisions of the Supreme Court for guidance in interpreting the Constitution, thus allowing for greater constitutional evolution. Souter's critics counter that his theory allows judges too much discretion in creating novel rights.

In our view, neither Scalia's nor Souter's theory of tradition can reconcile concern for liberty with concern for the rule of law. This failure can be traced to the inability of both theories to distinguish among traditions. In Part II, which follows, we discuss the efficiency advantages of tradition, properly defined, and structural criteria for assessing the efficiency of particular traditions.

II. THE VALUE OF TRADITION IN CONSTITUTIONAL INTERPRETATION

From an efficiency perspective, tradition's normative claims are practical rather than deontological; traditions should be respected in constitutional decisionmaking only insofar as they can facilitate efficiency-enhancing decisions.¹⁴⁶ We do not attempt to distinguish

they have been tested over time, in a variety of circumstances, and have been found to be at least good enough.").

145. See Luban, *supra* note 13, at 1046 ("Tradition is a heavily edited anthology of the past, and much of the past fails to participate in it at all."); *supra* notes 86-90 and accompanying text.

146. See Moore, *supra* note 16, at 268. Moore states:

[Burke] makes no claim that the past binds us in the way of a promise, a request, or a command. The only claim of the past as Burke here asserts it is epistemic:

efficient from inefficient traditions on a case-by-case basis; such efforts are inconsistent with the nature and value of a tradition itself.¹⁴⁷ Rather, we advocate the use of a structural approach, which seeks to identify efficient traditions *indirectly* by examining the institutional structure that engendered the tradition.¹⁴⁸ For purposes of this Article, therefore, a "constitutionally efficient tradition" is one that (1) is consistent with the unanimity-reinforcing purposes of constitutionalism *and* (2) has evolved from an institutional structure that tends to develop wise traditions. In practice, these two elements should collapse into one, as communities are unlikely to reach and maintain voluntary consensual support for traditions that serve no utilitarian value. Similarly, unwise and ineffective traditions are likely over time to be supplanted by more effective traditions, which receive popular acceptance and support.¹⁴⁹

A. Efficiency Purposes of Constitutionalism

In the economic theory of constitutionalism,¹⁵⁰ constitutions serve two primary purposes: (1) precommitment and (2) the reduction of agency costs.¹⁵¹ Precommitment allows a super-majority

the past *knows* better than do we what the truths of politics are. We should listen to tradition, on this view, because it is wise, and not because it has any other form of authority over us.

Id.; see also Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 649 (1994) (noting that traditions should be respected because they "reflect the accumulated wisdom of centuries of political decisions; each incremental step is the product either of rational deliberation or natural development and has been *tested* by the experience of many years" (emphasis added)). But see Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1047, 1066-67 (1990) (arguing that we are obliged to honor the authority of the past).

147. See *infra* notes 170-76 and accompanying text (arguing that we rely on tradition because it provides collective knowledge superior to anyone's individual knowledge).

148. See Robert D. Cooter, *Decentralized Law for a Complex Economy*, 23 SW. U. L. REV. 443, 445 (1994) [hereinafter Cooter, *Decentralized Law*] (characterizing this approach of identifying traditions indirectly as a "structural approach"); Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 215, 217 (1994) [hereinafter Cooter, *Structural Adjudication*] ("[L]awmakers following the structural approach infer the efficiency or inefficiency of a norm, rather than measuring it directly.").

149. See 1 F.A. HAYEK, *THE COLLECTED WORKS OF F.A. HAYEK: THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* 11-17 (W.W. Bartley, III, ed., 1989); McConnell, *supra* note 83, at 683.

150. The discussion here is drawn from Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 123-29 (1993).

151. See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 179 (1960). Hayek states: [The reason for constitutions] is that all men in the pursuit of immediate aims are apt—or, because of the limitation of their intellect, in fact bound—to violate

to put certain actions beyond the power of government in order to preclude potentially rash actions by future majority coalitions that are inconsistent with society's long-term interest.¹⁵² By placing enforcement authority for constitutional decisionmaking in the hands of an independent judiciary, society can effectively "bind itself to the mast," limiting the choices of future majorities.¹⁵³ In this way, society may reduce, although not eliminate, the possibility of inefficient future choices. For example, the federal Constitution's prohibitions against ex post facto laws and bills of attainder prohibit transient majorities from punishing past conduct or singling out individuals for punishment.¹⁵⁴

While democratic governments are uniquely susceptible to majoritarian overreaching, *all* governments are vulnerable to the imposition of agency costs by government actors. Agency costs are all costs incurred by a principal in relying upon another person to accomplish the principal's tasks. Agency costs are the sum of "(1) the monitoring expenditures of the principal, (2) the bonding expenditures by the agent, [and] (3) the residual loss."¹⁵⁵ Given the difficulty of monitoring and bonding in a governmental context, the primary cost will be the residual loss from shirking behavior by agents. Actors in all three branches of government may impose

rules of conduct which they would nevertheless wish to see generally observed. Because of the restricted capacity of our minds, our immediate purposes will always loom large, and we will tend to sacrifice long-term advantages to them.

Id. Hayek continues:

It need hardly be pointed out that a constitutional system does not involve an absolute limitation of the will of the people but merely a subordination of immediate objectives to long-term ones. In effect this means a limitation of the means available to a temporary majority for the achievement of particular objectives by general principles laid down by another majority for a long period in advance. Or, to put it differently, it means that the agreement to submit to the will of the temporary majority on particular issues is based on the understanding that this majority will abide by more general principles laid down beforehand by a more comprehensive body.

Id. at 180.

152. See Boudreaux & Pritchard, *supra* note 150, at 123.

153. *Id.* at 124. In Justice Brewer's colorful phrase, constitutional rules are "proscribed by Philip sober to control Philip drunk." David J. Brewer, *An Independent Judiciary as the Salvation of the Nation*, in NEW YORK STATE BAR ASS'N, PROCEEDINGS OF THE NEW YORK STATE BAR ASSOCIATION 37, 37-47 (1893), reprinted in 11 THE ANNALS OF AMERICA: AGRARIANISM AND URBANIZATION 1884-1894, at 423, 428 (1968); see also David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 804-06 (1998) (noting that Brewer was "an eloquent proponent of traditional constitutional theory").

154. See U.S. CONST. art. I, § 9.

155. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976).

agency costs on the citizenry (the "principal"): legislators, who will garner votes and money by extracting wealth from the public at large and transferring that wealth to concentrated interest groups; enforcement authorities, who may exploit a lack of monitoring by legislatures and voters to act in their own interests; and judges, who may use their positions and independence to impose their personal policy preferences on society and to increase their status.¹⁵⁶

A variety of constitutional devices help reduce these agency costs. Bicameralism and the separation of powers limit interest-group wealth transfers by increasing legislators' costs of securing agreement.¹⁵⁷ The Takings Clause (and, in the past, the Contracts Clause) more directly limits certain legislative wealth transfers.¹⁵⁸ The Fourth Amendment limits executive branch agency costs by prohibiting unreasonable searches and seizures.¹⁵⁹ The Due Process Clause reduces judicial agency costs by limiting arbitrary decisionmaking.¹⁶⁰

A critical purpose of constitutionalism, therefore, is to put certain rights beyond the reach of transient majorities by requiring super-majority consent to alter those rights. Ideally, these fundamental rights would be amendable *only* by unanimous vote, as only unanimity can guarantee that no one loses (on balance) from the change. And if there are *any* net losers, then it is uncertain whether any rule change will create a net benefit for society as a whole.¹⁶¹

156. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 129 (1998) ("Attention to the agency problem should remind us that all permanent government officials, even Article III judges, may at times pursue self-interested policies that fail to reflect the views and protect the liberties of ordinary Americans.").

157. See Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT'L REV. L. & ECON. 145, 151-59 (1992) (arguing that bicameralism fosters less wasteful rent-seeking and corruption than supermajoritarianism); Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50, 54-59 (1987); Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 176-79 (1997) [hereinafter Zywicki, *Shell and Husk*]; Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1031-33 (1994) [hereinafter Zywicki, *Senators*].

158. See U.S. CONST. amend. V.

159. See *id.* amend. IV.

160. See *id.* amend. V. See generally A.C. Pritchard, Note, *Government Promises and Due Process: An Economic Analysis of the "New Property,"* 77 VA. L. REV. 1053, 1066-74 (1991) (criticizing judicial activism and identifying areas in which judicial cost-benefit analysis is appropriate).

161. See James M. Buchanan, *Politics, Property, and the Law: An Alternative Interpretation* of Miller et al. v. Schoene, 15 J.L. & ECON. 439, 446 (1972) ("If so much as one person in the community is harmed, there is no insurance that the damage he suffers

Because the subjective costs and benefits of any rule change cannot be measured, we cannot determine with certainty whether one legal rule is more "efficient" than an alternative rule by aggregating those costs and benefits.¹⁶² External observers, such as judges or legislatures, simply have no way of making these calculations because the necessary data simply do not exist.¹⁶³ As a result, the only way to determine whether an individual expects to be better off after a proposed transaction is whether she consents. If everyone affected by the proposed transaction consents, their universal consent allows us to presume efficiency. With consent, the expected net benefits of the transaction necessarily exceed the expected net costs, or put more simply, everyone expects that they will be better off after the transaction than before.¹⁶⁴

may not outweigh the benefits or gains to all other persons in the group."); see also Louis De Alessi & Robert J. Staaf, *The Common Law Process: Efficiency or Order?*, 2 CONST. POL. ECON. 107, 115 (1991) (discussing the efficiency of the common law in a collective decisionmaking environment).

162. The inability to quantify the net aggregate welfare gain or loss of a proposal results from the subjective nature of value and cost. Each individual weighs the anticipated costs and benefits of a proposed action uniquely, and the same person may vary in his assessment in different settings. See Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 CASE W. RES. L. REV. 961, 966-68 (1996). In sum, "[c]ost is subjective; it exists only in the mind of the decision-maker and nowhere else. . . . [It] cannot be measured by someone other than the [decision-maker] since there is no way that subjective experience can be directly observed." James M. Buchanan, *Introduction: L.S.E. Cost Theory in Retrospect*, in L.S.E. ESSAYS ON COST 3, 15 (James M. Buchanan & G.F. Thirlby eds., 1981); see also FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 58-61 (1944) (discussing how it is impossible for people to comprehend the scope and variety of the needs of others). Hayek observes:

[T]he limits of our powers of imagination make it impossible to include in our scale of values more than a sector of the needs of the whole society, and that, since, strictly speaking scales of value can exist only in individual minds, nothing but partial scales of values exist—scales which are inevitably different and often inconsistent with each other.

Id.; see also THOMAS SOWELL, *KNOWLEDGE AND DECISIONS* 217-18 (1980) (noting the knowledge transfer needed to satisfy users involves subjective patterns of trade-off that are unknown); Alex Kozinski & David M. Schizer, *Echoes of Tomorrow: The Road to Serfdom Revisited*, 23 SW. L.J. 429, 433-34 (1994) (discussing the subjective cost and the impact of Hayek's school of thought).

163. See DON LAVOIE, *NATIONAL ECONOMIC PLANNING: WHAT IS LEFT?* 56 (1985).

164. See LUDWIG VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS* 312 (rev. ed. 1963); JAMES M. BUCHANAN, *Rights, Efficiency, and Exchange: The Irrelevance of Transaction Cost*, reprinted in *ECONOMICS: BETWEEN PREDICTIVE SCIENCE AND MORAL PHILOSOPHY* 153, 161 (Robert D. Tollison & Viktor J. Vanberg eds., 1987); Murray N. Rothbard, *Toward a Reconstruction of Utility and Welfare Economics*, in *ON FREEDOM AND FREE ENTERPRISE: ESSAYS IN HONOR OF LUDWIG VON MISES* 224, 250 (Mary Senholz ed., 1956); Milton Friedman, *The Social Responsibility of Business*, N.Y.

In practice, however, we cannot require unanimous assent to all proposed collective actions. Opportunistic bargaining, hold out problems, and the sheer cost of conducting negotiations make it impossible to secure unanimous agreement in all cases.¹⁶⁵ The practical problems associated with a pure unanimity rule, however, do not undermine its theoretical significance, nor do they justify abandonment of the unanimity principle.¹⁶⁶ Even though explicit unanimity may not be achievable, implicit unanimity, or supermajority requirements, may provide a "second-best" rule without the prohibitive costs of actual unanimity.¹⁶⁷ We refer to rules and institutions that tend to maximize consensus as "unanimity-reinforcing."¹⁶⁸

TIMES, Sept. 13, 1970, § 33 (Magazine), at 122-26, *reprinted in* THE ESSENCE OF FRIEDMAN 36, 42 (Kurt R. Leube ed., 1987).

The unanimity requirement can be interchanged with the concept of "Pareto efficiency" or "Pareto optimality," which requires that any proposal make at least one person better off while leaving no one else in a worse position. See Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1276-81 (1994). The unanimity requirement is arguably more useful than Pareto efficiency as a tool for measuring collective choice, as it requires parties to reveal their preferences through the process of making choices rather than implicitly assuming an ability to make and aggregate abstract welfare choices. Indeed, the unanimity requirement plays a critical role in evaluating the efficiency of both market and collective decisions. See Zywicki, *supra* note 162, at 980-81; see also James M. Buchanan, *The Coase Theorem and the Theory of the State*, 13 NAT. RESOURCES J. 579, 583-84 (1973) (discussing the impact of the unanimity rule on collective action); Robert J. Staaf & Bruce Yandle, *Collective and Private Choice: Constitutions, Statutes and the Common Law*, in ECONOMIC ANALYSIS OF LAW—A COLLECTION OF APPLICATIONS 254 (Wolfgang Weigel ed., 1991) (using the rule of unanimity to evaluate the effect of competition between the common law and statutes).

165. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 96 (1962).

166. See James M. Buchanan, *Positive Economics, Welfare Economics, and Political Economy*, 2 J.L. & ECON. 124, 127 (1959) ("The conceptual test is consensus among members of the choosing group, not objective improvement in some measurable social aggregate." (emphasis omitted)). See generally DAVID SCHMIDTZ, *THE LIMITS OF GOVERNMENT: AN ESSAY ON THE PUBLIC GOODS ARGUMENT* (1991) (discussing the government's power to exercise authority and the costs associated with it).

167. In making this argument, we are assuming that constitutional principles are premised on unanimity or supermajoritarian principles (acting as a proxy for unanimity) and that through logrolling and vote-trading, preferences can be "cardinalized" as in the market, thereby mitigating the problems usually associated with collective decisionmaking. See Stearns, *supra* note 164, at 1277-81.

168. See Zywicki, *supra* note 162, at 974-78. The unanimity framework outlined here is not essential to our analysis distinguishing "efficient" from "inefficient" traditions. As developed below, the tools used in this article will be familiar to conventional law and economics analysis, namely that the common law tends towards efficiency, whereas statutory law tends to be driven by inefficient, redistributive goals. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 569 (5th ed. 1998). We rely on the unanimity framework because it is more consistent with the principles of constitutionalism.

A "constitutionally efficient" policy can be understood as one that reduces agency costs or is supported by a high degree of consensus or super-majority support, thereby entitling it to precommitment status. Constitutions enable the populace to precommit to maintenance of these widely shared values by preventing legislatures from overriding them. "Unanimity-reinforcing" institutions are those that identify the widespread and deeply held values that should be given constitutional precommitment status. Those institutions are also likely to identify rules most likely to reduce agency costs.

These concepts of precommitment and agency-cost reduction are commonly used to evaluate constitutional provisions,¹⁶⁹ but they also provide useful tools for assessing competing theories of constitutional interpretation. *Ceteris paribus*, a constitutional interpretation that reduces agency costs or enforces a societal precommitment, enhances efficiency. In the next section, we show how tradition can guide judges in identifying constitutional interpretations that are unanimity-reinforcing and, therefore, most likely to serve the purposes of constitutionalism.

B. *The Value of Tradition*

Tradition enhances constitutional interpretation when it allows judges to construe ambiguous or unenumerated rights consistently with the underlying purposes of constitutionalism. Tradition advances precommitment and reduction of agency costs by identifying traditions that are unanimity-reinforcing. Indiscriminate use of tradition in constitutional interpretation, however, negates the virtues of tradition and undermines the purposes of constitutionalism.

Tradition provides a means of gaining greater insight into community norms and expectations and serves as a reservoir of efficient norms and institutions.¹⁷⁰ Michael McConnell analogizes

169. See AMAR, *supra* note 156, at xiii; Boudreaux & Pritchard, *supra* note 150, at 132-61.

170. Cf. BURKE, *supra* note 6, at 95 (arguing that tradition constrains current majorities). Burke states:

[O]ne of the first and most leading principles on which the commonwealth and the laws are consecrated, is lest the temporary possessors and life-renters in it, unmindful of what they have received from their ancestors, or of what is due to their posterity, should act as if they were the entire masters; that they should not think it amongst their rights to cut off the entail, or commit waste on the inheritance, by destroying at their pleasure the whole original fabric of their society; hazarding to leave to those who come after them, a ruin instead of an

tradition to the decentralized process of economic markets; both permit dispersed bits of individual information and knowledge to be combined, forming a type of collective wisdom exceeding that possessed by any single person.¹⁷¹ McConnell explains:

An individual has only his own, necessarily limited, intelligence and experience (personal and vicarious) to draw upon. Tradition, by contrast, is composed of the cumulative thoughts and experiences of thousands of individuals over an expanse of time, each of them making incremental and experimental alterations (often unconsciously), which are then adopted or rejected (again, often unconsciously) on the basis of experience—the experience, that is, of whether they advance the good life. Much as a market is superior to central planning for efficient operation of an economy, a tradition is superior to seemingly more “rational” modes of decisionmaking for attainment of moral knowledge.¹⁷²

Reliance on tradition can lead to sounder moral and legal judgments than can a pure democracy that immediately registers

habitation—and teaching these successors as little to respect their contrivances, as they had themselves respected the institutions of their forefathers. By this unprincipled facility of changing the state as often, and as much, and in as many ways as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken. . . . Men would become little better than the flies of a summer.

Id.; see 1 HAYEK, *supra* note 149, at 21-23; see also Francesco Parisi, *Toward a Theory of Spontaneous Law*, 6 CONST. POL. ECON. 211, 212 (1995) (discussing the efficiency of adopting “customary rules as primary norms of obligation”).

171. Professor McConnell is not alone among modern law professors in extolling the virtues of tradition. Dean Anthony T. Kronman has written two forceful articles in recent years elucidating the value of tradition. See Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1573-90 (1985); Kronman, *supra* note 146, at 1029, 1047-68. As the former of Kronman's articles indicates, Kronman's ideas recognize an intellectual debt to Alexander Bickel. See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* (1975) [hereinafter BICKEL, *MORALITY OF CONSENT*]; ALEXANDER M. BICKEL, *REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM* (1971).

172. McConnell, *supra* note 78, at 1504 (footnotes omitted); see also Cook, *supra* note 65, at 872 (arguing that “the use of tradition can help to avoid many of the perceived shortcomings of representative democracy”). Cook states:

Because a considerable number of communities will need to have adopted a law or practice in order for it to qualify as a tradition, the use of tradition permits a consensus of several communities, rather than a majority of a single one, to decide which rights are fundamental. The fact that many communities maintain a tradition reduces the chance of prejudice or mistake. It also greatly increases the likelihood that the tradition reflects the collective will of the people rather than that of interest groups.

Id.

current preferences.¹⁷³ McConnell argues that by supplying a source of knowledge deeper and wider than any one individual's (or discrete group of individuals') experiences, tradition gives a perspective apart from current understanding, which can be a powerful tool for social criticism.¹⁷⁴ To be sure, any view of tradition will necessarily be idealized, but an idealized tradition may bring us closer to our aspirations.¹⁷⁵ By giving us a wider and deeper source of knowledge, tradition can provide sounder judgments and lead us to rules that are

173. See Parisi, *supra* note 170, at 212 ("This inductive process guarantees an optimal weighing of individual values in public choices and avoids an unqualified reliance on the political process for the representation of individual interests.").

174. See McConnell, *supra* note 78, at 1505. McConnell states:

A recorded tradition gives individuals and communities access to a vantage point distinct from—and potentially in opposition to—the prevailing judgment of today, of what religious persons typically call "the world." Far from being the "dead hand of the past," tradition can be liberating because it frees us from the tyranny of the present. Thus we arrive at the paradox of conservatism: that allegiance to the memory of an idealized past, with its idealized principles, has historically been the leading impetus to constructive social (as well as individual) transformation.

Id. (footnotes omitted); see also HAYEK, *supra* note 151, at 62 ("Far from assuming that those who created the institutions were wiser than we are, the evolutionary view is based on the insight that the result of the experimentation of many generations may embody more experience than any one man possesses."); Calvin's Case, 77 Eng. Rep. 377, 381 (K.B. 1608) (describing the wisdom inherent in the law). Coke states:

[O]ur days upon the earth are but as a shadow, in respect of the old ancient days, and times past, wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience (the trial of right and truth) fined and refined, which no one man, (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto.

Id.

175. See McConnell, *supra* note 78, at 1507. McConnell states:

The virtue of piety inclines us to regard our forebears in the tradition as good, wise, and just (probably better, wiser, and more just than they were in fact). This will incline us, in seeking to understand the tradition, to emphasize those elements in the tradition that are most worthy of praise. We like to contemplate the American founders' heroic sacrifices for liberty; we do not like to dwell upon their institution of slavery.

Id.; see also F.A. Hayek, *The Results of Human Action But Not of Human Design*, in *STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS* 96, 103 (1967) (describing the process of approaching "absolute justice"). Hayek states:

If we realize that law is never wholly the product of design but is judged and tested within a framework of rules of justice which nobody has invented and which guided people's thinking and actions even before those rules were ever expressed in words, we obtain, though not a positive, yet still a negative criterion of justice which enables us, by progressively eliminating all rules which are incompatible with the rest of the system, gradually to approach (though perhaps never to reach) absolute justice.

Id. (footnotes omitted).

constitutionally efficient.¹⁷⁶

Because of the tacit and intangible nature of the wisdom embodied in tradition, direct measurement of the instrumental value of tradition is impossible.¹⁷⁷ Thus, the problem is not merely that judges may lack the institutional capacity to apply a functional analysis to tradition.¹⁷⁸ Rather, tradition is valuable because *nobody* has the capacity to apply a functional analysis to tradition. Measuring the value of any particular form of tradition will be prone to error, as observers will inevitably discount the importance of these unarticulated values, thereby understating the benefit of a particular tradition.¹⁷⁹ It is possible, however, to identify institutional

176. McConnell's views were, of course, first expressed by Edmund Burke. See BURKE, *supra* note 6, at 34 (arguing that "artificial institutions" and "the aid of her unerring and powerful instincts" can "fortify the fallible and feeble contrivances of our reason"); cf. Parisi, *supra* note 170, at 216 ("In this way, evolutionary paradigms provide an explanation for the emergence and development of efficient norms in a world of imperfect decisionmakers.").

177. See Kronman, *supra* note 171, at 1602 (noting that the "Whig model," rather than critically judging institutions, "accepts the values embedded in these institutions, acknowledging their origin to be 'mysterious' and hence beyond the power of human beings to replicate or even fully understand" (footnotes omitted)).

178. See Parisi, *supra* note 170, at 226 n.35.

179. Because of our inability to comprehend the wisdom and experience in traditional rules, many commentators have argued that there should exist a presumption in favor of maintaining traditional rules, to be rebutted only by a strong showing of their unreasonableness. See, e.g., BURKE, *supra* note 6, at 96. Burke states:

To avoid therefore the evils of inconstancy and versatility, ten thousand times worse than those of obstinacy and the blindest prejudice, we have consecrated the state, that no man should approach to look into its defects or corruptions but with due caution; that he should never dream of beginning its reformation by its subversion; that he should approach to the faults of the state as to the wounds of a father, with pious awe and trembling solicitude.

Id.; see also 1 HAYEK, *supra* note 149, at 27 (warning that "if we discard . . . traditions, out of ill-conceived notions . . . of what is reasonable, we shall doom a large part of mankind to poverty and death"); MICHAEL OAKESHOTT, *On Being Conservative*, in RATIONALISM IN POLITICS AND OTHER ESSAYS 407, 411 (1991) ("[I]nnovation entails certain loss and possible gain, therefore, the onus of proof, to show that the proposed change may be expected to be on the whole beneficial, rests with the would-be innovator."); J.G.A. Pocock, *Burke and the Ancient Constitution: A Problem in the History of Ideas*, in POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY 202, 202-03 (1971) (discussing Burke's ideas on the function of tradition in society). Pocock states:

[Chief Justice Sir Matthew Hale] argues that ancient laws very often defy our criticisms, for the reason that while we have the law itself we no longer know the circumstances in which, or the reason for which, it was originally made. Therefore we cannot criticize those reasons; but the mere fact that the law survives furnishes a presumption, not only that the law was originally good, but that it has adequately answered the needs of all the situations in which it has subsequently been invoked.

Id. at 219. The inability to understand all of the functional purposes underlying a

characteristics that will *tend* to produce valuable and efficient traditions and to distinguish them from characteristics that produce less-efficient traditions. Identifying the source of the tradition and whether it tends to produce efficient rules allows indirect measurement of the tradition's value. More importantly for our purposes, this structural approach enables courts to identify traditions appropriate for use in constitutional interpretation.

Two variables are relevant in determining whether certain institutional structures will tend to produce efficient, unanimity-reinforcing traditions: (1) the degree of decentralization of the institutions that produced the tradition,¹⁸⁰ and (2) the period of time over which the tradition has evolved.¹⁸¹ As these two variables increase, a tradition becomes more worthy of respect because it is more likely to reflect a broad-based consensus and thus is more likely to be unanimity-reinforcing.¹⁸² Moreover, having stood the test of time and developed through decentralized processes, a tradition is likely to be effective in practice. Old or decentralized traditions have evolved through the interaction and implicit approval of many people. They have been ratified either through many generations attesting to their merits, or by large numbers of individuals in disparate communities endorsing the tradition over a shorter period of time. Thus, the continued and repeated endorsement of ancient or widely accepted traditions strongly suggests that the tradition represents a consensus that the rule is beneficial and comports with

traditional rule suggests that it is improper to criticize a judge who ignores the functional elements of a traditional rule, so long as we have confidence in the evolutionary process that spawned the rule. See, e.g., *Burnham v. Superior Court*, 495 U.S. 604, 621-22 (1990) (concluding that it is unnecessary to conduct a functionalist defense of the traditional personal jurisdiction rule because "its validation is its pedigree"). For a criticism of Scalia's approach in *Burnham* which argues that the Court should engage in functional analysis of all traditions, see Strauss, *supra* note 18, at 1710-11.

180. See MICHAEL POLANYI, *THE LOGIC OF LIBERTY: REFLECTIONS AND REJOINDERS* 111-37 (1951); Lon L. Fuller, *Freedom—A Suggested Analysis*, 68 HARV. L. REV. 1305, 1315-16 (1955); J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407, 1469-74 (1996).

181. See Moore, *supra* note 16, at 266. Moore notes that to Burke "there was a modesty of individual human reason in the face of the collective wisdom that is bequeathed to us by the past. This is an almost Darwinian view: we subject social ideas to the test of time in which they flourish or die, and the fittest survive." *Id.*; see also POCOCK, *supra* note 179, at 202-03 (arguing that "the knowledge of an individual or a generation was limited," but "existing and ancient institutions . . . might contain the fruits of more experience than was available to living individuals").

182. See BURKE, *supra* note 6, at 34-35 ("We procure reverence to our civil institutions on the principle upon which nature teaches us to revere individual men; on account of their age; and on account of those from whom they are descended.").

shared values and expectations.¹⁸³

Consensus, in turn, is reinforced by opportunities to review and improve the tradition.¹⁸⁴ By diversifying across time and among communities, a tradition gains significantly more input, discussion, and feedback concerning the tradition's wisdom and efficacy.¹⁸⁵ By this process, tradition is constantly improved.¹⁸⁶ Tradition is efficient, therefore, when it embodies an extended trial-and-error process by multiple uncoordinated individuals, bolstered by feedback and modifications from numerous people reacting to varied

183. See Moore, *supra* note 16, at 267 ("[L]ong held and widely shared beliefs have stood the test of time, for they have been sifted by generations and not found wanting. These beliefs should be respected because there is greater experience behind them than any individual could possibly bring to bear against them . . ."); Parisi, *supra* note 170, at 212 ("To the extent that consuetudinary practices have spontaneously emerged under the selective screening of competitive adaptation, we can derive some trustworthy conclusions regarding individual and collective values."); POCOCK, *supra* note 179, at 219 (discussing Holdsworth's views on consent and tradition).

184. See POCOCK, *supra* note 179, at 202. Pocock states:

Burke held . . . that a nation's institutions were the fruit of its experience, that they had taken shape slowly as the result, and were in themselves the record, of a thousand adjustments to the needs of circumstance, each one of which, if it had been found by trial and error to answer recurrent needs, have been preserved in the usages and established rules of the nation concerned.

Id.; see also Barbara M. Rowland, *Beyond Hayek's Pessimism: Reason, Tradition and Bounded Constructivist Rationalism*, 18 BRIT. J. POL. SCI. 221, 239 (1988) (noting that tradition reflects "conflict because there are always opposed tendencies or processes going on in every society and in every historical period").

185. See Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43, 43-45, 64 (1987).

186. See J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 36 (Cambridge Univ. Press 1987) (1957). Pocock states:

Institutions which have survived . . . for a long time must be presumed to have solved innumerable more problems than the men of the present age can imagine, and experience indeed shows that the efforts of the living, even mustering their best wisdom for the purpose, to alter such institutions in the way that seems best to their own intelligence, have usually done more harm than good. The wisdom which they embody has accumulated to such a degree that no reflecting individual can in his lifetime come to the end of it, no matter how he calls philosophy and theoretical reason to his aid.

Id.; see also POCOCK, *supra* note 179, at 213 ("[C]ustom was constantly being subjected to the test of experience, so that if immemorial it was, equally, always up to date, and that it was ultimately rooted in nothing other than experience."); Young, *supra* note 146, at 656 (discussing Burke's theory of reform as it relates to tradition). Young observes:

Burke's theory of reform is thus grounded in the common-law tradition of evolutionary change whereby custom was constantly being subjected to the test of experience, so that if immemorial it was, equally, always up to date. Even when evolutionary adaptation was required, however, Burke insisted on careful adherence to the general themes and values inherent in tradition.

Id. (internal quotations omitted) (footnote omitted).

circumstances. All things being equal, a tradition that develops over a longer period of time and through a more decentralized institutional process will have a greater number of people, events, and contingencies to feed back into—and, hence, test and improve—the tradition. The most reliable traditions, therefore, have evolved in highly decentralized settings *and* have continued over long periods of time. These traditions are most likely to express the consensus of the community and, therefore, are most likely to express the constitutional goals of precommitment and reduction of agency costs. Constitutionally efficient traditions result from ancient and decentralized processes that tend to produce wise traditions; these traditions are most consistent with the unanimity-reinforcing goals of constitutionalism.¹⁸⁷

III. SOURCES OF TRADITION

Constitutionally efficient traditions will best be realized in a decentralized and flexible legal system that makes use of tradition's wisdom and that is designed to create unanimity-reinforcing legal rules. Such a legal system will be receptive to the lessons of tradition and can use those lessons as an instrument of constitutional growth. In such systems, law is created by and reflects norms and principles developed outside the legal system through voluntary individual interaction. We refer to such legal systems as "spontaneous legal orders."

In a spontaneous legal order, law reflects social consensus, rather than attempting to create it. In a spontaneous legal order, "the judge draws his authority from an ability to discover a law that exists independently of the will of particular political authorities or the judge, embedded in the customs and expectations of the society in which the judge operates."¹⁸⁸ Thus, the judge does not make law, but "finds" law in community expectations and expresses it as a legal

187. One implication of this is that "traditions" that arise from centralized institutional structures are unlikely to embody wisdom or public consensus. Thus, for instance, "traditions" of accommodation among the branches of the federal government, or between state government and federal government over the limitations imposed by federalism, are more likely to be the result of collusion among the political actors involved, designed to externalize costs on the public rather than reflect community consensus. This point is developed further in our response to Professor McGinnis's reply to this Article. See A.C. Pritchard & Todd J. Zywicki, *Constitutions and Spontaneous Orders: A Response to Professor McGinnis*, 77 N.C. L. REV. 537 (1999) (response appearing in this journal).

188. Zywicki, *supra* note 162, at 990. The following discussion also draws upon the same article.

rule.¹⁸⁹ Consequently, spontaneous legal order is "bottom-up" in its orientation.¹⁹⁰ The judge does not attempt to formulate the "best" rule according to any abstract external measuring rod, whether a cost-benefit analysis of efficiency,¹⁹¹ or the judge's sense of justice or fairness.¹⁹² Instead, the judge attempts to identify and articulate the legal rule that best reflects the community's prevailing preferences and expectations.¹⁹³ The judge should "find" law, not consciously "make" it.¹⁹⁴

A spontaneous order legal system rejects hierarchical lawmaking in favor of repeated and decentralized ratification of community norms. Spontaneous order law draws on the experience of *all* members of the community, not just the knowledge and experiences of a small number of legislators or Supreme Court Justices.¹⁹⁵ The legal principles produced by this process, therefore, embody the wisdom and experiences of *all* of these decentralized actors and judges, a type of "collective mind" that aggregates all of the dispersed and individualized intelligence, wisdom, and experience of the members of the community.¹⁹⁶ Spontaneous order legal systems also

189. See Cooter, *Decentralized Law*, *supra* note 148, at 446; Cooter, *Structural Adjudication*, *supra* note 148, at 216.

190. See Robert W. Gordon, *Hayek and Cooter on Custom and Reason*, 23 SW. U. L. REV. 453, 454 (1994).

191. See Cooter, *Decentralized Law*, *supra* note 148, at 445-46.

192. See 1 FRIEDRICH A. HAYEK, *LAW, LEGISLATION, AND LIBERTY: RULES & ORDER* 100-01 (1973); 2 DAVID HUME, *ESSAYS* 274 (1875).

193. See SIR CARLTON KEMP ALLEN, *LAW IN THE MAKING* 126-29 (7th ed. 1964); 1 HAYEK, *supra* note 192, at 118-22; see also *id.* at 65 (describing the evolutionary process of lawmaking); Cooter, *Structural Adjudication*, *supra* note 148, at 216 ("When courts apply community standards, they find law, rather than making [sic] it."). Bruno Leoni similarly describes law "not as something enacted, but as something existing which it was necessary to find, to discover." BRUNO LEONI, *FREEDOM AND THE LAW* 141 (3d ed. 1991); see also *id.* at 83 ("[Law is] something to be described or to be discovered, not something to be enacted—a world of things that were there, forming part of the common heritage of all . . . citizens. Nobody enacted that law; nobody could change it by any exercise of his personal will."); Peter H. Aranson, *Bruno Leoni in Retrospect*, 11 HARV. J.L. & PUB. POL'Y 661, 673 (1988) (arguing that law conforms to social behavior); Leonard P. Liggio & Tom G. Palmer, Comment, *Freedom and the Law: A Comment on Professor Aranson's Article*, 11 HARV. J.L. & PUB. POL'Y 713, 720-21 (1988) (arguing that judges do not make law, they discover it).

194. See 1 HAYEK, *supra* note 192, at 122-23; LEONI, *supra* note 193, at 143.

195. See Parisi, *supra* note 170, at 212 ("Every individual contributes through his own subjective preferences toward the making of the law. The emerging rule will embody the aggregate effects of the independent choices of the various individuals that participate in its formation.").

196. See Friedrich A. Hayek, *The Creative Powers of a Free Civilization*, in *ESSAYS ON INDIVIDUALITY* 259, 275-79 (Felix Morley ed., 1977); F.A. von Hayek, *Economics and Knowledge*, in *L.S.E. ESSAYS ON COST*, *supra* note 162, at 45, 52-53; McConnell, *supra* note 83, at 684. McConnell states:

tend to be unanimity-reinforcing in that judges “find” the law in the practices and expectations of the community.¹⁹⁷

The principles of spontaneous order law have been overwhelmed by the forces of legal positivism in twentieth-century legal thought. Legal positivism insists that a “sovereign” is required to make law.¹⁹⁸ Positivists, including Justices Scalia and Souter, see law as arising from *outside* the social order, imposed on society through hierarchical sources: for Scalia, legislative will; for Souter, overt judicial act. Positivism is a “top-down,” rather than a “bottom-up,” approach to legal rulemaking. According to legal positivists, judges and legislatures act as sovereign,¹⁹⁹ “making” the law out of whole

The voice of tradition is thus the voice of humility: the assumption that when many people, over a period of many years, have come to a particular conclusion, this is more reliable than the attempt of any one person (even oneself) or small group of persons (such as the Court) to chart a new course on the basis of abstract first principles.

Id.; see also Moore, *supra* note 16, at 266 (observing that Edmund Burke believed that “there was a modesty of individual human reason in the face of the collective wisdom that is bequeathed to us by the past”).

197. See 1 HAYEK, *supra* note 192, at 95. Hayek states:

It is only as a result of individuals observing certain common rules that a group of men can live together in those orderly relations which we call a society. It would therefore probably be nearer the truth if we inverted the plausible and widely held idea that law derives from authority and rather thought of all authority as deriving from law—not in the sense that the law appoints authority, but in the sense that authority commands obedience because (and so long as) it enforces a law presumed to exist independently of it and resting on a diffused opinion of what is right.

Id.; see also LON L. FULLER, *THE MORALITY OF LAW* 138 (rev. ed. 1969) (“There is no doubt that a legal system derives its ultimate support from a sense of being ‘right.’”); JOSEPH DE MAISTRE, *Essay on the Generative Principle of Political Constitutions*, in *THE WORKS OF JOSEPH DE MAISTRE* 147, 151 (Jack Lively ed., 1971) (arguing that constitutions came from “preexistent and unwritten rights”); Mario J. Rizzo, *Rules Versus Cost-Benefit Analysis in the Common Law*, in *ECONOMIC LIBERTIES AND THE JUDICIARY* 225, 228-29 (James A. Dorn & Henry G. Manne eds., 1987) (discussing Hayek’s theory on the development of the common law and its legitimacy).

198. See Norman Barry, *The Classical Theory of Law*, 73 CORNELL L. REV. 283, 284-85 (1988). Barry states:

Positivists in the English tradition of jurisprudence identify authorship with a sovereign while American Realists locate law creation in judicial activity itself, but both are at one in denying that rules to guide conduct can exist independently of the human will. But as Hayek and others have argued, this is an error, for a whole tradition of western legality shows that coherent and predictable legal orders can develop independently of will, design, and intention.

Id.; see also Hayek, *supra* note 175, at 101-04 (describing the dominance of the positivist view); Parisi, *supra* note 170, at 224 n.11 (stating that customary law challenges “the positivist belief that rules must come from some higher legislative or judicial body in order to constitute proper law”).

199. Justice Scalia, of course, attempts to avoid this implication of legal positivism by requiring judges to follow the command of the legislative sovereign. He believes,

cloth, rather than limiting themselves to finding a pre-existing law.²⁰⁰ The critical question for positivists, therefore, is whether law should be made by judges or legislatures.

A. *The Common Law*

The paradigm example of a spontaneous order legal system is the common law. The rise of legal realism and positivism in recent decades has obscured the common law's origins as a spontaneous legal order. Thus, in the current climate of legal thought, it may seem archaic to focus on the spontaneous order nature of the common law. But the vision of the common law as a spontaneous order system dominated legal thought for centuries.²⁰¹ More importantly, the spontaneous order model of the common law was the Framers' understanding of the common law.²⁰² Only comparatively recently has the spontaneous order model of the common law been supplanted by legal positivism. Imposing positivism on our understanding of the Constitution distorts the purposes that the Framers intended to achieve when they adopted that document. Looking at the common law through the Framers' eyes gives us a different perspective on the proper interpretation of the Constitution.

Tradition is inextricably linked to the classical common law.²⁰³ For the classical common law, "the authority of the [common law] rests ultimately on its justice and reasonableness, but the witness to this fact, and its strongest demonstration, lies in its very age, its persistence, and continuity over great reaches of time."²⁰⁴ Common-

however, that judges make law in the common-law arena. See Scalia, *supra* note 23, at 10.

200. See ALLEN, *supra* note 193, at 1. Allen explains:

In [legal positivism], the essence of law is that it is imposed upon society by a sovereign will. In [spontaneous order law], the essence of law is that it develops within society of its own vitality. In the one case, law is artificial: the picture is that of an omnipotent authority standing high above society, and issuing *downwards* its behests. In the other case, law is spontaneous, growing *upwards*, independently of any dominant will.

Id.; see also CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* 156-60 (1986) (contrasting spontaneous order legal theory as applied to constitutional interpretation with the legal positivist view that the Supreme Court "makes" law).

201. See Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 186-89.

202. See *id.* at 192-98.

203. See Barry, *supra* note 198, at 284.

204. GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 63 (1986); see also McConnell, *supra* note 83, at 683 (arguing that "courts should look to experience and to stable consensus as an objective basis for decisionmaking").

law judges decided cases by finding and articulating the customs, norms, expectations, and preferences of individuals and communities, rather than making new law and imposing it upon the community.²⁰⁵ This reliance on custom for substantive rules was mixed with the judicial reasoning of the common-law method²⁰⁶ to develop a body of law that provided the groundwork for the freedom and prosperity of the Anglo-American world.²⁰⁷ Among the elements that fed into the common law, "custom was the most important."²⁰⁸

Because of its focus on custom, the common law was as decentralized and ancient as custom itself. Not only did classical common-law attorneys believe that the "common law was common custom, originating in the usages of the people and declared, interpreted and applied in the courts,"²⁰⁹ but they also believed that "all custom was by definition immemorial, that which had been usage and law since time out of mind, so that any declaration of law, whether judgment or (with not quite the same certainty) statute, was a declaration that its content had been usage since time immemorial."²¹⁰ Moreover, where common-law rules evolved in a

205. Not all customs are equally valid sources of law for common law courts. The emerging literature on the theory of "norms" suggests that some customs provide a valuable role in social coordination, while others do not. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 343-54 (1997) (discussing the economics of norms); Steven Hetcher, *Social Norms and Customs in Tort Law* (June 4, 1998) (unpublished manuscript, on file with the *North Carolina Law Review*) (distinguishing among various types of norms and customs). The question of which customs common-law judges should look to for legal principles is beyond the scope of this paper.

206. See Allen Dillard Boyer, "Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review, 39 B.C. L. REV. 43, 44-45 (1997) ("The law rests somewhat upon custom (that is, on the evolution and acceptance over centuries) and somewhat upon reason (upon the perfection achieved by centuries of study).").

207. See Todd J. Zywicki, Book Review, 8 CONST. POL. ECON. 355, 356 (1997) (reviewing CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996)).

208. Boyer, *supra* note 206, at 45; see also POCOCK, *supra* note 186, at 32-33 (describing how English lawyers in the early 1600s viewed the common law as custom that had attained the force of law).

209. POCOCK, *supra* note 179, at 209. Coke described custom as "'one of the main triangles of the laws of England.'" ALLEN, *supra* note 193, at 72 (quoting Coke) (citation omitted). Blackstone echoed this sentiment in observing that the common law consists of three parts, the most important being "[g]eneral customs; which are the universal rule of the whole kingdom and form the common law." 1 WILLIAM BLACKSTONE, *COMMENTARIES* *67. Allen concludes that general customs "are, in short, the Common Law itself." ALLEN, *supra* note 193, at 73; cf. WOLFE, *supra* note 200, at 157-59 (discussing whether interpretation of natural law requires the judiciary to assume a law-making function). But see Scalia, *supra* note 23, at 4 (arguing that the common law is not customary law or a reflection of the people's practices, "but rather law developed by the judges").

210. POCOCK, *supra* note 179, at 209.

manner that caused them to depart from prevailing custom, "the common law refreshed itself at the source by dipping back into custom."²¹¹

As a result of this reliance on custom and community expectations, the common law has been "described as a sort of vast, continuous, and chiefly spontaneous collaboration between the judges and the people to discover what the people's will is in a series of definite instances."²¹² Society, even more than the common-law process, is likely to generate efficient traditions because society is more decentralized and its norms and customs constantly change at the margins. Because common-law judges found the law in society's ongoing spontaneous order, rather than by looking solely to judicial precedent or deferring to legislative outcomes, society was able to provide a source of wisdom and gradual evolutionary change.²¹³ The common law "mirrors the variety of human experience; it offers an honest reflection of the complexities and perplexities of life itself."²¹⁴ As Pocock writes, the common law represented the "distilled knowledge of many generations of men, each decision based on the experience of those before and tested by the experience of those after, and it is wiser than any individual . . . can possibly be."²¹⁵

The common law is not self-enclosed; it is a dynamic system that "tends to expand and contract with the breathing of its subject matter."²¹⁶ Robert Cooter has made these observations about the common law's efficiency:

If law is not directed toward efficiency by the hand of the judge or the hidden hand of competition, why are efficiency models so successful in explaining common law rules? The traditional conception of the common law provides an

211. Gordon, *supra* note 190, at 456; cf. Cooter, *Decentralized Law*, *supra* note 148, at 445-47 (defining a "structural approach" to discover and enforce societal norms).

212. LEONI, *supra* note 193, at 22.

213. See POSTEMA, *supra* note 204, at 64 ("[Common law] is the great textbook of civil experience recording the products of continuous experiments with civil arrangements.").

214. LON L. FULLER, *ANATOMY OF THE LAW* 106 (1968).

215. POCOCK, *supra* note 186, at 35. Postema advocates deference "to the greater wisdom of the long-established law . . . not because our ancestors were individually any wiser than we, but because no individual or even entire generation can match the experience and wisdom accumulated over countless generations and repositied in the law." POSTEMA, *supra* note 204, at 64. The similarity between Burke's views and those of the classical common-law judges is striking. Indeed, much of Burke's analysis and symbolism relied directly on analogies to the common law. See Strauss, *supra* note 132, at 893-94 ("Burke wrote at a time when the common law approach was a mainstay of English political culture, and he may have drawn more or less consciously on the common law approach as his model for how society should change.").

216. Ruhl, *supra* note 180, at 1472.

answer. According to the traditional conception, courts enforce social norms that arise outside of the legal system. The common law tends toward efficiency because the underlying social norms tend toward efficiency. The absorption of the medieval law merchant into common law is a case in point. Thus, the efficiency of the common law rests upon the efficiency of social norms, whose existence precedes the law.²¹⁷

The common law's efficiency, therefore, lies in its origins: community norms and individual expectations.²¹⁸

Because common-law rules arose from individual interactions and generally accepted community values, those rules existed independently of the will of particular political authorities or judges.²¹⁹ As Lon Fuller has observed: "[O]ver much of its history the common law has been largely engaged in working out the implications of conceptions that were generally held in the society of the time."²²⁰ Because individuals have relied upon this understanding of the law in forming their expectations, judges protected those expectations by locating and articulating these underlying principles.²²¹ Consent of community members "was manifested in custom, that is, in the patterns and norms of behavior tacitly or expressly accepted by the community."²²² By adhering to these patterns of principles that undergird the actions and expectations of the community's members, the judge made the traditional common law an effective institutional structure for reinforcing unanimity. As a result, widely accepted principles that are reflected in the common

217. Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1694 (1996).

218. See LEONI, *supra* note 193, at 217. Leoni explains the two-fold function of an interpreter: "On the one hand he should discover the existing legal convictions of the community in order to describe them, and on the other hand he should frame uniform generalizations reflecting those convictions in order to apply them to all cases." *Id.*

219. See LEONI, *supra* note 193, at 147; Aranson, *supra* note 193, at 673; Barry, *supra* note 198, at 284-86; Parisi, *supra* note 170, at 224 n.11; Rizzo, *supra* note 197, at 228; Zywicki, *supra* note 162, at 990-91.

220. FULLER, *supra* note 197, at 50.

221. See Zywicki, *supra* note 162, at 994; see also Cooter, *Decentralized Law*, *supra* note 148, at 446-47 (providing an approach of discovering and enforcing societal norms). Predictability is important not only for those who are relying on rules for a given transaction but also for those who have chosen not to rely upon them by creating their own rules through private contract. See De Alessi & Staaf, *supra* note 161, at 116.

222. Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1700 (1994) (describing Selden's historical jurisprudence); see also LEONI, *supra* note 193, at 217 (noting that the common law is "a kind of crystallization in rules" of what can be "called the common consent of the people concerned").

law bear many similarities to the unanimity-reinforcing principles of constitutionalism. As Bruce Benson observes:

Customary law reflects the norms of those who choose to function in the particular social order "governed" by those laws. In a very real sense, then, such customary law is a unanimously adopted "social contract" or "constitution." It establishes the rules that are the basis for spontaneous social order. This social contract evolves and adapts to changing social conditions.²²³

Insofar as the common law reflects principles spontaneously evolved through many decentralized, voluntary individual interactions over an extended period, common-law rules are efficient.²²⁴

The decentralized, non-hierarchical institutional structure and history of the common law, which is analogous to the market economy,²²⁵ also suggests that it will tend to produce unanimity-reinforcing outcomes. For centuries the common law existed side-by-side with numerous other competing sources of *legal* authority, such as canon law, equity, feudal law, or urban law.²²⁶ The ecclesiastical courts declared themselves independent from the secular authorities.²²⁷ In addition, "[s]ecular law itself was divided into various competing types, including royal law, feudal law, manorial law, urban law, and mercantile law."²²⁸ For this reason, "[t]he same person might be subject to the ecclesiastical courts in one type of case, the king's courts in another, his lord's courts in a third, the manorial court in a fourth, a town court in a fifth, [and] a merchants' court in a sixth."²²⁹

223. BRUCE L. BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE* 322 (1990).

224. See Raoul Berger, *Jack Rakove's Rendition of Original Meaning*, 72 IND. L.J. 619, 623 (1997) (noting that the common law "represented wisdom accumulated over the centuries").

225. See LEONI, *supra* note 193, at 22.

226. See HAROLD J. BERMAN, *LAW & REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 10 (1983) ("Perhaps the most distinctive characteristic of the Western legal tradition is the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems." (emphasis added)); FULLER, *supra* note 214, at 123 ("A possible . . . objection to the view [of law] taken here is that it permits the existence of more than one legal system governing the same population. The answer is, of course, that such multiple systems do exist and have in history been more common than unitary systems.").

227. See BERMAN, *supra* note 226, at 10; see also Mirjan R. Damaska, *How Did It All Begin?*, 94 YALE L.J. 1807, 1813-14 (1985) (reviewing BERMAN, *supra* note 226).

228. BERMAN, *supra* note 226, at 10.

229. *Id.*; see also THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 210 (5th ed. 1956) (observing that the "competition between the King's

This decentralization forced the traditional common-law courts to compete for business and legitimacy, thereby ensuring that they would remain faithful to their limited role as pronouncers of community values and providing a feedback mechanism to discover the community's sense of the law.²³⁰ A "supreme court" whose judgments are binding on "lower" courts deviates from the traditional common-law process, which was marked by competing sources of legal authority, not a monopolistic sovereign.²³¹

Of course, the United States has a Supreme Court. To the extent that the Supreme Court purports to be a common-law court relying on tradition to articulate evolving community standards and supermajoritarian principles, it should recognize that it lacks the decentralization of the classical common-law system.²³² Moreover,

Bench, Common Pleas and Exchequer . . . resulted in these three courts having coordinate jurisdiction in many common classes of cases").

230. For instance, Judge Mansfield's radical innovations updating the common law's commercial rules were driven by competition from the law merchant and international law courts. Businessmen were resolving their disputes arising from complex international transactions in law merchant courts that found law according to generally-accepted commercial practice. Consequently, the common law was losing jurisdiction over important cases to those courts. See BENSON, *supra* note 223, at 225. These competitive pressures forced the common law to adapt, especially because royal judges were paid in large part out of litigation fees. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 31 (1971); BENSON, *supra* note 223, at 61. As these competitive pressures subsequently waned, however, the common law often lost touch with underlying commercial norms. In response, parties would again opt out of the common-law system into private arbitration and foreign courts. See BENSON, *supra* note 223, at 225-26. Faced with these competitive pressures, the common law again returned to the source, reestablishing its connection to commercial practices. See *id.* at 226.

231. See LEONI, *supra* note 193, at 24. Leoni states:

In our time the mechanism . . . where "supreme courts" are established results in the imposition of the personal views of the members of these courts, or of a majority of them, on all the other people concerned whenever there is a great deal of disagreement between the opinion of the former and the convictions of the latter.

Id. For several historical examples of how competing courts developed legal principles in the American west prior to the intervention of sovereign legal authorities, see Andrew P. Morriss, Miners, Vigilantes & Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law (1997) (unpublished manuscript, on file with the *North Carolina Law Review*).

232. The legal doctrines of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which allowed state and federal common law to co-exist, may have been more consistent with the classical common-law system than the current *Erie* regime. Under *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), although states compete among themselves, this competition is mitigated by state boundaries. In the classical common law, the availability of multiple jurisdictions within a single geographical area made it easier for individuals to engage in private ordering by allowing them to choose among competing legal jurisdictions. Recent scholarship has suggested that *Erie* was animated not by fears of excessive forum shopping, but was intended to prevent individuals from escaping

the Supreme Court should recognize that the role of courts in the classical common-law system was limited to identifying and articulating already extant community practices and expectations. Our hierarchical court structure may make it more difficult for the Supreme Court to function as a common-law court, but the Court can only overcome these institutional handicaps if it first recognizes them.

The common law's status as a source of constitutionally efficient traditions was recognized by the Framers. The common law directly influenced the federal Constitution; several rights enumerated in Article I, Section 9, Clauses 2 and 3, were first found in the common law, as were the provisions of the first eight amendments of the Bill of Rights.²³³ As Chief Justice Taft remarked: "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted."²³⁴ Moreover, when the

burdensome state-regulation—thereby explicitly preventing the very freedom to engage in private ordering that has been understood to be the strength of the common-law system. See Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 397-99 (1995) (arguing that the *Erie* doctrine may have been created to regulate lower federal courts that were hostile to progressive state law reform programs); William A. Braverman, Note, *Janus Was Not a God of Justice: Realignment of Parties in Diversity Jurisdiction*, 68 N.Y.U. L. REV. 1072, 1096 (1993) (same).

233. See THE FEDERALIST NO. 84, at 575-77 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 2 (1996) (noting that the Framers of the Constitution were steeped in Blackstone's *Commentaries* and that his influence may have exceeded that of all other legal commentators); Barry, *supra* note 198, at 288 ("[T]he protections for individuality contained in the [Constitution] can be interpreted as declarations of general common law principles."); Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 259 n.155 (1983) (observing that the rights in the Constitution's main body "are rooted in the common law"); Randy J. Holland, *State Constitutions: Purpose and Function*, 69 TEMP. L. REV. 989, 996 (1996) (noting that some common-law concepts are specifically incorporated into the constitutional text, such as the writ of habeas corpus, but that "the United States Constitution did not provide for a general preservation of the common law heritage from England"); John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 1032-33 (1993) (discussing the common law as a source of unenumerated rights).

234. *Ex parte Grossman*, 267 U.S. 87, 108-09 (1925); see also *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898) (noting that "[t]he language of the Constitution, as has been well said, could not be understood without reference to the common law"); *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) ("[The Bill of Rights] was not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors . . ."); *Moore v. United States*, 91 U.S. 270, 274 (1875) ("The language of the Constitution and of the many acts of Congress could not be understood without reference to the common law."); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-77 (1855) (stating that the content of Fifth Amendment due process was ascertained from

Framers originally drafted the Constitution, the common law was seen as a constraint on the power of popularly elected legislatures.²³⁵ Thus, in the wake of the state legislatures' excesses under the Articles of Confederation, the Framers looked to an independent judiciary to enforce common-law rights against majority infringement.²³⁶ By incorporating these rights into the original Constitution and Bill of Rights, the Framers tapped into a reservoir of constitutionally efficient rules.²³⁷

Critics may complain that the above description of the common law as a spontaneous order legal system is at best anachronistic and at worst inaccurate. Some modern commentators argue that even in its classical form, the common law was never a spontaneous order legal system.²³⁸ Rather, it is argued, the common law was actually a system in which common-law judges *made* the law (whether consciously or unconsciously), rather than merely finding the law.²³⁹ Moreover, even if there was an era in which the spontaneous order theory flourished, modern legal thought has rejected such a vision. We now see the law through realist lenses: the judge acts as a law-maker, guided by the policy implications of his decisions.²⁴⁰

As our discussion above indicates, we disagree with this characterization of the classical common law, as do the other scholars referenced.²⁴¹ Indeed, given the Framers' adherence to a spontaneous order view of the common law, it seems more accurate to conclude that it is the prevailing realist-positivist orthodoxy that advocates an anachronistic view of history. Regardless of the merits of that debate, however, it is not necessary to accept the spontaneous

pre-independence English common-law and statutory sources).

235. See Scalia, *supra* note 23, at 12-13; Gordon S. Wood, *Comment, in A MATTER OF INTERPRETATION, supra* note 23, at 49, 58.

236. See Wood, *supra* note 235, at 52.

237. See Boudreaux & Pritchard, *supra* note 150, at 139-40.

238. See, e.g., RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 20-21 (1990).

239. Alschuler, for instance, has recently argued that despite Blackstone's insistence that common-law judges merely found the law in social custom, Blackstone actually recognized the "modern" idea that judges actually "made" the law and endorsed that role for judges. See Alschuler, *supra* note 233, at 37 (noting that Blackstone presented a "declaratory theory" with "a wink and a nod" and "as a fiction"). Similarly, Boyer argues that Coke merely paid lip-service to the law-finding theory. See Boyer, *supra* note 206, at 49.

240. Alschuler characterizes the "modern" attitude towards the spontaneous order theory as "rest[ing] on a silly, ponderous, formal, conceptual, outdated, deductive, mechanistic, naive and hopelessly unrealistic jurisprudence." Alschuler, *supra* note 233, at 2.

241. See *supra* notes 209-15 and accompanying text.

order theory of law to accept the central proposition that judges should look to common-law traditions when construing the Constitution.²⁴² Conventional law and economics also supports the common law's efficiency. Judge Posner attributes the common law's efficiency to the impersonal nature of the judicial process and the fact that judges have very limited tools for the redistribution of wealth.²⁴³ If these structural differences make the common law efficient, interpretations of the Constitution that rely on the common law are also likely to be efficient.

B. *State Constitutions*

America's state constitutions grew out of the common law. Because state constitutions were rooted in the common law, state constitutional rules embody many of the common law's features and advantages.²⁴⁴ Moreover, the decentralized evolution of state constitutions reinforces their status as efficient, unanimity-reinforcing devices.

As with the common law, the state constitutions of the original thirteen states emerged from a decentralized and localist process.²⁴⁵ As Alexis de Tocqueville observed, "the township was organized before the county, the county before the State, the State before the Union."²⁴⁶ The states were confederations of local colonies that

242. An excellent overview of the long-running dispute between legal positivists and spontaneous order legal theorists is presented in WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 122-31, 138-47 (1994).

243. See POSNER, *supra* note 168, at 569-71.

244. See Ackerman, *supra* note 130, at 5-6; Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 82 (1991).

245. For the history of the evolution of the American colonies from local English shires through statehood, see HANNIS TAYLOR, *THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION: AN HISTORICAL TREATISE* 52 (1911). Taylor states:

The settlements made by the English colonists in America in the seventeenth century were in all material particulars substantial reproductions of the English settlements made in Britain in the fifth. . . . American constitutional history therefore begins, not with the landing of the English in America in the seventeenth century, but with the landing of the English in Britain in the fifth.

Id.; see also BENSON, *supra* note 223, at 21-30 (discussing the origins of the common law); DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 7-32 (1988) (discussing the history of small local colonies combining into larger federations and finally into states); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 134 (1969) (noting that the early state constitutions arose from charters written by previously independent colonies).

246. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 46 (Richard D. Heffner ed., 1956). Taylor observes that the English experience provided the model for evolution of American townships into colonies and then into states. See TAYLOR, *supra* note 245, at

preserved a large amount of their autonomy even after combination. More importantly, substantive political and civil rights were created and protected by local colonial charters and institutions. The larger alliances that became states recognized these already existing rights, rather than creating new rights. Although state constitutions developed independently, the resulting institutions and substantive rights were similar.²⁴⁷ Despite being separated by the difficult travel and limited communications of the time, the colonies shared a common British political tradition, a religious tradition that provided the foundation for their communities, and the common challenge of a threatening wilderness.²⁴⁸ Based on these common traditions, the colonies developed political institutions that later emerged as state governments. Like the decentralized common-law process, the decentralized development of the political and civil institutions of the colonies led to efficient constitutional provisions later recognized in the state and federal constitutions. Common governing principles allowed the colonies to knit together into states and laid the groundwork for the evolution of a federal government.

One shared element of colonial political development was the evolution of bills of rights. The common law provided many of the underlying principles of substantive rights in the colonies. Just as the common law was grounded in local decentralized community traditions, the provisions of state constitutions in turn grew out of common-law traditions.²⁴⁹ But the common law was not the exclusive source of the rights recognized in the state constitutions, nor did the

100-01; see also *id.* at 60 (noting that England is “a mere aggregation of shires”).

247. See LUTZ, *supra* note 245, at 27. Although the colonies shared many similar developmental features, local forces led to variations among them. In particular, geographical, religious, and other forces led to variations among the regions of the country in political institutions. See *id.* at 51-53. Although differing origins and experiences led to constitutional variations among the states, by 1776, “there was a common core” to them all. *Id.* at 52.

248. See *id.* at 27.

249. Indeed, many early state constitutions contained a specific statement declaring the bedrock principle that “the common law of England . . . shall remain in force” in the new state. Holland, *supra* note 233, at 996; see also LUTZ, *supra* note 245, at 101-02 (analyzing New Hampshire’s first constitution—the first constitution framed by any state—and observing that it incorporated the common law); Holland, *supra* note 233, at 1000-01 (describing how Delaware’s 1831 Constitution has been construed to be merely a declaration of the common law); Ellen A. Peters, *Common Law Antecedents of Constitutional Law in Connecticut*, 53 ALB. L. REV. 259, 261 (1989) (describing how “[i]n Connecticut constitutional law, it is well established that several rights now denominated as constitutional had well-recognized common law antecedents”). Other early state constitutions both enumerated lists of natural rights and also incorporated British and colonial common-law tradition by reference. See Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1134 (1987).

states simply write the common law wholesale into their constitutions.²⁵⁰ The states filtered the common law through local traditions and experiences before incorporating it into their constitutions.²⁵¹ The states supplemented inherited common-law principles with theories of custom, natural law, the law of nature, religious law, enacted law, and reason.²⁵² Suzanna Sherry observes:

As Bolingbroke proposed in theory and the new American states translated into action, judges were to look to natural law and the inherent rights of man, as well as to the written constitution, in determining the validity of a statute. Where the written constitution affirmatively addressed a problem . . . it was dispositive, but in other cases, judges looked outside the written constitution.²⁵³

Thus, as justification for invalidating "unconstitutional" laws, early judges relied not just on constitutional text, but also on authorities as diverse as "the fundamental laws of England, the law of nations, the Magna Charta, common right and reason, inalienable rights, and natural justice."²⁵⁴ Because there was widespread understanding of and support for all of these principles, judicial decisionmaking was seen as being rooted in societal "consensus." Rather than simply deferring to majority will as reflected in enacted legislation, judges and lawyers of the Founders' generation sought to identify "shared values which transcended [majority] will," thereby establishing as a constitutional principle that "the government decide[s] many questions independent[] of any single individual's or interest group's will."²⁵⁵

This model of constitutional decisionmaking grounded in consensus and unanimity-reinforcing principles provided the background for state constitutions drafted following independence. In seeking independence, Americans did not overthrow the basic

250. See LUTZ, *supra* note 245, at 62; Holland, *supra* note 233, at 996.

251. See LUTZ, *supra* note 245, at 62; see also Holland, *supra* note 233, at 996 ("By 1787, although each state had a common law based on the same principles, the particulars were often very different.").

252. See HAYEK, *supra* note 151, at 177-78; Sherry, *supra* note 249, at 1129.

253. Sherry, *supra* note 249, at 1145-46.

254. Suzanna Sherry, *The Early Virginia Tradition of Extratextual Interpretation, in TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS* 157, 158 (Paul Finkelman & Stephen E. Gottlieb eds., 1991); see also *Hurtado v. California*, 110 U.S. 516, 531-32 (1884) ("[T]he provisions of Magna Charta were incorporated into [state] Bills of Rights."); Caplan, *supra* note 233, at 227 ("[S]tate rights represented entitlements derived from both natural law theory and the hereditary rights of Englishmen.").

255. William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 901 (1978).

structure of their political system: “[M]ost Americans wished to preserve a political order which generally required officials to govern according to common values or principles which nearly all citizens accepted as right or otherwise legitimate.”²⁵⁶ The state constitutions reflected a melding of diverse forces. They were anchored in the common law, a legal system that reflected the norms and values of local communities as identified by judges and juries drawn from those communities. Natural law, discerned through reason, further revealed community consensus as it reflected the shared values and principles of reasoned agreement. State constitutions reflected this melding of common-law and natural-law traditions, and judges construing state constitutions could rely on the identifiable consensus found in those sources to supplement these constitutions when the text was silent.

Given this history, it is not surprising that the Framers of the Constitution and Bill of Rights looked to the state constitutions for guidance. State constitutions, to a greater extent than even the common law, were the source for the development of the federal Constitution. The Articles of Confederation, for example, “recognized that the country’s fundamental law consisted of the states’ fundamental laws.”²⁵⁷ Indeed, the influence of state constitutions goes back even further, as twenty-four of the twenty-eight grievances against the Crown enumerated in the Declaration of Independence were originally in state constitutions.²⁵⁸ State constitutions similarly influenced the federal Constitution.²⁵⁹ Thus,

256. *Id.* at 924.

257. Caplan, *supra* note 233, at 236.

258. See LUTZ, *supra* note 245, at 114.

259. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977) (“Prior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions.”). The 13 state constitutions of 1787 are referred to directly or by implication more than 50 times in 42 sections of the federal Constitution. See LUTZ, *supra* note 245, at 2. Many participants at the Constitutional Convention in 1787 had helped draft state constitutions. See *id.* at 12 n.10 (noting that of the 51 delegates who actively participated in the convention, 26 had served in state legislatures (most of them having been involved in drafting their respective state constitutions), “six had held major state offices in the executive branch, and at least forty had held some local political office”). Indeed, the concept of judicial review was inherited from existing state practice. See Nelson, *supra* note 255, at 937. Coke instituted the principle of judicial review in the common law in *Dr. Bonham’s Case*, 77 Eng. Rep. 646 (K.B. 1610), but Blackstone noted that tradition had ended by the late-seventeenth century. See Boyer, *supra* note 206, at 89. Nelson further observes that this justification for exercising judicial review to protect unanimously favored values was commonly accepted in the eighteenth century. For instance, it was laid out in THE FEDERALIST NO. 78 and several state judicial opinions during the 1790s. See Nelson, *supra* note 255, at 937.

the federal Constitution and the Bill of Rights can be seen as the culmination of the historical progress of the ancient common law, through the Magna Carta, and the refinement and articulation of these principles in state constitution-making.²⁶⁰

Admittedly, translating historic state constitutions to the present day presents some difficulty. The federal Constitution and Bill of Rights drew from only the original thirteen colonies. The constitutions of these colonies evolved from the decentralized process that embodied the virtues of both decentralized evolution as well as explicit supermajoritarian precommitment. Subsequent state constitutions, by contrast, were derived from the federal Constitution and other state constitutions. As a result, while they reflect supermajoritarian precommitment, they have not evolved through the same decentralized process as the original state constitutions. Nonetheless, their origins in a decentralized processes suggest that they provide a sufficiently reliable source of unanimity-reinforcing constitutional principles.²⁶¹

C. Justice Scalia's Majoritarian Model of Tradition

For a tradition to be a source of wisdom worthy of deference by judges, it should be the product of decentralized and ancient evolutionary processes. Traditions that survive this test will tend to reflect a high degree of wisdom and social consensus. Justice Scalia's model of majoritarian tradition, however, does not require decentralization, only ratification by a discrete group of legislators.²⁶² Patterns of rent-seeking by legislatures are entitled to as much (or more) deference in Scalia's model as the efficient traditions found in the common law and state constitutions. The actual operation of the

260. See TAYLOR, *supra* note 245, at 79 ("[T]he bills of rights of those first state constitutions are but epitomes, and the very best epitomes of the English constitutional system as it stood forth after the Revolutions of 1640 and 1688."). Just as the Revolutions of 1640 and 1688 drew on the Magna Charta for their animating principles, *see id.* at 74, the Magna Charta in turn had its roots deep in the history of a prior charter of rights from Henry I and ancient common law, *see* A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CHARTA AND CONSTITUTIONALISM IN AMERICA* (1968); POCKOCK, *supra* note 179, at 208.

261. Similar difficulties arise with an analysis of amendments to state constitutions generated by majoritarian direct democracy, such as initiative or referendum. We express no opinion as to whether constitutional change through such a process provides reliable evidence of consensus.

262. Thus, while we agree with Professor McConnell that longevity and evolution from decentralized institutions provide the mark of constitutionally efficient traditions, *see* McConnell, *supra* note 83, at 682, we disagree with his conclusion that legislative traditions embody these characteristics.

legislative process suggests that such legislative ratification represents interest group influence, rather than societal consensus, even if that legislation has been reproduced in many different states.

1. Legislation and Tradition

Scalia rejects the fundamental underpinnings of the common law and spontaneous order legal theory. For him, the notion of judges "finding" law is outmoded; legal realism has exposed this myth. Nonetheless, he admits that the founding generation subscribed to this "myth":

[Madison] wrote in an era when the prevailing image of the common law was that of a preexisting body of rules, uniform throughout the nation (rather than different from state to state), that judges merely "discovered" rather than created. It is only in this century, with the rise of legal realism, that we came to acknowledge that judges in fact "make" the common law, and that each state has its own.²⁶³

As Scalia recognizes, the founders, therefore, believed that judges found the law in the preexisting body of common-law principles and community norms and customs. Although Scalia is an originalist in most matters, on this issue he parts company with Madison and his contemporaries in favor of a more "realistic" and "modern" vision of the common law: Common-law judges are conscious policy makers.²⁶⁴ He rejects the spontaneous order system of law envisioned by Madison as the intellectual relic of a bygone era.²⁶⁵ For Scalia, law is made, not found.²⁶⁶ The only question is

263. Scalia, *supra* note 23, at 10.

264. *See id.*

265. *See id.*

266. Some of Justice Scalia's retroactivity jurisprudence could be interpreted as contradicting this generalization, in that he has suggested that Article III of the Constitution and the nature of the judicial process require judges to "find" the law, rather than "make" it. *See, e.g., James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring); *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 200-01 (1990) (Scalia, J., concurring). Read in context, however, it is evident that Scalia considers the distinction largely semantic. *See James B. Beam Distilling*, 501 U.S. at 549 (Scalia, J., concurring). In *James B. Beam Distilling*, Scalia stated:

I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it *as judges make it*, which is to say *as though* they were "finding" it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.

Id. (Scalia, J., concurring); *see also American Trucking*, 496 U.S. at 201 (Scalia, J., concurring) ("I share Justice Stevens' perception that prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be."). He is not urging judges to "find" the law in any substantive way, but, rather,

whether that law will be made by elected legislatures or unelected judges.

Justice Scalia's theory of tradition fails because of its deference to legislative traditions. While theories of separation of powers and federalism unquestionably limit the ability of courts to second-guess the policy decisions of the elected branches, it is simply untenable for Justice Scalia to conclude that a longstanding tradition of legislative regulation justifies a "presumption of constitutionality."²⁶⁷ Courts may defer to the judgments of the legislature as a matter of practical necessity, but there is no reason to elevate the questionable outcomes of the legislative process to constitutional status.

Legislative traditions fail the tests of decentralization and longevity. Legislation exemplifies centralized decisionmaking; indeed, centralization is often cited as the cardinal virtue of legislative rule-making. Legislatures, it is argued, can investigate, process all relevant information, and then declare a clear and definitive rule. In principle, legislatures also have the ability to respond immediately to changes in majority preferences. Because the legislature is the highest authority in the hierarchy of social order, a definitive legislative pronouncement can and should preempt all other sources of authority. Thus, legislation reflects the central premise of legal positivism in that the legislature governs through top-down commands. Legislatures exist to make law, not find it; law is what the legislature says it is.

Legal positivism animates Scalia's concept of legislative "tradition." Going back to Jeremy Bentham, legal positivists have seen ancient use and decentralized processes as characteristics of *bad* legal rules needing reform, rather than good rules worth celebrating.²⁶⁸ Because ancient rules, by definition, were conceived far in the past, positivists consider them to be presumptively unfit for contemporary times, relics of a benighted time that regrettably

simply "to say what the law is," as contrasted with "the power to change it." *James B. Beam Distilling*, 501 U.S. at 549 (Scalia, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). More fundamentally, precedent simply interprets an unchanging Constitution to which case law is to conform and merely articulates the principles therein. Because the Constitution does not change in Scalia's view, "the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense." *American Trucking*, 496 U.S. at 201 (Scalia, J., concurring).

267. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting).

268. See ALLEN, *supra* note 193, at 44 (discussing Bentham's skepticism with respect to inherited common-law rules); BURKE, *supra* note 6, at 87-88; POSTEMA, *supra* note 204, at 196 (discussing Bentham's views on legislation); Richard A. Posner, *Blackstone and Bentham*, 19 J.L. & ECON. 569, 594-95 (1976).

continues to haunt modern lawmaking.²⁶⁹ Ancient rules cry out for close scrutiny and reform—they deserve pulling out at the root. This distrust of the past squarely contradicts the philosophy of spontaneous order law, which sees law as constantly—but incrementally—changing to keep pace with society.²⁷⁰ Moreover, spontaneous order theorists, unlike positivists, generally view longevity as a reason *supporting* a rule, because longevity suggests collective wisdom and settled individual expectations.²⁷¹ Legal positivism, by contrast, ignores the wisdom implicit in longevity.

Legal positivism also rejects the idea that decentralized processes produce superior legal rules. Because the legislature can centralize and process all relevant information, the legislative process is “more rational” than a chaotic and unsupervised decentralized process. Legal positivists are consequentialist: Legal rules should further specific, identifiable collective policy goals.²⁷² Initially, majority will identifies the ends to be pursued, and then elected representatives enact the majority’s will.

For positivists, decentralized processes such as the spontaneous legal order of the common law conflict with both of these stages of the legislative process. Decentralized spontaneous ordering systems are “directionless” because they are not designed to accomplish specific external goals.²⁷³ The common law has no independent purposes of its own.²⁷⁴ Instead, rules arise from uncontrolled and voluntary interactions of many isolated individuals pursuing independent goals.²⁷⁵ As Hayek notes:

[Spontaneous order law] does not serve any [particular] purpose but countless different purposes of different individuals. It provides only the means for a large number of different purposes that as a whole are not known to anybody. In the ordinary sense of purpose law is therefore not a means to any purpose, but merely a condition for the

269. See 8 JEREMY BENTHAM, *THE CORRESPONDENCE OF JEREMY BENTHAM* 182 (Stephen Conway ed., 1988) (letter to James Madison).

270. See LEONI, *supra* note 193, at 143; see also Aranson, *supra* note 193, at 673 (noting that “[t]he common law merely confirms ongoing expectations”).

271. See Siegel, *supra* note 244, at 76-77.

272. See 1 HAYEK, *supra* note 192, at 113.

273. Rizzo, *supra* note 197, at 233.

274. Hayek distinguishes spontaneous legal orders characterized by *nomos*, neutral laws preserving individual expectations but having no systemic purpose of their own, from legal orders characterized by *thesis*, legislation or other law aimed at accomplishing specific identifiable goals. See 1 HAYEK, *supra* note 192, at 94-144.

275. See *id.* at 106-07.

successful pursuit of most purposes.²⁷⁶

Rather than seeing decentralization as efficiency-enhancing, positivists see decentralization as spawning disorder because it interferes with identification of specific goals for "rational" decisionmaking. Moreover, decentralization interferes with law's use to achieve identified social goals.²⁷⁷

In sum, legislative traditions, and thus Scalia's theory of tradition, fail the efficiency tests of decentralization and longevity because the legislative process rejects decentralization and longevity as valuable concepts. Advocates of positivism also explicitly reject the idea that law should recognize norms and principles developed through voluntary individual interactions.²⁷⁸ For legal positivists, law is a command from the legislative sovereign used to accomplish identified goals directly, not a bottom-up process. Legislation is prospective, seeking to change future behavior. Consequently, statutes do not reflect wisdom or experience of society over time; at best, they are snapshots that reflect the judgment of a very narrow segment of society at a particular moment. Even when legislation has been reproduced in many states, there can be no assurance that it reflects the custom of the people; because of the centralization of the legislative process, repetitions of a statutory rule reflect nothing more than a series of top-down commands.²⁷⁹ Thus, legislative traditions cannot be a source of constitutionally efficient norms, even if one assumes that legislatures accurately register majority preferences, because they reflect only the current majority—not historical

276. *Id.* at 113.

277. See Liggio & Palmer, *supra* note 193, at 716 ("Legislation is inherently based on policy—the pursuit of specifically intended outcomes. Common law, in contrast, addresses the needs of parties coming before judges to seek resolution of specific conflicts, or redress of specific grievances."). Spontaneous order systems, such as the common law, are not easily harnessed to accomplish specific goals for another reason. Because law is just one of several sources of social ordering, when law conflicts with other sources of social order, it is not always clear which will predominate. Advocates of spontaneous order law, of course, see this as a strength, as it allows individuals to develop rules appropriate for their individual purposes without requiring collective decisionmaking. See James M. Buchanan, *Social Choice, Democracy and Free Markets*, 62 J. POL. ECON. 114, 120-23 (1954), reprinted in *ECONOMICS: BETWEEN PREDICTIVE SCIENCE & MORAL PHILOSOPHY* 171, 179-80 (Robert D. Tollison & Viktor J. Vanberg eds., 1987). For positivists, on the other hand, competing sources of social authority interfere with the implementation of legislative policy goals. Legislation is seen as a means to force agreement when no societal consensus exists. See LEONI, *supra* note 193, at 16-17. To the extent that law's power to enforce this artificial consensus is hampered, positivism's goals are obstructed.

278. See *supra* note 272 and accompanying text.

279. See *infra* notes 316-21 and accompanying text.

wisdom. Legislation cannot be relied upon as a reliable source of precommitments or mechanisms for reducing agency costs, the efficiency purposes of constitutionalism.

2. A Public Choice Analysis of the Legislative Process

The conflict between legislative tradition and constitutionalism becomes sharper when we consider how the legislative process works in practice. Advocates of legislative tradition typically view democratic processes as beneficial for society, or at least as reflecting citizens' wishes, in that outcomes that emerge from the democratic process reflect the "will of the People," or at least do so more effectively than any other arm of the government.²⁸⁰ In this model, voters are fully cognizant of the costs and benefits of various policy proposals and make choices accordingly.²⁸¹ Outside observers, such as judges, cannot legitimately second-guess this choice. Scalia's model of legislative tradition is grounded in this collective-rationality model of the legislative process, as are the views of many critics of tradition.²⁸²

Closer examination casts doubt on democracy's ability to consistently produce collectively rational decisions representing the views of the majority. While a legislative judgment that certain individuals should enjoy entitlements at others' expense *may* benefit society, legislative authorization of this transfer does not by *itself* demonstrate that citizens favor the transfer or that the transfer benefits society.²⁸³ Because democratic outcomes result from a

280. See Scalia, *supra* note 92, at 136. Scalia states:

Judges are *not*, however, naturally appropriate expositors of the aspirations of a particular age; that task can be better done by legislature or by plebiscite. In other words, if the guarantees of the Bill of Rights had been aspirational, their textually unassigned implementation should, like the implementation of the French Declaration of the Rights of Man, have been left to the legislature.

Id.

281. See, e.g., DONALD A. WITTMAN, *THE MYTH OF DEMOCRATIC FAILURE* 12-17 (1995) (arguing that Public Choice analysis fails to show that democratic processes consistently generate outcomes that harm citizens of democratic nations). But see Donald J. Boudreaux, Review Essay, *Was Your High-School Civics Teacher Right After All?*, 1 INDEP. REV. 111 (1996) (criticizing Wittman); Richard E. Wagner, *Donald A. Wittman: The Myth of Democratic Failure*, 7 CONST. POL. ECON. 153, 156 (1996) (book review) (same).

282. See *supra* notes 23-62 (discussing Scalia's model and criticisms of tradition as antidemocratic).

283. See Richard A. Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, in *ECONOMIC LIBERTIES AND THE JUDICIARY*, *supra* note 197, at 39, 40. Epstein observes:

What are the problems with legislation? When we put someone in charge of the collective purse or the police force, we in effect give him a spigot that

multitude of individual decisions, democratic outcomes are superior to individual choices only if the settings in which individual voters vote—along with the settings in which political representatives make decisions—give each decision-maker sufficient incentive to choose in such a way that the resulting aggregate outcome accurately reflects collective preferences. We will review several arguments that raise doubts about the rationality of democratic outcomes and, therefore, Scalia's model of legislative tradition.

Several factors support this skepticism about majoritarian decisionmaking processes, including: (1) the influence of special interests on the political process; (2) the "lumpiness" of political decisions; (3) the "rational ignorance" of voters; (4) the "rational irrationality" of voters caused by their individually trivial influence over election outcomes; (5) Arrow's Theorem (the problem of aggregating individual preferences into coherent collective preferences); and (6) the problem of "stakeless voting." These factors suggest that conventional wisdom grossly overstates the ability of majoritarian democracy to produce sound decisions.²⁸⁴ Of course, these defects also undermine Justice Scalia's model of tradition, grounded as it is in a belief in the wisdom and representativeness of majoritarian legislative decisionmaking. We briefly discuss each of these factors in turn.

a. Special Interests

Representative democracy favors concentrated interest groups at the expense of dispersed groups.²⁸⁵ The benefits of political action are concentrated and the costs are broadly dispersed. This asymmetry skews the political process toward programs that benefit concentrated interests while foisting the bill upon dispersed

allows him to tap into other people's property, money, and liberty. The legislator that casts a vote on an appropriations bill is spending not only his own wealth, but everyone else's. When the power of coalition, the power of factions, the power of artifice and strategy come into play, it often turns out that legislatures reach results that (in the long as well as the short run) are far from the social optimum.

Id.

284. See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 638 (1993).

285. See MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 141-46 (1971); MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 31 (1982) [hereinafter OLSON, *RISE AND DECLINE*] ("[T]he incentive for group action diminishes as group size increases, so that large groups are less able to act in their common interest than small ones.").

interests.²⁸⁶ The social merits or demerits of the funded programs do not determine this calculus.²⁸⁷ The relative organizational strength of interest groups, rather than the merits of these groups or the programs they advocate, determines which interest groups receive government transfers and which groups pay for these transfers. Thus, it is naïve to believe that legislation generally represents the will of the people, or even a majority of the people. Much legislation represents the will of narrow special interests using the political process to transfer wealth from “the people” to themselves.²⁸⁸

b. Lumpiness

Inefficient political outcomes also emerge from the “lumpiness” of political choices.²⁸⁹ Each candidate stands for a bundle of positions on a broad range of issues. Because the number of issues in any election vastly exceeds the number of candidates, it is unlikely that any candidate shares with even a single voter the same position on *all* issues. While each voter chooses the most appropriate *bundle*, even winning voters typically get many political outcomes they dislike. Because even the smallest polity contains several dozen people and a great number of policy positions among which voters can choose, the

286. See CHICAGO STUDIES IN POLITICAL ECONOMY (George J. Stigler ed., 1988) (discussing many schemes for carrying out such wealth transfers); S. DAVID YOUNG, *THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA* (1987) (discussing the use of occupational licensing requirements as a widely used system for transferring wealth from the dispersed public to concentrated special interests). In wealthy economies, consumers in particular suffer political disadvantage relative to producers. This consumer disadvantage grows with increases in national wealth because wealth increases only as an economy's division of labor deepens—that is, as production becomes increasingly specialized. Increased specialization also lowers costs and raises benefits to producers who organize for effective political lobbying. Increased specialization also broadens the range of goods and services available for sale and, consequently, consumers spend less of their incomes on any one item. As a result, increased producer specialization lowers benefits to consumers of lobbying to protect themselves from rent-seeking producers.

287. See 3 F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE* 3 (1979) (“[T]he majority of the representative assembly, in order to remain a majority, *must* do what it can to buy the support of the several interests by granting them special benefits.”); ROBERT E. MCCORMICK & ROBERT D. TOLLISON, *POLITICIANS, LEGISLATION, AND THE ECONOMY* 30-33 (1981) (analyzing the wealth transfer to interest groups and observing that “the political transfer process must pay careful attention to the opposition . . . so that at the margin the political gain to the politician from the last dollar transferred just equals the loss”).

288. See POSNER, *supra* note 168, at 572-78; Friedman, *supra* note 284, at 633; William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975).

289. GORDON TULLOCK, *PRIVATE WANTS, PUBLIC MEANS* 113 (1970); see also Boudreaux, *supra* note 281, at 117 (discussing the vast number of issues in each election and the limited “channels of expression” voters possess).

possible number of different desirable policy packages is inconceivably large. But at most only a handful of candidates will be on the ballot. Consequently, no candidate will advocate the precise policy mix favored by even a single voter. Voters choosing a candidate do not, therefore, get their ideal package of policy positions.

The lumpiness of political choices also means that winning candidates seldom know why they won, and losing candidates seldom know why they lost. Voters provide scant feedback to representatives because voters elect a bundle of positions, some of which they agree with and others of which they do not. The candidate who embodies this bundle of positions cannot discern which elements of the bundle led to his election.²⁹⁰

c. Rational Ignorance

The "rational ignorance" of voters also casts doubt upon the conventional view of democracy. Knowledge is scarce; hence, it is costly.²⁹¹ It takes time, effort, and money to learn about candidates and legislation. By contrast, the benefit to the informed voter from these investments is trivial, as her vote will have a negligible expected effect on the outcome of the election.²⁹² If no voter can reasonably expect to affect the outcome, expenditures by any voter to become better informed for purposes of making more appropriate electoral choices are—for each individual voter—wasted.²⁹³ A voting process

290. Even if the outside observer inquires into the voter's motives the answers given will reveal little. Exit polls and other survey methods are highly imperfect means of deciphering voters' underlying motives as only a handful of voters can be sampled. More fundamentally, the questions asked in such surveys afford voters inadequate opportunity to express the nuances motivating their electoral choices or the relative importance of the various issues.

291. Cf. George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 213-20 (1961) (analyzing the cost of determining market price).

292. Note that it is irrelevant as to whether the vote in the end *actually* has an effect on the outcome in an election. The *expected* effect is all that matters, as the voter will have to decide whether to gather the information and actually vote before she knows whether her vote will matter. In almost every case, her vote will not provide the marginal difference in an election.

293. See, e.g., GEOFFREY BRENNAN & LOREN LOMASKY, *DEMOCRACY AND DECISION: THE PURE THEORY OF ELECTORAL PREFERENCE* 19-20 (1993); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 246 (1957). Downs states:

But in fact his vote is not decisive: it is lost in a sea of other votes. Hence whether he himself is well-informed has no perceptible impact on the benefits he gets. If all others express their true views, he gets the benefits of a well-informed electorate no matter how well-informed he is; if they are badly informed, he cannot produce these benefits himself. Therefore, as in all cases of indivisible benefits, the individual is motivated to shirk his share of the costs: he

that aggregates thousands or millions of rationally uninformed votes will not likely hit upon policies that would be chosen by a more fully informed electorate.²⁹⁴ Indeed, for similar reasons, even politicians will be rationally ignorant of most provisions in the bills that come before them, voting on bills of which they have little knowledge of the contents.²⁹⁵

d. Rational Irrationality

Because the practical importance of any person's vote is insignificant, voters will also have a tendency to use elections to express their aspirations rather than a considered choice among imperfect but obtainable outcomes. Put somewhat differently, the typical voter rationally ignores the practical costs of an ideologically favored policy. The typical voter is *rationally irrational* in the voting booth.²⁹⁶ Aggregating such "rationally irrational" voting decisions is unlikely to generate efficient collective policy results.²⁹⁷

refuses to get enough information to discover his true views.

Id.; see also OLSON, RISE AND DECLINE, *supra* note 285, at 25-26 (discussing how typical voters are "rationally ignorant"). Discussing the typical voter, Olson notes:

The gain to such a voter from studying issues and candidates until it is clear what vote is truly in his or her interest is given by the difference in the value to the individual of the "right" election outcome as compared with the "wrong" outcome, multiplied by the probability a change in the individual's vote will alter the outcome of the election. Since the probability that a typical voter will change the outcome of the election is vanishingly small, the typical citizen is usually "rationally ignorant" about public affairs.

Id.

294. The problem of rational ignorance will be exacerbated by the incentives of special interests to exploit this phenomenon. Special interests, of course, will not remain ignorant about the specific governmental policies that favor them. As a result, rational ignorance will be a problem that only cuts one way. See DAVID FRIEDMAN, HIDDEN ORDER: THE ECONOMICS OF EVERYDAY LIFE 289-93 (1996); Aranson, *supra* note 193, at 703. Moreover, special interests will have an incentive to disseminate *misinformation* about the consequences of governmental policies, so that to the extent that voters do seek out information about government policies, it will become more difficult to determine the accuracy of the competing claims. See Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123, 1138 (1997).

295. See Friedman, *supra* note 284, at 633 ("[T]he voting representatives themselves have little cognizance of many statutes, instead following the lead of floor leaders and committee chairs.").

296. See BRENNAN & LOMASKY, *supra* note 293, at 20.

297. Bryan Caplan has identified the related phenomenon of "rational idiocy." See Bryan Caplan, *Rational Ignorance and Rational Idiocy* (1998) (unpublished manuscript, on file with the *North Carolina Law Review*). As noted, the theory of rational ignorance predicts that if there is no private incentive to acquire information, then beliefs will be widely dispersed around the true belief. The theory of "rational idiocy" takes this one step further in predicting that if there is no private incentive to be right at all (as is the

e. Arrow's Theorem

A further problem with majoritarian democracy is captured by "Arrow's Theorem."²⁹⁸ Democratic theory assumes that a coherent majority will exist that would prevail if only voters could accurately express their true preferences in the voting booth and bind their elected representatives to heed these preferences. In fact, majoritarian voting cannot discover the majority will in typical cases. If three or more voters face three or more choices, the outcome of majority-rule voting will generally depend not on the voters' underlying preferences, but, instead, on the temporal order in which the options are put to the voters.²⁹⁹ Therefore, majoritarian voting cannot reliably discover and implement majority will because over a broad range of issues there is no such thing.³⁰⁰ Barry Friedman describes the problem in more colloquial terms: "Rather than majority aggregation, then, we have a debate among constituencies. Babble is perhaps a more accurate word. Government cannot simply follow majority will, because none is readily identifiable."³⁰¹

f. Stakeless Voting

Finally, majoritarian decisionmaking gives decision authority to many people with little or no personal stake in a matter.³⁰² Consider a voter asked to approve or disapprove the statute at issue in *Griswold v. Connecticut*.³⁰³ Should the state prevent married couples

case with voting), then beliefs will not only be widely dispersed but may be systematically biased towards incorrect results. Put differently, because all voters are making their decisions on the basis of frivolous information and under incentives that do not reward differentiation between sensible and foolish policies, there is no reason to believe that the beliefs of even the median voter are sensible.

298. See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 59 (2d ed. 1963).

299. See *id.*; Patrick B. Crawford, *The Utility of the Efficiency/Equity Dichotomy in Tax Policy Analysis*, 16 VA. TAX REV. 501, 505-09 (1997); Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 984-90 (1989); Stearns, *supra* note 164, at 1247-56.

300. Cf. 3 HAYEK, *supra* note 287, at 6. Hayek states:

It appears that we have unwittingly created a machinery which makes it possible to claim the sanction of an alleged majority for measures which are in fact not desired by a majority, and which may even be disapproved by a majority of the people; and that this machinery produces an aggregate of measures that not only is not wanted by anybody, but that could not as a whole be approved by any rational mind because it is inherently contradictory.

Id.

301. Friedman, *supra* note 284, at 643.

302. See Zywicki, *supra* note 162, at 984-85.

303. 381 U.S. 479 (1965).

from using artificial contraceptives?³⁰⁴ While each person has a high personal stake in making appropriate decisions regarding her *own* use of contraception, no person has any genuine stake in the contraception decisions of others. The connection between a person's decisions regarding contraception and a stranger's well-being is too remote and speculative to justify giving to the stranger any say in the person's decisions. Therefore, insofar as majoritarian institutions let voters decide how strangers conduct their lives, these institutions are unlikely to produce sound decisions.³⁰⁵

Despite this incongruity, majoritarian democracy allows voters in a winning majority to extract subsidies for their policies from voters in the losing block. A political decision allows one person to "buy" his preferred good—whether pure air, more B-2 bombers, or larger welfare payments—and force others to pay for it.³⁰⁶ Because "regulations are enforced upon everybody, including those who never participated in the process of making the regulations and who may never have had notice of it,"³⁰⁷ collective decisions made by majority vote will often produce inefficient policies.³⁰⁸

As a result of these defects inherent in the democratic process, Justice Scalia is simply misguided in looking to the outcomes of legislative bodies as evidence of the beliefs of the American people. Legislative traditions are traditions of special interest rent-seeking and exploitation of minorities. Maintaining this exploitation over many generations makes it no more legitimate and no more evidences super-majoritarian community consensus than does a statute that has only been on the books for a short time. Such traditions cannot be seen as a source of wisdom or public consensus, and thus are not constitutionally efficient traditions.

Justice Scalia's faith in majoritarian outcomes ignores these problems in the legislative process. Thus, it is instructive that several of the cases in which he relied most heavily on legislative traditions—

304. *See id.* at 480.

305. *See Zywicki, supra* note 162, at 987-88.

306. In this sense, majoritarian democracy creates an externality in that the members of the winning coalition do not have to bear the full cost of their activity. *See* BUCHANAN & TULLOCK, *supra* note 165, at 89-90. Buchanan and Tullock note that "the essence of the collective choice process under majority voting rules is the fact that the minority of voters are forced to accede to actions which they cannot prevent and for which they cannot claim compensation for damages resulting. Note that this is precisely the definition [typically] given for externality." *Id.*

307. LEONI, *supra* note 193, at 105.

308. *See* Buchanan, *supra* note 166, at 584-85.

the regulation of elections,³⁰⁹ political speech,³¹⁰ and political patronage³¹¹—are areas in which the agency costs of legislators' self-dealing are highest.³¹² When legislators' personal interests are not implicated, the power of special interests often are.³¹³ Given these obvious defects in the legislative process, it is somewhat Pollyannaish for Justice Scalia to conclude that "it is rare that any nationwide practice would develop contrary to a proper understanding of the First Amendment itself."³¹⁴ In essence, Justice Scalia has turned the keys to the constitutional kingdom over to politicians and special interests, the two groups most likely to manipulate this power for their own benefit. Not coincidentally, these are the two groups Madison and the other Framers sought to restrain through their constitutional architecture.³¹⁵

In response to the argument advanced here, others may contend that, even though any particular legislature is in fact a centralized

309. See *Burson v. Freeman*, 504 U.S. 191 (1992); see also *supra* notes 58-61 and accompanying text (discussing *Burson*).

310. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); see also *supra* notes 45-51 and accompanying text (discussing *McIntyre*).

311. See *Rutan v. Republican Party*, 497 U.S. 62, 94-97 (1990) (Scalia, J., dissenting).

312. See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 502-09 (1997).

313. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). There, the state of Rhode Island imposed a complete ban on all price information related to the sale of alcoholic beverages. See *id.* at 489-90. The state of Rhode Island, in defending the statute, admitted that the intent of the ban was to "mitigate competition and maintain prices at a higher level than would prevail in a completely free market." *Id.* at 505. Thus, the effect of the regulation was analogized to "a collusive agreement among competitors to refrain from such advertising." *Id.* Given that raising the price of alcoholic beverages for suppliers and withholding "truthful, nonmisleading" information from consumers was the *express intent* of the law, it is difficult to imagine that the ban on price advertisement in *44 Liquormart* reflected anything but the influence of the Rhode Island liquor retail industry over the state legislature. It is notable that the state's expert witness conceded that higher prices could have been maintained either through direct regulation or increased taxation. See *id.* at 507. The fact that the state chose to enrich alcohol retailers rather than the public fisc tends to evidence the special-interest thrust of the law. See James M. Buchanan & Gordon Tullock, *Polluters' Profits and Political Response: Direct Controls Versus Taxes*, 65 AM. ECON. REV. 139, 142 (1975) (arguing that regulated parties will favor direct regulation over taxation because direct regulation can be a mechanism for creating an industry cartel); see also Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform* 73 TUL. L. REV. (forthcoming Dec. 1998) (copy on file with the *North Carolina Law Review*) (discussing Buchanan and Tullock's model of regulation).

314. *44 Liquormart*, 517 U.S. at 517-18 (Scalia, J., concurring in part and concurring in the judgment).

315. See THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself.").

body, the results of *many* legislatures ensures a sufficient degree of decentralization so as to serve as a source of constitutionally efficient principles. In a sense, this argument suggests that the aggregate result of multiple states reaching independent agreement is more reliable than any single state's legislation. There are two responses to this argument.

First, legislative outcomes reflect no more wisdom when aggregated because the constituent elements are inherently unreliable. The legislative process simply is not a source of constitutionally efficient principles. The defects of the legislative process discussed above will be found in *every* legislature. As a result, "adding up" the results of these various legislative bodies will simply compile a consistent pattern of rent-seeking. Consensus across legislatures does not evidence constitutionally efficient principles. Instead, it may simply reflect the capture of many legislatures by special interests.³¹⁶

Second, while each legislature may act independently, it is doubtful that their decisionmaking processes will actually be substantively decentralized. Under the common-law process, for instance, courts find the law in the customs and norms of the community. Law percolates up, and, as a result, the law in any one state is likely to develop independently of that in any other state. It is unquestionable that common-law courts also engage in copying (for instance, by looking to the case law of other states as persuasive authority for their own decisions). To the extent that a court looks to judicial precedent, however, it looks to its own precedent before looking outside the state. Thus, most "copying" will be intertemporal (applying previous case law to the current case) rather than

316. The argument that special interests in several states could produce similar legislative outcomes may seem more plausible to skeptics once it is realized that different special interests may seek the same result for different reasons. For instance, labor unions, party bosses, farmers, and "good government" believers in democracy all favored the passage of the Seventeenth Amendment to the United States Constitution, but for a myriad of different reasons. See Zywicki, *Senators*, *supra* note 157, at 1016-21. Simply because farmers could capture western state legislatures, labor unions and party bosses could capture northeastern state legislatures, and both regions were allied in wanting to undermine the power of the South on national politics does not indicate that the passage of the Seventeenth Amendment was a constitutionally efficient outcome. See Zywicki, *Shell and Husk*, *supra* note 157, at 184-94; see also Donald J. Boudreaux & A.C. Pritchard, *The Price of Prohibition*, 36 ARIZ. L. REV. 1, 7-10 (1994) (observing that Prohibition was repealed as a result of dissatisfaction with Prohibition and a desire to increase government tax revenues in response to the Depression); Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, REGULATION, May-June 1983, at 12, 13 (noting that devout Christians and makers of bootleg whiskey share an interest in limiting the sale of liquor).

interjurisdictional (borrowing from the case law of other states or the federal courts). The historical record suggests that such copying is more widespread among legislatures than it is among other sources of tradition.³¹⁷

The legislative process is marked by a high degree of "copying," as state legislatures look to other states as models for legislation, often with minimal independent debate or study. To the extent that such copying occurs, the advantage of many states deliberating independently disappears. State legislatures are not acting independently, but following one "lead" state (or a few lead states), thereby ignoring their own information and simply perpetuating the initial rule through a process of "herd" behavior.³¹⁸ Indeed, a political entrepreneur can be expected to recognize that an opportunity exists to reproduce rent-seeking legislation for similar interests in his own state.³¹⁹ The problem of copying is exacerbated when so-called "uniform laws" (such as the Uniform Commercial Code) prevail, as uniformity in design, implementation, and application is the express purpose of such acts.³²⁰ Recent evidence indicates that the independent bodies constructed to draft such laws are subject to the same special interest pressures and distortions as ordinary legislative bodies.³²¹

317. Admittedly, this conclusion is intuitive, rather than empirical. The difficulty of distinguishing rote copying from spontaneous uniformity is illustrated by Justice Scalia's observation in *Burson* that it is "noteworthy" that most of the statutes banning election-day speech near the polling place specified the same distance of 100 feet. See *Burson v. Freeman*, 504 U.S. 191, 215 (1992). The figure of 100 feet could result from rote copying of that distance from another state, or from the states acting largely independently and converging on an optimal answer through a process of spontaneous uniformity. For an argument that tends to support the latter story, see Bruce H. Kobayashi & Larry E. Ribstein, *Evolution and Spontaneous Uniformity: Evidence from the Evolution of the Limited Liability Company*, 34 ECON. INQUIRY 464, 479 (1996).

318. See Kobayashi & Ribstein, *supra* note 317, at 479 (describing "herd" behavior hypothesis and listing cites).

319. See *id.* at 470 (noting that the uniformity of statutory provisions governing limited liability companies may be explained at least in part by the uniform presence of dominant interest groups (in that case, lawyers)). The spread of "mini-Sherman Acts" in the 1880s presents one example of legislatures and special interests "copying" inefficient legislative outcomes from one state to another. See Donald J. Boudreaux et al., *Antitrust Before the Sherman Act*, in THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE 255, 255-56 (Fred S. McChesney & William F. Shughart, II eds., 1995). David Bernstein has similarly documented the rapid spread of pernicious regulations limiting the ability of homeowners to sell their houses to buyers of a different race, purportedly for the facially neutral purpose of maintaining property values. See Bernstein, *supra* note 153, at 798-800.

320. See U.C.C. § 1-102(2)(c) (1995) (stating that one of the purposes of the U.C.C. is to "make uniform the law among the various jurisdictions").

321. See Alan Schwartz & Robert E. Scott, *The Political Economy of Private*

The error implicit in relying on legislative traditions as a guide to constitutional interpretation is demonstrated by several examples of legislative traditions that are frequently and improperly invoked to criticize tradition generally. Reliance on tradition is said to be misplaced because it gives no criteria for distinguishing socially desirable from baneful traditions. David Luban, for example, argues:

[R]acial segregation was a multigenerational project that depended for its survival on the next generation pitching in to preserve it; yet it had no value, or rather, negative value. A traditionalist would be hard-pressed to explain why anyone should regard Jim Crow as an achievement imposing on us "the burdens of a trust that cannot be escaped."³²²

Similarly, Michael Moore has observed that "[s]o-called 'sunset laws' were in force when [he] grew up in Oregon in the 1950s, under which all black people had to be out of town by sunset."³²³ He has noted that "[s]urely we should judge these to be wrong traditions; surely individual reason can and should stand against them no matter how revolutionary doing so might seem to be."³²⁴

Luban and Moore are right: The traditions of Jim Crow, "sunset laws," and mandatory school segregation should be condemned and rejected. The critical point here is that all of these traditions derive from *statutes*. They are *legislative* enactments that illustrate the peril of relying on legislative traditions for guidance and wisdom—legislative traditions tend to reflect the will and preferences of naked majorities united in their oppression of weaker minorities. Indeed, it is striking that in *Dred Scott v. Sandford*,³²⁵ in contrast to the legislative traditions relied on by Justice Taney in his majority opinion,³²⁶ both Justice McLean and Justice Curtis writing in dissent concluded that under the common law the Court would have had jurisdiction to hear Scott's claim.³²⁷ Moreover, at least some of the Framers of the Fourteenth Amendment believed that the common law prohibited discrimination in public accommodations, such as

Legislatures, 143 U. PA. L. REV. 595, 650-52 (1995).

322. Luban, *supra* note 13, at 1056-57 (quoting Kronman, *supra* note 146, at 1055); see also Strauss, *supra* note 18, at 1712 (noting that "[s]egregation was a tradition of long standing").

323. Moore, *supra* note 16, at 269.

324. *Id.*

325. 60 U.S. (19 How.) 393 (1857).

326. See *id.* at 408-09, 412-17.

327. Justices McLean and Curtis both argued that the common law incorporated principles of international law which would have given the Court jurisdiction to hear the case. See *id.* at 556, 595 (McLean & Curtis, JJ., dissenting).

inns.³²⁸ Thus, lumping legislative tradition together with common-law tradition grossly distorts the utility of tradition in constitutional interpretation.

Regulations intended to harm minorities (whether racial or otherwise) can often be sustained *only* through legislation, in that most common-law rules can be "contracted around," allowing the parties to opt-out of the dominant legal rule.³²⁹ Legislation, on the other hand, creates a uniform rule binding on all regardless of whether they personally support the rule.³³⁰ Indeed, imposing uniform rules is usually the very purpose of legislation.³³¹ Thus, legislative traditions are inconsistent with unanimity-reinforcing principles and constitutional efficiency.³³²

We do not claim that all legislative outcomes are driven only by the public choice pressures described. And, it may be possible to isolate certain factors about legislation that make it possible to distinguish public-regarding legislation from the vast bulk of special-interest legislation that marks the modern state.³³³ These exceptions do not, however, change the central insight—that legislation at best aims only to achieve a majoritarian outcome, and at worst merely reflects the triumph of minority special-interests. Thus, legislative

328. See Yoo, *supra* note 233, at 1029-30 (noting Senator Sherman's remarks). Senator Sherman believed that the Ninth Amendment incorporated the common law into the federal Constitution, an idea that is discussed further *infra*, notes 407-12 and accompanying text. Yoo further argues that this common law principle (as embodied in the Ninth Amendment) would also have provided more persuasive justification for the Supreme Court's decision in *Bolling v. Sharpe*, 347 U.S. 497 (1954), which prohibited the federal government from maintaining segregated schools in the District of Columbia. See *id.* at 500.

329. For instance, prior to the Jim Crow Era, the combination of competitive market pressures and strict enforcement of common-law principles was eroding support for segregated streetcars and trains. This trend towards integration was stopped only through the passage of legislation that required segregation. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 99-103 (1992); Bernstein, *supra* note 153, at 821-28; Jennifer Roback, *The Political Economy of Segregation: The Case of Segregated Streetcars*, 46 J. ECON. HIST. 893 (1986) (discussing segregation laws, using segregation of municipal streetcars as a case study).

330. See Staaf & Yandle, *supra* note 164, at 254-56.

331. For instance, parties are not allowed to contract around the minimum wage laws or environmental protection laws, even when there are no externalities imposed on third-parties. See Zywicki, *supra* note 162, at 998.

332. Burke himself recognized that tradition can be a useful counterweight to democracy's tendency towards the oppression of minorities. See BURKE, *supra* note 6, at 125-26; BICKEL, *MORALITY OF CONSENT*, *supra* note 171, at 16-17.

333. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1513-20 (1987); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 295-319 (1988).

tradition is fundamentally incompatible with the unanimity principle that underlies constitutionalism, and Justice Scalia is simply incorrect to conclude that a long tradition of legislation establishes a "presumption of constitutionality" and evidence of deep-seated support for those policies. Principles of separation of powers may require courts to defer to the legislature for policy-making decisions, but there is simply no reason to elevate a long-standing tradition of legislative activity to constitutional status.

D. Souter's "Common-Law" Model of Tradition

1. The Supreme Court Is Not a Common-Law Court

On its face, Justice Souter's common-law theory of tradition has more appeal than Justice Scalia's theory. Justice Souter's theory is premised on the development of precedent over time in a manner that *appears* to use spontaneous order legal principles, especially the common law. In Souter's common-law theory of tradition, the Supreme Court is charged with defining constitutional rights.³³⁴ The Supreme Court acts as a common-law court, seeking to find legal rights in prior Court precedent, allowing the Constitution to evolve over time. Souter appears to believe that this method of decisionmaking merely extends common law methods to constitutional decisionmaking.³³⁵

We disagree. The superficial similarity of Souter's approach to the common law does not give it the common law's efficiency. Souter retains the form of spontaneous order law without its substance. Despite its reliance on some of the common law's features, Souter's theory of tradition shares many of the flaws of Justice Scalia's theory. In particular, Souter's theory assumes the premise of legal positivism, but merely replaces legislatures with the Supreme Court as sovereign.³³⁶ He agrees with the positivists that judges should be empowered to make new law, rather than simply finding law in the norms and expectations of the community. Unlike the classical

334. See *supra* notes 113-28 and accompanying text.

335. See *supra* Part I.D. (discussing Souter's theory of tradition).

336. Thus, Professor Strauss misses the mark in attempting to distinguish his "common law constitutionalism" from legal positivism, and in arguing that his model rejects the "command theory" of law. Strauss, *supra* note 132, at 884; see also *id.* at 887 ("My argument is that no version of a command theory, however refined, can account for our constitutional practices. Constitutional law in the United States today represents a flowering of the common law tradition and an implicit rejection of any command theory."); *id.* at 879 (distinguishing between the "common law approach" and "textualism").

common law, however, Souter makes no pretense of actually finding the law in the evolved norms and customs of the community. Indeed, the Court generally has disdained community support for its declarations.³³⁷ Souter's theory implicitly follows Justice Charles Evans Hughes in believing that the Constitution means only what prior Courts and current Justices say it means.³³⁸

For Souter, judicial authority derives from consistency with prior Supreme Court precedent. Precedent, however, is not coextensive with tradition. As David Strauss observes, "Precedent overlaps tradition; it is not subsumed by it."³³⁹ In other words, tradition provides a set of norms guiding individual expectations of appropriate behavior. Judicial precedent is one of many sources of norms that generate individual expectations. Precedent cannot be *presumed* to help form expectations simply because it exists.³⁴⁰ Only if a "judicial precedent has been followed on many occasions, has become widely accepted by society, and has created a web of institutions dependent on it," should it be "honor[ed]" as precedent.³⁴¹ Thus, precedent should be honored only when it becomes part of tradition—that is, when a societal *consensus* recognizes the precedent and gives rise to individual expectations that it will be recognized. By contrast, when the precedent "is relatively recent and has not met widespread acceptance," then precedent can be repudiated, "especially if the precedent itself overturned a widespread practice."³⁴² Precedent should yield when it "go[es] too much against the grain of the forces of spontaneous

337. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 867 (1992) (joint opinion of Souter, Kennedy & O'Connor, JJ.) (arguing that the Supreme Court should refuse to overrule unpopular precedent because to do so would "demonstrate" that the Court was improperly "surrender[ing] to political pressure," which would "subvert the Court's legitimacy beyond any serious question").

338. See Charles Evans Hughes, Speech at Elmira, New York (May 3, 1907), in *BARTLETT'S FAMILIAR QUOTATIONS* 586 (Justin Kaplan ed., 16th ed. 1992).

339. Strauss, *supra* note 18, at 1706; see also ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 69 (1991) (arguing that "[r]eported cases are but the tip of the legal iceberg"); Gordon, *supra* note 190, at 460 ("[L]aw is one order amid a plurality of normative orders, a rival of local law and custom."). But see Kronman, *supra* note 146, at 1044 (suggesting that precedent is tradition).

340. See Strauss, *supra* note 18, at 1706 ("Some precedents may be said to be part of a tradition. But not all are. Some are simply the decisions of a group of judges rendered a few years ago.").

341. *Id.*

342. *Id.* Strauss notes that for a Burkean, "[t]radition is venerated," but he also states that "[p]rior decisions per se, however, do not have the same claim. That is because they may reflect just the abstract theories of individual judges, rather than the hard-won lessons of years of experience. Especially when those decisions overturned traditional practices, judges should not hesitate to disregard them." *Id.* at 1708.

order.”³⁴³

The original purpose of the common-law doctrine of stare decisis reflects the fact that tradition creates precedent, *not* the other way around. The initial purpose of stare decisis was not merely to ensure predictability and uniformity of decisions.³⁴⁴ Rather, stare decisis showed that because several courts reached similar outcomes, a certain view “stood as the considered opinion of the community of all classes”³⁴⁵ and generally was accepted as a wise and reasonable rule.³⁴⁶ Thus, stare decisis was intended to demonstrate—through ancient and repeated invocation—that a particular principle represented the consensus of the community.³⁴⁷ Souter turns the historic conception of precedent on its head by assuming that precedent creates tradition. Souter’s positivist common law, like Scalia’s legislative tradition, is a top-down process, with the Supreme Court replacing the legislature as the sovereign lawmaker.³⁴⁸

343. ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, CO-OPERATION, AND WELFARE* 5 (1986).

344. Compare POSTEMA, *supra* note 204, at 194-95 (noting that the common-law judge was not “bound to any past articulation of that law, never absolutely bound to follow a previous decision, and always free to test it against his tradition-shaped judgment of its reasonableness” because according to “Common Law theory, established law rests on and derives its authority from a shared sense of its reasonableness”), with *id.* at 196 (“The doctrine of expectations underlies Bentham’s call for strict adherence to precedent.”).

345. Donald Lutz, *Political Participation in Eighteenth Century America*, in TOWARD A USABLE PAST, *supra* note 254, at 19, 34.

346. See POCOCK, *supra* note 179, at 213.

347. Leoni observes that “all common-law systems probably were and are based on the principle of precedent,” and precedent as the generally accepted principle of the community must be distinguished from the principle of “binding precedent in the common-law systems of the Anglo-Saxon countries at the present time.” LEONI, *supra* note 193, at 180; see also N. Stephan Kinsella, *Legislation and the Discovery of Law in a Free Society*, 11 J. LIBERTARIAN STUD. 132, 145 (1995) (discussing how under the common law at the time of Blackstone, court decisions were not “absolutely binding”); Posner, *supra*, note 268, at 584 (describing how “Blackstone was not a slavish adherent of the principal of stare decisis”); Gordon Tullock, *Courts as Legislatures*, in LIBERTY AND THE RULE OF LAW 132, 142 (Robert L. Cunningham ed., 1979) (discussing how at the time of Blackstone, “an individual decision was not binding on future courts”).

348. Leoni anticipated that the existence of a supreme court with authority to bind lower courts would encourage practices that mirrored those of a legislature. See LEONI, *supra* note 193, at 180. Leoni observes:

[J]udiciary law may undergo some deviations the effect of which may be the reintroduction of the legislative process under a judiciary guise. This tends to happen first of all when supreme courts are entitled to have the last word in the resolution of cases that have already been examined by inferior courts and when, moreover, the supreme courts’ decisions are taken as binding precedents for any similar decisions on the part of all other judges in the future. Whenever this happens, the position of members of the supreme courts is somewhat similar to that of legislators.

Id. Leoni adds that, although similar, supreme court and legislative lawmaking are “by no

Souter's theory also is flawed in looking to the Supreme Court as a tradition-generating institution. Souter's model of tradition centralizes decisionmaking authority in the hands of the Supreme Court, rather than diffusing that authority like the traditional common law, an authentically spontaneous legal order.³⁴⁹ Moreover, many of the precedents on which Souter's theory would rely have very shallow roots.³⁵⁰ As the product of centralized decisionmaking over a short period of time, Supreme Court precedent and traditions are not sufficiently decentralized, nor have they been sufficiently tested, to be reliable evidence of rules appropriate for constitutional incorporation as precommitments and devices for reducing agency costs.³⁵¹

Moreover, by looking to its own cases as the sole source of constitutional principles, the Supreme Court is confronted by crippling problems of path-dependence.³⁵² Because any one decision by the Supreme Court will bind future courts, path dependency creates an incentive for special-interests to attempt to manipulate the Supreme Court's agenda to force the Court to hear the cases most favorable to their positions.³⁵³ Because there is no way for evolving

means identical," but the distinctions are practical ones not relevant to the current discussion. *Id.* at 180-81; see also *id.* at 24 ("[L]awyers' law or the judiciary law may tend to acquire the characteristics of legislation, including its undesirable ones, whenever jurists or judges are entitled to decide ultimately on a case.").

349. Thus, Professor Strauss is incorrect in arguing that the "common law method has a centuries-long record of restraining judges." Strauss, *supra* note 132, at 927. Professor Strauss's observation fails to appreciate that the common law's decentralized structure and its need to reflect the values and expectations of the community constrained common law judges to follow precedent. See Zywicki, *supra* note 207, at 357-58 (criticizing the use of the common-law form divorced from substance and structure of the common-law system).

350. For example, *Roe v. Wade*, 410 U.S. 113 (1973), found its roots in a decision—*Griswold v. Connecticut*, 381 U.S. 479 (1965)—not 10 years old when the Supreme Court decided *Roe*.

351. It may be argued that sufficient decentralization is provided by the circuit courts in the federal system who are also in the business of construing the federal Constitution, as well as federal district courts. Although the existence of these other courts might appear to guarantee a sufficient level of decentralization, this appearance is deceiving. These courts are subordinate to the Supreme Court; thus, their decisions will generally represent an attempt to apply the Supreme Court's interpretation of the Constitution, rather than the consensus of the lower courts, which the Supreme Court ignores when it suits its purposes.

352. See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 817-21 (1982).

353. See Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1329-50 (1995) (arguing that the problem created by adherence to precedent is not path dependency, but primarily path manipulation). Professor Stearns notes that both the standing and certiorari powers provide the Supreme

social norms to enter this sealed system of "tradition," except through ad hoc and disingenuous abandonment of legal principle,³⁵⁴ the Supreme Court runs the danger of becoming path-dependent with respect to its precedent. A spontaneous order legal system, by contrast, looks to community norms and expectations for its legal principles, and consequently will usually be self-correcting.³⁵⁵ Thus, it will be much more likely faithfully to reflect the ongoing evolution of community values and expectations.³⁵⁶

In the long run, Supreme Court justices commit the same error as legislatures: They believe that they can *create* social consensus by force of law when there is no such preexisting consensus.³⁵⁷ Souter's perspective mirrors Scalia's: Law is *made* (either by a legislature or the Supreme Court), not *found* in society. Because the Supreme Court sits at the top of a hierarchical pyramid of courts, and its constitutional interpretations trump legislative enactments, the Court can act as if it were a legislature and *make* law.³⁵⁸ Both Souter and Scalia are positivists; they differ only on the locus of lawmaking authority.

Court with mechanisms to mitigate the threat of agenda-manipulation by special interests. *See id.* at 819.

354. *See* Scalia, *supra* note 23, at 45 ("What is it that the judge must consult to determine when, and in what direction, evolution has occurred? Is it the will of the majority, discerned from newspapers, radio talk shows, public opinion polls, and chats at the country club?").

355. *See* Parisi, *supra* note 170, at 213-16.

356. *See* LEONI, *supra* note 193, at 143 (noting that the common law "is always changing, although slowly and in a rather clandestine way").

357. *Cf.* *Planned Parenthood v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting in part) (noting President Buchanan's belief that the issue of slavery in the territories would be "'speedily and finally settled'" by the Supreme Court in *Dred Scott v. Sanford*, 60 U.S. (19 How.) at 393 (1857) (quoting from INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. DOC. NO. 100-10, at 126 (1989))); *Dred Scott*, 60 U.S. (19 How.) 393 (purporting to resolve national conflict over slavery). *Compare Casey*, 505 U.S. at 866-67 (stating that in *Roe v. Wade* the Court was able to "resolve" the "intensely divisive controversy" of abortion rights and to call upon the "contending sides of [the] national controversy to end their national division by accepting a common mandate rooted in the Constitution"), *with id.* at 995 (Scalia, J., dissenting in part) ("Not only did *Roe* not, as the Court suggests, *resolve* the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve.").

358. *See* LEONI, *supra* note 193, at 180. Leoni states that because "both the legislators and judges of supreme courts perform the task of keeping the legal system on some kind of rails," both groups "may be in a position to impose their own personal will upon a great number of dissenters." *Id.* Scalia notes that this form of common law is especially dangerous in that it is "infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures." Scalia, *supra* note 23, at 38.

2. Agency Costs and Rent-Seeking Through the Supreme Court

As a centralized decisionmaker, the Supreme Court is the target of the same interest-group rent-seeking that plagues legislatures.³⁵⁹ Interest groups who are unable to prevail in the political process will instead pursue their agendas through the courts.³⁶⁰ Interest groups attempt to influence the judiciary's interpretation of the Constitution in two ways: (1) by litigating constitutional claims for the benefit of their members; and (2) by influencing the selection of judges.

Article III of the Constitution insulates federal judges from many of the interest group influences that determine the behavior of members of the legislative and executive branches.³⁶¹ Federal judges have life tenure; unlike elected officials, they are not dependent upon interest groups for money and votes.³⁶² Judges are instead free to maximize their interests by balancing among three goods: (1) ideological voting; (2) their reputation and status; and (3) the power of the judiciary.³⁶³ Interest groups maximize their interests by appealing to these three judicial incentives. Like other voters, judges can vote ideologically in deciding cases at low cost to themselves.³⁶⁴

359. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 35, 80-81 (1991) (noting that both judges and legislators will be subject to pressures from groups pursuing their interests).

360. See Antonin Scalia, *Economic Affairs as Human Affairs*, in ECONOMIC LIBERTIES AND THE JUDICIARY, *supra* note 197, at 31, 34 (James A. Dorn & Henry G. Manne eds., 1987). Scalia notes that some interest groups view the courts "as an alternate legislature, whose charge differs from that of the ordinary legislature in the respect that while the latter may enact into law good ideas, the former may enact into law only unquestionably good ideas, which, since they are so unquestionably good, must be part of the Constitution." *Id.*

361. See generally Donald J. Boudreaux & A.C. Pritchard, *Reassessing the Role of the Independent Judiciary in Enforcing Interest-Group Bargains*, 5 CONST. POL. ECON. 1 (1994) (discussing the independent judiciary and concluding that the framers believed this design would serve the long-term public interest).

362. There are also stringent restrictions on their ability to earn outside income. See RICHARD A. POSNER, *OVERCOMING LAW* 137-38 (1996).

363. Cf. *id.* at 117-23 (listing popularity, prestige, the public interest, reputation, and voting as components of judicial utility); see also Richard L. Hasen, "High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act, 75 N.C. L. REV. 1305, 1330-34 (1997) (discussing Posner's model of the judicial utility function).

364. See Boudreaux & Pritchard, *supra* note 361, at 14 ("Judges with lifetime tenure hold the quintessential 'safe seats.' Therefore, Article III judges are more likely to vote ideologically than are elected judges or legislators. In fact, we can fairly say that judges with lifetime tenure are the paragon ideological voters."); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 562 (1989) (arguing that Supreme Court justices "are free to use whatever doctrines fit their own preferences"); see also Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1642-55

Interest groups who have little to offer elected representatives may find appeal to judges' ideological interests to be a superior method for advancing their interests.

Judges' ideological voting is constrained primarily by their concern for reputation.³⁶⁵ There is an emerging, albeit still embryonic, economics literature that models status as an economic good.³⁶⁶ In the specialized field of law, judges look first to other lawyers (including academics and other judges, as well as practitioners) for feedback on their performance.³⁶⁷ Because judges are all drawn from the general category of "lawyers," we can plausibly assume that lawyers will likely be a status group that judges consider in deciding cases. If a judge's ideological position meshes with the ideological profile of that group to whom the judge looks most earnestly for approval, then this judge has considerable latitude to rule according to her ideology. If lawyers as a group have any coherent ideology, judges will be inclined to decide cases in accordance with that ideology. Assuming that lawyers favor decisions furthering their financial self-interest, rulings that create greater pecuniary opportunities for lawyers will be widely approved by lawyers. Self-interest creates a general bias in the legal profession toward laws governing a large range of human activity, which is likely to correlate with more litigation and more demand for legal counseling on methods to evade those rules.³⁶⁸ Beyond financial

(1998) (discussing the evolution of models of judicial preferences). *But see* Hasen, *supra* note 363, at 1335 (concluding that "most judges can vote their values, that is, act independently, most of the time, whether they are elected or appointed" and noting that on rare occasions "a high-salience case will lead a trial court judge subject to reelection or reappointment to deviate from voting her values in order to curry favor with voters or the appointing authorities").

365. See Richard A. Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253, 273 (1980). Epstein observes:

Few institutional constraints prevent judges from consciously asserting their values into the course of the decision-making process, especially if public policy is a proper subject of judicial concerns. Ideology does not dominate all judges and all times, but often it asserts itself in precisely those bedrock cases that mark a major departure from established principle.

Id.

366. See, e.g., Philip R. P. Coelho, *An Examination into the Causes of Economic Growth: Status as an Economic Good*, 7 RES. L. & ECON. 89 (1985).

367. See POSNER, *supra* note 362, at 119 ("[A] potentially significant element in the judicial utility function is reputation, both with other judges, especially ones on the same court—one's colleagues (and here reputation merges with popularity)—and with the legal profession at large.").

368. See Laurence A. Silberman, *The American Bar Association and Judicial Nominations*, 59 GEO. WASH. L. REV. 1092, 1095 (1991) ("Because the fortunes of lawyers as a class, and particularly litigating lawyers, tend to wax at a time of rising, not

interest, lawyers will also favor more legal rules because these rules validate the importance of their chosen career.

Lawyers will also tend to support rules of greater complexity and vagueness because they will be able to externalize the effective costs of those rules. Thus, whereas the public benefits from fewer and simpler rules,³⁶⁹ lawyers benefit from an increase in the number and complexity of legal rules.³⁷⁰ As a result, the cost of providing this benefit to lawyers will be borne by the dispersed public. There is no effective mechanism for bringing lawyers' incentives into alignment with the public interest. For these reasons, lawyers—and judges—are

declining, judicial power, it is not surprising that there were numerous conflicts between the ABA and the Reagan DOJ."). This may also help to explain the Supreme Court's preference for open-ended "balancing tests," which will tend to spawn more litigation than do bright-line rules. Indeed, some commentators have observed that the institution of judicial review itself gives lawyers disproportionate power in shaping society. See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 358 n.5 (1989) ("[J]udicial review greatly increases the power of certain lawyers, and indirectly of the legal profession, over the shaping of the American constitutional and political system and its public policies. Thus the power of judicial review nicely serves the corporate interests of the legal profession."). It should be noted that the legislative process is also subject to a pro-lawyer bias; lawyers are disproportionately powerful in the process of lobbying for and drafting legislation, as well as the subsequent regulations that interpret that legislation. Of course, many state legislators are also lawyers, often practicing law contemporaneously with their legislative duties. They also often return to legal practice after service in the state legislature. See POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT 79-100 (Robert E. McCormick & Robert D. Tollison eds., 1981) (observing that lawyers supply a larger number of state legislators than any other occupation, and concluding that this is because the opportunity cost for lawyers of serving in state legislatures is lower than for members of other occupations because as legislators they have disproportionate ability to supplement legislative income with current and future income as practicing lawyers). As a result, legislators have an incentive to transfer wealth to lawyers generally, but also to maximize the complexity of the rules they draft so that their services will be in demand when they return to the private sector. See Michelle J. White, *Legal Complexity and Lawyers' Benefit from Litigation*, 12 INT'L REV. L. & ECON. 381, 394-96 (1992). Indeed, because legislators often "sell" particular legislative provisions in return for political donations, they will make those rules highly complex so as to require frequent rewriting and to tailor their reach to the intended party. See *id.*

369. See Todd J. Zywicki, *Epstein and Polanyi on Simple Rules, Complex Systems, and Decentralization*, 9 CONST. POL. ECON. 143 (1998).

370. See RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 1-17 (1995). Michelle White has argued that lawyers will prefer an "intermediate" level of complexity for legal rules, as overly complex rules will lead to a reduction in the number of cases filed and increased settlement rates. See White, *supra* note 368, at 381. Professor White's conclusions are theoretical, not empirical; thus, she does not identify the "intermediate" point at which diminishing marginal returns to complexity begin. Nor does she indicate whether this point has ever been reached in practice, although one supposes it to be at a very high level. Her conclusion does not undermine our point, which is that the privately optimal level of complexity for lawyers is likely to be greater than the socially optimal level.

likely to be biased toward more legal rules in their ideological worldview, at the expense of private ordering.

The vagueness of many constitutional provisions invites the "common-law" style of adjudication espoused by Souter. The demand for legal services is likely to be greatest when judges afford themselves the greatest discretion, as Souter's theory does.³⁷¹ Consequently, Souter's open-ended approach to constitutional interpretation enhances judges' status with their fellow lawyers.

Numerous commentators have also observed that the Supreme Court reflects the biases and values of the Justices themselves.³⁷² In recent decades, the dominant social values of the elite have become more intellectual and less commercial in nature.³⁷³ Consequently, the Court has reflected the values of this social class, as the Justices are largely drawn from the elite.³⁷⁴ As Thomas Baker has observed, "The Justices have been shaped by our culture. They are creatures of their caste. These are people of above-average intelligence, narrowed by education, and isolated by their professional experience, ruling based on their fuzzy notions of the moral zeitgeist."³⁷⁵ Souter's theory would entrust the interpretation of the Constitution to this cloistered

371. See Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 274 (1974).

372. See, e.g., BORK, *supra* note 78, at 8-9, 16-17.

373. Cf. Scalia, *supra* note 360, at 36 (describing "the courts' long retirement from the field of constitutional economics").

374. See *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn."); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 399 (1988) ("Elite American judges generally absorb the thinking of elite American intellectuals, although often there is a time lag between intellectual offer and judicial acceptance."). While an in-depth discussion goes well beyond the scope of this project, personal biases may also explain the disparate treatment afforded economic versus political or so-called "civil" rights during the post-New Deal Era, as it is difficult to argue that some forms of individual self-expression are inherently superior to others, see Scalia, *supra* note 360, at 31-32, or that there is a utilitarian justification for this differential treatment, see Jonathan R. Macey, *Some Causes and Consequences of the Bifurcated Treatment of Economic Rights and "Other" Rights Under the United States Constitution*, in *ECONOMIC RIGHTS* 141, 146 (Ellen Frankel Paul et al. eds., 1992).

375. Thomas E. Baker, *Bob Borks Amerika*, 44 UCLA L. REV. 1185, 1199 (1997). In fact, Professor Baker observes that "in their attitudes and outlooks, the judging class most resembles the professorate," and that, in fact, almost a majority of the current Supreme Court "were law professors before being reincarnated as judges." *Id.*; see also JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 346-52 (1994) (noting that Powell's support for *Roe v. Wade* was not surprising in that Powell "was a well-educated, non-Catholic, upper-class male" who believed that the forces of history made widespread popular support for abortion inevitable).

and unrepresentative group of scholars;³⁷⁶ there is simply no reason to believe that the values they articulate as constitutional law reflect the consensus opinion of society.³⁷⁷

Judges will also be interested in enhancing the power of the judiciary.³⁷⁸ Insofar as judges value power over others, they may rule in ways that expand judicial influence over greater numbers of individuals. The power of the judiciary has two aspects: (1) judicial power relative to the executive and legislative power;³⁷⁹ and (2) judicial power over the conduct of ordinary citizens. The judiciary enhances its power relative to the executive and legislature by promulgating constitutional doctrines. Souter's open-ended theory allows the judiciary great discretion in enhancing its own power relative to the elected branches through the promulgation of constitutional doctrines. The judiciary enhances its own power over ordinary citizens by ignoring the limited grant of federal power in the Constitution (for example, the Commerce Clause, the Necessary and Proper Clause).³⁸⁰ Ignoring these limitations has vastly increased the federal government's power relative to the states; federal judges have garnered their share of that increased power through an ever-increasing number of statutes to interpret in accordance with their own policy views. Greater federal power allows federal judges more opportunities to leave their mark on society.

376. For instance, it has been reported that Justice Powell believed that he "had never known a homosexual." JEFFRIES, *supra* note 375, at 528. This revelation is especially surprising given Powell's many varied experiences and wide travel during his life, as well as his long and active career as a practicing attorney and leader of the national bar. This revelation also suggests that other Justices with less diverse backgrounds than Justice Powell may suffer from even greater insularity.

377. Thus, it is somewhat puzzling for Professor Strauss to ask what use "we" are to make of tradition, as "we" have no input into Supreme Court decisionmaking. See Strauss, *supra* note 132, at 895. In his model, all that matters is what a majority of the Supreme Court attributes to the constitutional tradition. As Frank Michelman observes, "[t]o be precise, we do not write the story [of American constitutional law] unless we happen to be justices." Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1531 (1988).

378. See POSNER, *supra* note 168, at 583 (arguing that judges are animated by a desire to "impose their policy preferences on society"); POSNER, *supra* note 362, at 120-22.

379. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (declaring the Supreme Court to be the final arbiter of the Constitution); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (same).

380. See Zywicki, *Shell and Husk*, *supra* note 157, at 228 (noting the Supreme Court's "inherent conflict-of-interest in enforcing federalism"). It may be protested that recent cases such as *United States v. Lopez*, 514 U.S. 549 (1995), suggest a more aggressive attitude on the part of the Supreme Court in enforcing federalism. Closer examination, however, reveals these limits to be largely toothless. See Zywicki, *Shell and Husk*, *supra* note 157, at 212.

Interest groups seeking rents through the judiciary will appeal to judges' interest in status, power, and ideological voting, rather than pecuniary gains or political support. Influence on the judiciary can take a variety of forms, such as submitting amicus curiae briefs in pending cases, becoming litigants in test cases, and organizing protesters to march in front of courthouses.³⁸¹ In addition, interest groups may write or sponsor influential scholarly works or op-ed pieces designed to influence the way justices and other judges approach and decide legal questions.³⁸² Interest groups are unlikely to invest resources in such efforts merely to serve the cause of justice—they expect tangible returns on their investments. The large number of amicus briefs filed in some cases suggests that something other than assistance in legal analysis is being offered. More plausibly, interests groups use amicus briefs to signal their preferences to judges,³⁸³ and, consequently, signal to judges how a decision can enhance the judges' status with that group.³⁸⁴

Money will be of only limited utility in efforts aimed at influencing the judiciary. Of course, money can be used to purchase high quality legal representation, but the structure of appellate litigation (where rules governing large segments of society are made) places important limits on the marginal benefit of money to an interest group.³⁸⁵ There is only one appellate brief to be written, one oral argument to be made, and even the wealthiest interest group will quickly find itself reaching the point of diminishing marginal returns.

381. In his concurring opinion in *Webster*, Justice Scalia specifically remarked on the political activity designed to influence the Court's decision in that case. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 535 (1989) (Scalia, J., concurring); see also BORK, *supra* note 78, at 3 (describing the annual rallies held in front of the Supreme Court by forces supporting and opposing the Court's decision in *Roe v. Wade*).

382. See, e.g., JACK W. PELTASON, *FEDERAL COURTS IN THE POLITICAL PROCESS* 52 (1955) (noting that the NAACP used law review articles as part of its overall litigation strategy to bring an end to racial segregation).

383. See Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1121-22 (1988) (finding that the number of amicus briefs filed when the U.S. Supreme Court is deciding whether or not to grant certiorari is positively correlated with the probability that the Court will grant certiorari).

384. The law review articles discussed above, praising expansive interpretations of the Constitution and criticizing Scalia, signal to other justices and judges how they can enhance their status with academic lawyers.

385. See Friedman, *supra* note 284, at 661 ("For organized groups with limited resources concerned with societal change, courts are a logical place to turn. As compared with trying to force change in the legislative arena, courts are relatively accessible. Judicial actions require far fewer resources than legislative challenges. Inertia is more easily overcome in the courts."); Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 L. & SOC. INQUIRY 959, 967 (1997).

Interest groups with substantial financial resources will be better served by focusing on the legislature; congressmen always need more money for re-election. Groups that lack money, but which can offer judges opportunities for ideological voting, status enhancement, and increased judicial power, will tend to seek their rents through the judiciary.

For example, criminal defendants benefited greatly from the immense expansion of constitutional criminal procedural rules by the Warren Court. While criminal defendants cannot plausibly be viewed as a coherent interest group, criminal defense attorneys are an effective lobbying force. The Warren Court produced a series of decisions that expanded the demand for criminal defense lawyers and placed the burden on state and local governments to provide for them.³⁸⁶ The amicus briefs filed in these cases are telling. In *Gideon v. Wainwright*,³⁸⁷ for example, amicus briefs were filed by groups representing both defense attorneys and *prosecutors*.³⁸⁸ Prosecutors, of course, often become defense attorneys. More importantly, the demand for prosecutors' services will increase if all defendants are represented by counsel; the state must spend more on prosecutions in order to secure convictions. Prosecutors wanting control over a larger staff and larger budget favor *Gideon's* guarantee of counsel for defendants. The amicus briefs filed in *Gideon* and other cases signaled the Justices that they could enhance their status with members of both sides of the criminal bar. The favorable decisions in these cases expanded the demand for the services of lawyers specializing in criminal law.³⁸⁹

Judges' ability to vote ideologically at low cost will lead interest groups to expend resources sponsoring judicial candidates whose ideologies further those groups' interests and opposing those candidates whose ideologies conflict with the groups' interests.³⁹⁰ Interest groups will be especially concerned with the ideology of life-

386. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (guaranteeing right to counsel whenever there is a possibility of jail time); *Douglas v. California*, 372 U.S. 353, 357-58 (1963) (guaranteeing right to counsel on criminal appeal); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (guaranteeing right to counsel at trial in felony cases).

387. 372 U.S. 335 (1963).

388. See ANTHONY LEWIS, *GIDEON'S TRUMPET* 144-50 (1966) (describing the amicus brief in *Gideon* filed by the attorneys general of 23 states).

389. *Douglas*, at least, appears to benefit primarily lawyers. See A.C. Pritchard, *Auctioning Justice: Legal and Market Mechanisms for Allocating Criminal Appellate Counsel*, 34 AM. CRIM. L. REV. 1161, 1163-69 (1997).

390. See BORK, *supra* note 78, at 271-349 (describing confirmation hearings on his nomination to the Supreme Court).

tenured judges because ideology may well be the only reliable indicator of how the judge will vote in the future, given the curtailment of other incentives.³⁹¹ As tenure increases, ideology becomes more important as a precommitment device.³⁹² Consequently, the increasingly ideological aspect of the confirmation process for Supreme Court Justices simply reflects the interest group rent-seeking that drives the legislative process expanding to take hold in judicial selection. This interest group influence suggests that judicial traditions centered on Supreme Court decisions are subject to much the same distortions that plague legislative traditions. As a result, Souter's reliance on Supreme Court precedent is unlikely to generate traditions that help identify rules appropriately incorporated as precommitments or as devices for reducing agency costs.

IV. DECENTRALIZED TRADITION IN CONSTITUTIONAL INTERPRETATION—A MODEL

Our analysis of different sources of tradition in Part III suggests that, in general, judges should defer to and rely upon traditions that are the product of ancient and decentralized evolutionary processes: The Supreme Court should "find" rather than "make" the law. In this Part we propose a model that relies on finding constitutional principles in the common law and state constitutional law. When the text, history, and structure of the Constitution fail to provide an answer to a constitutional question, judges would find constitutional principles in the consensus of the common law and state constitutional law for interpretive assistance. The "finding" model would require the Supreme Court to confine itself to the traditional judicial task of *finding* the law as expressed in the customs of the people, rather than the boundless task of creating a constitutional scheme that attempts to capture evolving notions of social justice. Supreme Court Justices would be judges, not "philosopher-kings."³⁹³

391. See POSNER, *supra* note 362, at 130 (noting that the role of ideology in judicial decisionmaking can help explain "the function of confirmation hearings in enabling legislators to ascertain a judicial candidate's policy preferences, since those preferences can be expected to guide or at least influence a judge's decisions").

392. Cf. William R. Dougan & Michael C. Munger, *The Rationality of Ideology*, 32 J.L. & ECON. 119, 120-30 (1989) (finding that Senators (six year terms) are more likely to vote ideologically than Representatives (two year terms)).

393. *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (opinion of Scalia, J.) (noting that "[to reach] a decision supported neither by constitutional text nor by the demonstrable current standards of our citizens" would "replace judges of the law with a committee of philosopher-kings"); see LEARNED HAND, *THE BILL OF RIGHTS* 73-74 (1958).

This finding model is purposefully mechanical. While the finding model would confine the discretion of the Supreme Court in interpreting the Constitution, it would still allow room for constitutional evolution as the common law and state constitutional law evolve. As such, it accommodates the need for constitutional development while minimizing the threat that this freedom will lead to unconstrained judicial creation of constitutional rules.

A. *The Finding Model*

In interpreting the Constitution, when the text and structure of the Constitution, as well as historical practice at the time of the framing, provide a clear answer, that mandate would control because it would most effectively enforce the precommitment made by the Framers and those who ratified their constitutional plan. But when text, structure, and history are ambiguous, the Supreme Court (and the lower federal courts) should look to the tradition found in state court decisions under the common law. State constitutional decisions would also be relevant when state constitutions have a provision analogous to a federal right.³⁹⁴ In this sense, the Supreme Court would be simply reenacting the methods used by the Framers of the Constitution and the Bill of Rights by looking to state constitutions and the common law for the substantive principles of the federal Constitution.³⁹⁵ By choosing among legal sources of tradition on the basis of structural efficiency, the Court could rely on traditions that are consistent with the purposes of constitutionalism.

As discussed above, common law and state constitutional law supply constitutionally efficient traditions. Because legislation is an unreliable source of tradition, statutes passed by the state legislatures and Congress would simply be ignored in determining whether there was a societal consensus.³⁹⁶ Where a consensus of at least a majority

394. Akhil Amar has suggested that state constitutional provisions provide a more reliable indicia of community consensus than legislation. See Akhil Reed Amar, *Foreword: Lord Camden Meets Federalism—Using State Constitutions to Counter Federal Abuses*, 27 RUTGERS L.J. 845, 861 (1996) ("In this tally of state laws, perhaps state constitutions should count for more than mere state statutes or local ordinances, as constitutions represent deeper and more considered judgments of the people themselves.").

395. See *People v. Brisendine*, 531 P.2d 1099, 1113 (Cal. 1975) (en banc), *superseded on other grounds by* CAL. CONST. art. I, § 28(d). In *Brisendine*, the court noted that there was "a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse." *Id.*

396. Statutes that merely codified common-law doctrine could, of course, be

of state courts emerged from the state common-law and constitutional decisions, that consensus would be adopted as the authoritative interpretation of the Constitution. Until a majority consensus emerged, the Court could exercise its discretion to deny certiorari, allowing state courts an opportunity to pass on the issue presented.³⁹⁷ By deferring decision, the Court would provide time for feedback as rules developed; just as importantly, waiting for a majority state court consensus would allow legal rules to percolate from the *bottom up*.

By looking to state court decisions, the Court would be governed by an external rule of decision—albeit one founded in decentralized sources much more closely tied to the customs of the people. Rather than relying on the commands of legislative sovereigns, the Court would rely on state court decisions to serve as a proxy for custom. The Supreme Court, sitting at the top of a hierarchical court system, is in no position to be familiar with the customs of the people, which likely differ from customs inside the Beltway. While these customs may vary by region, that is a strength, not a weakness, of the finding model. Until a majority consensus emerged, the Supreme Court would not impose a constitutional rule on the states. Once a national consensus had emerged, the Supreme Court would bring states that lagged behind into conformity by establishing a constitutional baseline. In looking to state court decisions, the Court would be *finding*, not *making*, constitutional law. In finding the law this way, the Court could rely on the decentralization inherent in our federal system, as well as the unanimity-reinforcing principles that drive state court common-law and constitutional decisions.

As state common law and constitutional law evolved toward the creation of new rights, federal law would follow. When a state-court majority consensus emerged recognizing a right, that consensus would receive uniform federal application. But that uniformity would be imposed only after a national consensus had developed. When the federal judiciary overrode the decisions of state elected leaders, it would be based on the decentralized consensus of state court decisions, not the individual predilections of the Justices. While the Supreme Court could not impose its policy preferences on the nation through constitutional interpretation, criminal defendants, dissidents, and other unpopular groups would have their rights

considered.

397. Lower federal courts would have to do the best they could with the state court decisions available at the time of decision.

enumerated in the Constitution protected (at both the state and federal level) from erosion by legislatures. Again, this approach simply adds a dynamic element to the method used by the Framers of the Constitution and the Bill of Rights.

We recognize that there is a latent tension between any form of incorporation of constitutional liberties against the states and maintaining the efficiency benefits of decentralization. Imposing the state consensus on the *federal* government can be justified as supplementing the limitation on federal power inherent in the doctrine of enumerated powers. Limiting the federal government to only those powers enumerated in the Constitution has proved largely ineffective as a constraint on government expansion; additional constraints would seem justified as a means of furthering that original intent. Less obvious is the need to impose similar constraints on state power. As an original matter, our federal system recognized that states would vary in the protections they gave to individual rights.³⁹⁸ That diversity is part of the genius of federalism, which allows for the efficiency-enhancing decentralization that produces the unanimity-reinforcing traditions found in the common law and state constitutions.³⁹⁹

Notwithstanding our recognition of the efficiency benefits of decentralization, we believe that the text and history surrounding the Fourteenth Amendment provide a fairly strong textual command requiring incorporation of the Bill of Rights against the states. Such incorporation flows most naturally from the Fourteenth Amendment's Privileges and Immunities Clause.⁴⁰⁰ Most commentators agree this clause is the appropriate textual basis for the incorporation doctrine,⁴⁰¹ despite the Supreme Court's contrary conclusion in the *Slaughter-House Cases*.⁴⁰² The Fourteenth

398. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (stating that the Bill of Rights does not apply to the states).

399. Cf. Nelson Lund, *Federalism and Civil Liberties*, 45 U. KAN. L. REV. 1045, 1046 (1997) (noting that the benefits of the federal structure are that multiple jurisdictions allow citizens to select the jurisdiction with policies closest to their personal tastes); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1498 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)) (discussing competition among jurisdictions as an advantage of our federal system).

400. See U.S. CONST. amend. XIV, § 1.

401. See AMAR, *supra* note 156, at 137-230; MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 56-91 (1986); McConnell, *supra* note 83, at 692.

402. 83 U.S. (16 Wall.) 36, 74-79 (1873) (arguing that the Privileges and Immunities Clause does not incorporate the Bill of Rights).

Amendment was intended to ensure that newly freed black Americans and northern immigrants to the South would enjoy civil rights on the same terms as white Southerners; it was not meant to consolidate local authority in the hands of the federal government.⁴⁰³ Requiring that rights be enjoyed on equal terms is obviously the most important legal change toward achieving that goal; incorporating the first eight amendments against the states is at most a secondary means to that goal. Nonetheless, incorporation arguably strikes an appropriate balance because it guarantees a minimum baseline of freedoms essential to liberty, without unduly constraining the development of other liberties in the states. Under the circumstances prevailing in the southern states at the time of the Reconstruction, an argument could be made that the first eight amendments of the Bill of Rights were essential "privileges and immunities," given the high costs that certain minorities faced at that time in exiting from those jurisdictions. From the perspective of the Fourteenth Amendment's drafters, a state that failed to provide even this constitutional baseline would fall far short of any ideal of constitutional efficiency.

As these rights were derived from a consensus of the common law and state constitutions, the first eight amendments may well be essential precommitments and devices to reduce agency costs even today. At a minimum, it is far from clear that constraining the states in this manner significantly impairs the benefits available from decentralization. The principal cost is reduced experimentation and feedback in the ongoing development of these rights. Once a particular aspect of one of the Bill of Rights is recognized by the federal Supreme Court, state courts are constrained by that interpretation.

This constraint does not mean, however, that rights under our finding regime would be wholly static. As new circumstances affecting those rights emerged, state courts would be free to extend or distinguish prior Supreme Court decisions as they have traditionally done under the common law's approach to precedent. Only when a majority consensus had emerged from the state courts under those new circumstances would the issue be appropriate for the Supreme Court to address. Although a core right previously recognized by the Supreme Court would have to be respected by the state courts, they would have considerable discretion in addressing how those rights were extended, thus ensuring that decentralization

403. See Todd J. Zywicki, *Federal Judicial Review of State Ballot Access Regulations: Escape From the Political Thicket*, 20 T. MARSHALL L. REV. 87, 101-07 (1994).

would still play a role in the development of rights.

Going beyond the baseline of the Bill of Rights, however, to limit state governments in ways not specified by the Constitution's text is not as clearly mandated by the Fourteenth Amendment. While the Fourteenth Amendment might be thought to require wholesale incorporation of the Bill of Rights against the states, there are reasons to reject incorporation of the Ninth Amendment even post-Fourteenth Amendment.⁴⁰⁴ Most obviously, such a drastic shift of power from the states to the federal government would have come as a rude shock to the state governments that ratified the Fourteenth Amendment.⁴⁰⁵ More relevant to our theory, however, is that incorporating rights created by state governments against those same governments would collapse upon itself, freezing common-law and state constitutional rights intended to evolve with social and economic conditions. One of the central virtues of the common law and state constitutional law is their ability to evolve and develop. Freezing those rights as a matter of federal law would substantially erode the benefits of decentralization.

Modern economic conditions also counsel against recognizing unenumerated rights against the states on the same terms as the federal government. Because exit from the United States as a whole would impose substantial costs on any individual, the federal government faces little jurisdictional competition in the provision of rights. But today, those exit costs are reduced substantially for a move from one state to another.⁴⁰⁶ Consequently, states face

404. See U.S. CONST. amend. IX. Given the difficulty of this issue, we offer only very preliminary views. A detailed and illuminating discussion of the arguments both for and against incorporation of Ninth Amendment rights is presented in Professor Massey's book on the Ninth Amendment. See CALVIN R. MASSEY, *SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS* 32-60 (1995). The historic record indicates that while the Framers of the Fourteenth Amendment arguably intended to incorporate the first eight amendments against the states, they "apparently did not intend to incorporate the Ninth and Tenth Amendments." Yoo, *supra* note 233, at 1023-24.

405. Indeed, a similar argument is made by those who oppose incorporation of the Bill of Rights against the states. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 137 (1949) ("Congress would not have attempted such a thing, the country would not have stood for it, the legislatures would not have ratified [it].").

406. See Richard A. Epstein, *Exit Rights Under Federalism*, LAW & CONTEMP. PROBS., Winter 1992, at 147, 149; Zywicki, *Shell and Husk*, *supra* note 157, at 209-10 (discussing rationales for federalism). To ensure that those costs remain low, the recognition of a right to travel, enforceable against the states, is justified, even if such a right is arguably not specified by the text of the Constitution. If any right is implicit in the structure of the federal Constitution, it is the right to travel.

substantial competition from other states in the provision of rights, which means that state political actors—unlike federal officials—face a natural constraint on rent-seeking. This competition serves the same purposes as constitutional rules that function as precommitments or devices to reduce agency costs. Accordingly, there is less efficiency justification for judicial intervention to restrain political actors on the state level.

For these reasons, our tentative conclusion is that the Ninth Amendment is appropriately limited to protecting state common-law and constitutional rights against *federal* infringement.⁴⁰⁷ Limiting Congress in ways not specified by the text is appropriate because the Constitution provided the federal government with only limited and enumerated powers.⁴⁰⁸ Recent scholarship argues that the common law and the state constitutions were incorporated into the Constitution through the Ninth Amendment.⁴⁰⁹ The Ninth Amendment was adopted in part as a response to fears that rights enjoyed under state and common law would be lost under the Constitution.⁴¹⁰ While the specific purpose of the Ninth Amendment

407. Thus, our conclusion is similar to that reached by Professor Yoo—the Ninth Amendment applies only to the federal government, and that action by states is properly considered under the Privileges and Immunities Clause of the Fourteenth Amendment. See Yoo, *supra* note 233, at 1038-39.

408. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812). In this case, the Court stated:

The powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions . . . Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested none but what the power ceded to the general Government will authorize them to confer.

Id.

409. Some of the Framers of the Fourteenth Amendment specifically regarded the common law as a “significant source” for the unenumerated rights protected by the Ninth Amendment. Yoo, *supra* note 233, at 1032-33.

410. See MASSEY, *supra* note 404, at 121-22 (“The inclusion of the Ninth Amendment was, in part, an attempt to be certain that rights protected by state law were not supplanted by federal law simply because they were not enumerated.”); Caplan, *supra* note 233, at 253-54 (describing Madison’s efforts to calm people’s fears about losing rights enjoyed under the common law upon ratification of the Constitution). This is not to deny that the Ninth Amendment may also have a “natural law” component, delegating to the judiciary the authority and responsibility to articulate unenumerated natural rights. See MASSEY, *supra* note 404, at 122 (“It is thus reasonable to conclude that the Ninth Amendment protects two distinct categories of rights: positive or civil rights that originate in state law, and natural rights that are grounded in societal conceptions of the inalienable rights of humans.”). Nor do we take a position as to other alternative formulations of the Ninth Amendment. See, e.g., AMAR, *supra* note 156, at 119-33 (arguing that the Ninth Amendment’s “legislative history strongly supports an

was to provide federal constitutional protection for state rights, it also serves as a natural mechanism for recognizing new federal rights based on widely accepted state constitutional rights.⁴¹¹ The Ninth Amendment affords a textual basis justifying the Court's authority to recognize unenumerated rights, thereby developing new liberties as society changes and those new rights are recognized at the state level.⁴¹²

In order to ensure that a deeply rooted consensus exists before the judiciary adopts a new right limiting Congress, the finding model would adopt a more demanding standard in identifying *unenumerated* rights. Once again, the Supreme Court would take its cue from state-court decisions under the common law and state constitutions, thereby finding new constitutional rights in the same sources that the Framers looked to in drafting the Bill of Rights. But we believe that the test must be greater than a mere majority—a super-majority of

enumerated-powers, federalism-based reading," rather than the popular modern view that the Ninth Amendment is about individual rights); Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 35 (1988) (arguing that the Ninth Amendment creates a "general constitutional presumption in favor of individual liberty"); Yoo, *supra* note 233, at 970-99, 1022-35 (arguing that originally the Ninth Amendment combined elements of popular sovereignty and federalism, but was transformed during Reconstruction to protect unenumerated individual rights as well). All that is relevant for present purposes is that the Ninth Amendment was intended, at least in part, to bestow federal constitutional protection upon state constitutional rights. But see N. Stephan Kinsella, *Taking the Ninth Amendment Seriously: A Review of Calvin R. Massey's Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights*, 24 HASTINGS CONST. L.Q. 757, 771-75 (1997) (book review) (challenging Massey's view that the Ninth Amendment incorporates "state-sourced" rights); Thomas B. McAfee, *Federalism and the Protection of Rights: The Modern Ninth Amendment's Spreading Confusion*, 1996 B.Y.U. L. REV. 351, 374 (arguing that the Ninth Amendment does not create or protect substantive rights); Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1317 (1990) (same).

411. Calvin Massey suggests a variation on this model as one possible mechanism for implementing the Ninth Amendment. See MASSEY, *supra* note 404, at 132. Of course, if the Due Process Clause is believed to have a "substantive" prong, then it too could provide a basis for recognizing rights developed through tradition. However, the Ninth Amendment seems to be a more plausible source than the Due Process Clause. By distinguishing among sources of tradition with respect to their reliability as indicators of consensus, our model also responds to Stephan Kinsella's criticism that there is no principled distinction that can be drawn which state-sourced rights should be recognized and which should not. See Kinsella, *supra* note 410, at 773.

412. Note that we disagree with theorists such as Professor Strauss, who would treat tradition and text on equal footing. See Strauss, *supra* note 132, at 899 (stating that his model "would treat a textual provision as no more binding than a common law precedent"); *id.* at 899-900 ("The text of the Constitution is analogous to the holding of an earlier case; the Framers' specific intentions (assuming they can be ascertained) are analogous to the earlier court's reasoning."); *id.* ("[U]nder [Strauss's] traditionalist view there is nothing wrong with sometimes deciding . . . that a textual provision should be discarded—just as precedents can be overruled.").

the states to address the question must have recognized an unenumerated right. In finding an unenumerated right under the Constitution, the Court is effectively supplementing the list of rights set forth in the constitutional text, a form of quasi-amendment. Accordingly, we believe that the recognition of unenumerated rights should require the same three-fourths level of state consensus required by the Article V amendment process.⁴¹³ But that consensus would be found in state common-law and constitutional decisions, not pronouncements of state legislatures. By looking to common law and state constitutions, the finding model seeks guidance for constitutionally efficient principles from the sources relied upon by the Framers.

B. Examples

Although the Supreme Court has not used the finding model as its primary means of construing ambiguous constitutional provisions, it has employed an analogous approach in certain areas.⁴¹⁴ Two lines of case law suggest examples of how such a model might operate: first, the development of a Sixth Amendment guarantee of a right to counsel, and second, the application of the exclusionary rule to illegally seized evidence. The right to counsel is a precommitment, a guarantee by the people to ensure the dignity and rights of criminal defendants even at times when that goal becomes unpopular. It also provides an example of how a finding model might work in the interpretation of an enumerated right. On the other hand, the application of the exclusionary rule is a clear attempt by the judiciary to reduce agency costs imposed by law-enforcement officers; it provides an example of the application of the finding model to an unenumerated right (in this case, an unenumerated *remedy* not anticipated at the time of the framing).

413. See U.S. CONST. art. V.

414. A model similar in some respects to the one advanced here was proposed in Steven L. Winter, *Tennessee v. Garner and the Democratic Practice of Judicial Review*, 14 N.Y.U. REV. L. & SOC. CHANGE 679, 701-04 (1986), and Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 329-30, 333 (1957). See also Friedman, *supra* note 284, at 597 (describing the practice of “polling” by the Supreme Court); Amar, *supra* note 394, at 860-61 (suggesting that the Court should tally state laws, giving greater weight to state constitutions that “represent deeper and more considered judgments of the people themselves”); Curtis R. Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 473-77 (1960) (discussing the role of the Supreme Court in reviewing federal habeas corpus cases); Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 16 (1956) (discussing state practices for resolving constitutional issues).

1. Interpreting an Enumerated Right: The Right to Counsel

In *Powell v. Alabama*,⁴¹⁵ the Supreme Court confronted the issue of whether the Sixth Amendment's right to counsel requires the states, through the Fourteenth Amendment, to appoint counsel for indigent defendants in capital cases. In holding that such a right exists, the Supreme Court looked to several sources for authority, including the widespread adoption of such a right in the states.⁴¹⁶ The Court observed that the appointment of counsel under federal law "and [in] every state in the Union by express provision of law, or by the determination of its courts" is required for indigents.⁴¹⁷ Although the Court in *Powell* stopped short of basing its decision on this point, it observed that a "rule adopted with such *unanimous* accord reflects, if it does not establish, the inherent right to have counsel appointed at least [in capital cases], and lends convincing support to the conclusion we have reached as to the fundamental nature of that right."⁴¹⁸

Powell only required the appointment of counsel to indigents in capital cases. In *Betts v. Brady*,⁴¹⁹ the Supreme Court was asked to extend this right to defendants charged with non-capital felonies. Although the Court refused to recognize a general right to counsel for indigent criminal defendants,⁴²⁰ the case is revealing for Justice Black's dissenting opinion, to which he appended a compilation of state laws with respect to the appointment of counsel.⁴²¹ In *McNeal v. Culver*,⁴²² which reaffirmed the legal rule of *Betts* but held that counsel was required on the facts of the case, Justice Douglas's concurrence followed Justice Black's approach in *Betts* by updating his state-by-state survey.⁴²³

Finally, in *Gideon v. Wainwright*,⁴²⁴ the Court overruled *Betts* and held that the federal Constitution requires the appointment of counsel in all felony cases.⁴²⁵ In recognizing this right, the Court

415. 287 U.S. 45 (1932).

416. *See id.* at 61-63, 73. The Court in *Powell* did not distinguish states recognizing the right as a state constitutional right from those providing such a right by statute or non-constitutional common-law decision. *See id.* at 73.

417. *Id.* (emphasis added).

418. *Id.* (emphasis added).

419. 316 U.S. 455 (1942).

420. *See id.* at 473.

421. *See id.* at 477-80 (Black, J., dissenting).

422. 365 U.S. 109 (1961).

423. *See id.* at 119-22 (Douglas, J., concurring).

424. 372 U.S. 335 (1963).

425. *See id.* at 339, 345.

noted that it was appropriate to examine the historical practice of the colonies and the states prior to the enactment of the Constitution, as well as the “‘constitutional, legislative, and judicial history of the States to the present date.’”⁴²⁶ Moreover, the Court took special notice of an amicus curiae brief filed by the attorneys general of twenty-two states advocating a right to counsel, as opposed to only three states favoring the retention of *Betts*.⁴²⁷ Thus, even though the Court did not base its decision primarily on the practices of the states, it examined them in detail and then relied on those practices in construing the federal Constitution. It thus provides a useful example of how the Court might use a finding model to interpret enumerated but ambiguous federal rights.

2. Unenumerated Rights: The Exclusionary Rule

The Supreme Court followed a similar analytical approach in determining whether the exclusionary rule should be incorporated to apply against the states for improperly seized evidence. In *Weeks v. United States*,⁴²⁸ the Court held that, in a federal prosecution, the Fourth Amendment barred the use of evidence secured through an illegal search and seizure.⁴²⁹ In *Wolf v. Colorado*,⁴³⁰ the Supreme Court held that this holding should not be incorporated to apply against the states.⁴³¹ Writing for the Court, Justice Felix Frankfurter noted that the issue was whether the states should be compelled to accept the exclusionary rule as a remedy for Fourth Amendment violations, as opposed to the other remedies that had been devised by the common law and the various states.⁴³² In concluding that they should not, Justice Frankfurter appealed to the experiences of the states, especially their lukewarm response to the Court’s decision in *Weeks*. He observed:

When we find that in fact most of the English-speaking world does not regard as vital to such protection the

426. *Id.* at 340 (quoting *Betts*, 316 U.S. at 465).

427. *See id.* at 345; *see also* Brief for Amici Curiae at 9-10, *Gideon* (No. 155) (arguing that the Court ought to “inquire into the laws and to examine the procedures of the several states as a step in deciding the factors of due process which ought to be imposed today upon the states,” and noting that “[s]uch inquiries were made and were fundamental to the holdings of several previous cases,” including *Powell* and *McNeal*); LEWIS, at 147-50 (describing the amicus brief in *Gideon* and its importance).

428. 232 U.S. 383 (1914).

429. *See id.* at 398-99.

430. 338 U.S. 25 (1949).

431. *See id.* at 33.

432. *See id.* at 29 n.1 (discussing the alternative remedies available for violations of the Fourth Amendment).

exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right. The contrariety of views of the States is particularly impressive in view of the careful reconsideration which they have given the problem in the light of the *Weeks* decision.⁴³³

Justice Frankfurter surveyed the status of the exclusionary rule both before and after the *Weeks* decision and determined that in both periods a substantial majority of states opposed the mandatory invocation of the exclusionary rule for all Fourth Amendment violations.⁴³⁴ Given this overwhelming rejection of the mandatory use of the exclusionary rule, Frankfurter observed, "We cannot brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence."⁴³⁵ Finally, he added, "The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country."⁴³⁶ For Frankfurter, this suggested that it was appropriate at that time to reject incorporation of the exclusionary rule as a remedy for Fourth Amendment violations.

By 1960, however, the landscape had changed. In *Elkins v. United States*,⁴³⁷ the Court noted that the post-*Wolf* "experience of the states is impressive."⁴³⁸ At the time *Wolf* was decided, sixteen states followed the *Weeks* rule.⁴³⁹ In the seventeen years since *Wolf*, however, the number of the states that had adopted the exclusionary rule in whole or part rose to more than one half of the states.⁴⁴⁰ In part as a result of this "halting but seemingly inexorable"⁴⁴¹ movement towards the exclusionary rule, the Court in *Elkins* held that evidence seized by state officers in an illegal search was inadmissible in a later federal trial.⁴⁴²

433. *Id.* at 29.

434. *See id.* at 29-30.

435. *Id.* at 31-32.

436. *Id.* at 32.

437. 364 U.S. 206 (1960).

438. *Id.* at 218-19.

439. *See Wolf*, 338 U.S. at 29.

440. *See Elkins*, 364 U.S. at 219.

441. *Id.*

442. *See id.* at 223.

Finally, in *Mapp v. Ohio*,⁴⁴³ the Court held that the exclusionary rule applied with full force against the states.⁴⁴⁴ In so holding, Justice Clark specifically noted that prior to *Wolf* in 1949, “almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule.”⁴⁴⁵ Based in part on this showing, the Court concluded that the time had come to incorporate the exclusionary rule against the states.⁴⁴⁶

We caution that there are many important differences between the analytical process used by the Supreme Court in the cases discussed and the approach of the finding model. In both the right to counsel and the exclusionary rule contexts, the Court took little notice of the source of the changes in state law, looking equally to explicit state constitutional provisions, judicial decisions based on state constitutions, legislative enactments, and common-law judicial decisions. For the reasons discussed in Part III, we do not agree that legislative enactments should be accorded equal deference. The Court should have relied exclusively on common-law and state constitutional law decisions in these areas. Interpreting the Sixth Amendment’s enumerated right to counsel as entitling indigents to counsel at state expense would have required a showing that a majority of the state courts had come to such a conclusion. Recognizing a criminal defendant’s right to have criminal evidence excluded from his trial—a right nowhere enumerated in the Constitution—would have required a super-majority showing in the state courts. Even then, the right (because it was unenumerated) would have been enforced only against the federal government, not against the states. Only enumerated rights are enforced against the states in our model. Thus, under the finding model, *Weeks* was prematurely decided; *Mapp* was wrongly decided. Nonetheless, the Court’s approach to these cases is instructive.

The Court’s reliance on state law in these cases was inconsistent and halting. The Court usually appealed to state practice only to corroborate a decision reached by other means, probably because of a reluctance to surrender its authority to create new rights.⁴⁴⁷

443. 367 U.S. 643 (1961).

444. *See id.* at 655.

445. *Id.* at 651.

446. *See id.* at 655.

447. *See supra* notes 384-89 and accompanying text (discussing the Supreme Court’s incentives to aggrandize its power).

Moreover, the Court has never declared how many states are necessary to establish the widespread acceptance of a given practice, nor how "inexorable" the movement toward a certain practice is before it is sufficiently ingrained to warrant protection as a federal constitutional right. A majority of state court common-law and state constitutional law decisions would be required before an interpretation of an enumerated right would be adopted as federal law; a super-majority would be required for an unenumerated right, and then, only against the federal government. The finding model provides more determinate answers to these questions. We believe that common law and state constitutional law are efficient means through which the Supreme Court can construe ambiguous federal constitutional rights.

C. *Advantages and Disadvantages of the Finding Model*

Economics supports the use of tradition as a means of encouraging constitutional evolution. In an earlier article, one of us used public choice theory to explore the Article V amendment process.⁴⁴⁸ That article found that the Article V amendment process poorly served the efficiency purposes of constitutionalism.⁴⁴⁹ Article V gives Congress agenda control over the proposal of amendments, thereby skewing the constitutional amendment process in favor of amendments that increase agency costs and undermine the unanimity-reinforcing and precommitment purposes of constitutionalism.⁴⁵⁰ The amendments found in the Bill of Rights furthered the purposes of constitutionalism, but they were possible only because the federal government was still in its infancy, without the interest group satellites that now hover around the national

448. See Boudreaux & Pritchard, *supra* note 150; see also Boudreaux & Pritchard, *supra* note 316, at 3-10 (applying public choice analysis to explain passage of the Eighteenth and Twenty-first Amendments); Zywicki, *Senators*, *supra* note 157, at 1026-55 (applying public choice analysis to explain passage of Seventeenth Amendment); Zywicki, *Shell and Husk*, *supra* note 157, at 201-19 (same). This model of the Article V amendment process suggests that Professor Strauss is incorrect in his view that the failure of subsequent generations to amend the Constitution or to overrule a Supreme Court decision through constitutional amendment demonstrates "acquiescence" towards those provisions or decisions. See Strauss, *supra* note 132, at 897; *id.* at 892 ("[T]he parts of the Constitution that have not been amended . . . have obtained at least the acquiescence, and sometimes the enthusiastic reaffirmation, of many subsequent generations."). In fact, Strauss may be closer to the mark when he observes that "the persistence of a provision . . . might just show that powerful groups or actors are in a position to prevent it from being changed." *Id.* at 897 n.49.

449. See Boudreaux & Pritchard, *supra* note 150, at 161-62.

450. See *id.* at 161-62.

government vigilantly protecting the source of their privileges.⁴⁵¹ Subsequent amendments, however, have done little to serve precommitment or reduce agency costs, as interest groups have dominated the amendment process.⁴⁵²

If the Supreme Court were to limit itself to *finding* the law in preexisting consensus, it would be the most efficient institution, if not the only institution, for translating that consensus into constitutional principle.⁴⁵³ Because both the majoritarian legislative process and the amendment process of Article V have been captured by special interests, informal "amendment" by the Court will often be the only means available for translating unanimity-reinforcing values into constitutional right. Allowing quasi-amendment through constitutional interpretation would ameliorate the failure of Article V and permit the Constitution to be updated to serve its intended purposes.

Permitting constitutional change through this method allows ready resolution of many controversial constitutional issues. For instance, consider the issue whether the Constitution contains a general right to privacy, and if so, whether that right protects the specific practices of abortion, homosexual sex, or various other acts. Under the Supreme Court's current jurisprudence, the protection of these specific practices are fought at a high level of generality, and protection of particular rights is subject to the shifting whims of Supreme Court coalitions whose decisions cannot be derived from any coherent principle.

Under the finding model, by contrast, whether there is a right to "privacy" is decided by looking to the states. Several states have enacted explicit privacy amendments to their state constitutions.⁴⁵⁴ Other states have recognized a right to privacy through the common law.⁴⁵⁵ Moreover, state constitutions are relatively easy to amend,⁴⁵⁶ so if there was not already preemptive federal law on point, we could

451. *See id.* at 139-40.

452. *See id.* at 140-52.

453. Several authors have argued for the necessity of extratextual amendment processes to remedy other perceived defects in the Article V amendment process. *See, e.g.,* ACKERMAN, *supra* note 16, at 53-55; Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 458-61 (1994). *But see* David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 39-66 (1990) (arguing for the exclusivity of Article V process for amending the Constitution).

454. *See* Ken Gormley & Rhonda G. Hartman, *Privacy and the States*, 65 TEMP. L. REV. 1279, 1282 (1992).

455. *See id.* at 1321.

456. *See id.* at 1323.

expect many other states to consider the enactment of such protections. Once a state consensus emerged, that consensus would be applied to the federal government as well under the finding model.

A further virtue of looking to state constitutional law is that many of these state protections are extremely specific in content, thereby relieving the Court of the difficulty of identifying the appropriate level of generality for defining such rights. For instance, states have traditionally afforded strong privacy protection to decisions involving medical decisionmaking⁴⁵⁷ and reproductive autonomy.⁴⁵⁸ Some state courts have even found a right to abortion in their state constitutions.⁴⁵⁹ But states have tended to be more cautious on issues such as surrogate parenthood, abortion funding, and homosexual acts.⁴⁶⁰ Thus, rather than a highly abstract and unfocused inquiry into what the "right to privacy" includes, state experience provides insight into the constitutionality of concrete practices. The Supreme Court would no longer have to determine whether its judicially defined right to privacy also includes the right to abortion. Instead, the issue would boil down to whether specific conduct is constitutionally protected.⁴⁶¹ Further development would be left to the evolution of state constitutions and common law.

It is worth observing that our model would also ensure that the Supreme Court rendered its decisions according to neutral principle, a concept advocated by Robert Bork as a means of preventing the Supreme Court from acting as a "naked power organ."⁴⁶² Bork argues that the test of neutral principles can be satisfied only if neutrality is observed in deriving, defining, and applying principle.⁴⁶³ Because the Supreme Court would look *outside* of itself for guidance,

457. *See id.* at 1284.

458. *See id.* at 1290-91.

459. *See, e.g.,* *Planned Parenthood League v. Operation Rescue*, 550 N.E.2d 1361, 1365 (Mass. 1990); *Doe v. Director of Dep't of Social Servs.*, 468 N.W.2d 862, 868-69 (Mich. App. 1991); *Davis v. Davis*, 842 S.W.2d 588, 600 (Tenn. 1992).

460. *See Gormley & Hartman, supra* note 454, at 1291-98.

461. This self-defining nature of the rights recognized also answers Scalia's charge that "there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution." Scalia, *supra* note 23, at 44-45. Under our model, the Supreme Court need not agree—it only needs to adopt the agreement of other courts.

462. BORK, *supra* note 78, at 146.

463. *See id.* at 143-53 (advocating neutrality in deriving, defining, and applying legal principles); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 18-19 (1971); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 10-20 (1959); Zywicki, *supra* note 403, at 134-35 (describing neutral principles).

its approach to constitutional interpretation would be consistent with the neutral derivation of constitutional principles. Thus, like the judge guided by a faithful adherence to originalist principles, our judge "need not, and must not, make unguided value judgments of his own."⁴⁶⁴ A judge following our approach would also satisfy Bork's requirement that the judge be neutral in the definition of principle.⁴⁶⁵ In particular, our approach answers the criticism that reliance on neutral principles is misguided because the judge will still have to determine the level of generality to be applied.⁴⁶⁶ With our model, this choice is already made: The appropriate level of generality is that level which has been recognized by a sufficient number of states.⁴⁶⁷ Finally, our model is consistent with the requirement of neutrality in the application of principle in that it will be easy for outsiders to monitor whether judges are acting with integrity.⁴⁶⁸

We recognize the imperfections of the finding model. First, while it rests constitution-making in a highly decentralized process, it does not directly reward the longevity of a tradition. Indirectly, however, the perseverance and spread of constitutional principles through multiple independent states suggests that any principles attaining supermajoritarian status will necessarily have evolved and survived over a long period of time. In this sense, our model provides a screen, requiring new rights to be recognized by many states acting independently through unanimity-reinforcing processes. This process takes time and will allow the various states to learn from other states' experiments. Thus, it does not readily respond to passing fads, whether legislative or judicial in origin.

Second, we have lost much of the classical common-law system. The current common-law system is not as decentralized as it historically was, nor is competition among courts as prevalent. The legal realist revolution has also undermined the mindset and many of the institutional bulwarks of the spontaneous order legal system described above that anchored the common-law principles embedded

464. BORK, *supra* note 78, at 146.

465. *See id.* at 147-51.

466. *See, e.g.,* Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1091-92 (1981).

467. *See* BORK, *supra* note 78, at 149-50 (arguing that the Court should look to constitutional text and history to determine what level of generality is most reasonably supported).

468. *See id.* at 151. For further discussion of neutral principles in law, *see* Bork, *supra* note 463, at 19, and Zywicki, *supra* note 403, at 134-35.

in the Constitution and the Bill of Rights. Rather than finding the law in spontaneously generated customs, modern judges view themselves as conscious policy-makers. As a result, the common law does not mirror custom as closely as it once did. Moreover, state common-law judges will face temptations similar to Supreme Court Justices to act in their own interests, especially when judges are elected.⁴⁶⁹

These defects prevent the finding model from being an ideal contemporary model of constitutional tradition. But we live in a world of the second-best. To the extent that the Supreme Court looks to tradition as a source of wisdom, consensus, and constitutional principles, it should use tradition in a manner that maximizes its virtues and its compatibility with constitutional efficiency. The common law and state constitutional law were developed through an efficient process. If that process is not as efficient as it once was, that legacy of efficiency is still superior to the more pronounced flaws of legislation and Supreme Court precedent as sources of tradition. Thus, the finding model—despite its flaws—is superior to the alternative models of tradition offered by Scalia and Souter.

CONCLUSION

The Court is unlikely to adopt the finding model. It would take a heroic act of self-restraint by the Court to cede its monopoly power on constitutional interpretation to spontaneously generated institutions. The Court will not willingly cede the power that it has acquired through free-ranging interpretations of the Constitution, nor is it likely to impose new limits on the reach of federal power.

469. The effect of elections on judicial decisionmaking is probably much smaller than is conventionally believed. See Hasen, *supra* note 363, at 1326 (noting that judicial elections will have no impact on decisionmaking in all except some "high-salience" races, and even in high-salience races the effect will be uncertain). Professor Hasen concludes that the degree of judicial independence is affected more by the length of the judge's tenure, rather than the mechanism for selection. See *id.* at 1330. Nonetheless, the election of judges may be partially responsible for a decline in the spontaneous order model of the common law. Even if that is so, however, the requirement that common-law or state constitutional principles be simultaneously recognized by a supermajority of states acting independently makes it more difficult for special interests to manipulate the evolution of the legal system through rent-seeking litigation and influence over elections. Cf. Zywicki, *Shell and Husk*, *supra* note 157, at 216-17 (noting that prior to direct election of U.S. Senators, special interests could capture the Senate only through persuading a majority of both houses of state legislatures to support the desired legislation, an expensive and cumbersome process that significantly reduced rent-seeking activity); Zywicki, *Senators*, *supra* note 157, at 1040 (same).

Nor is Justice Scalia likely to reverse his conclusion that legislatures remain the best source for constitutional change. And we doubt that Congress is likely to impose the finding model on the Court by constitutional amendment. Nonetheless, an economic perspective on the use of tradition in constitutional interpretation can help us better understand the project of constitutionalism.

Justice Scalia's aversion to the imposition of his own policy preferences in the guise of constitutional rules has driven him to a theory of tradition that allows constitutional rights to be defined by majoritarian institutions. But this deference to majoritarian institutions squarely conflicts with the central purposes of constitutionalism: minimizing the agency costs imposed by legislatures on citizens and allowing majorities to precommit against imposing unwarranted costs on minorities. Moreover, this abdication in favor of majoritarianism conflicts with the Framers' intent.⁴⁷⁰ Constitutionalism is intended to check the abuses fostered by majoritarian institutions; Scalia's theory of tradition makes those abuses the paramount source for interpreting the Constitution.

Souter's theory of tradition is no more satisfying. Advocates of Souter's theory believe that judges should have greater discretion in creating constitutional rights than Scalia's theory would afford, but they have not convincingly distinguished Souter's theory from the *Lochner* era jurisprudence that both they and Scalia reject as the imposition by judges of their own policy preferences. As Robert Bork has observed, adherents to the Souter approach must have "either substantive due process all the way or not at all. If we want *Griswold* and *Roe*, then *Lochner* and *Adkins* come with them. If we reject *Lochner* and *Adkins*, then we cannot have *Griswold* and *Roe*."⁴⁷¹ If anything, Souter's theory allows the judiciary greater latitude in imposing its policy preferences than even the *Lochner* Court claimed. The *Lochner* Court at least took its guidance from the common law, relying on centuries-old spontaneously generated

470. See Epstein, *supra* note 283, at 40-41; Stephen Macedo, *Majority Power, Moral Skepticism, and the New Right's Constitution*, in ECONOMIC LIBERTIES AND THE JUDICIARY, *supra* note 197, at 111, 120. Macedo states:

[T]he conservative invocation of Original Intent has less to do with reverence for the ideas of the Founders than with a political preference for majority power over individual rights and liberty. Underlying the New Rights jurisprudence is a majoritarian impulse that, far from being in accord with the intention of the Framers, is deeply at odds both with the text and the structure of the Constitution and the project of constitutionalism itself.

Id.

471. BORK, *supra* note 78, at 225.

principles of freedom of contract and aversion to "class legislation."⁴⁷² Souter's theory of tradition, by contrast, is answerable only to the Court's own precedents and a vague, Darwinist theory of self-selection. Experience suggests that these are fragile ties indeed for binding the power of the federal judiciary.

The "counter-majoritarian difficulty" that drives debates over the use of tradition in constitutional interpretation misconceives constitutionalism's purpose. Economics teaches that a constitution's purpose is to foster unanimity, not majoritarianism. Unanimity is, of course, impossible to achieve, but super-majoritarianism and custom provide a proxy for that ideal. State constitutional and common law provide a source of constitutional traditions developed through decentralized processes and improved by testing and feedback over time. Those sources provide benchmark traditions appropriate for incorporation as precommitments or devices to reduce agency costs. By eliminating the common law's role in the Constitution, the Court has allowed majoritarianism to undercut the very purposes of constitutionalism. Economic analysis of tradition demonstrates that judicial deference to majoritarianism cannot be reconciled with constitutionalism.

Tradition can provide a source of knowledge on which to base constitutional judgments broader than the ephemeral and limited wisdom of a legislative body or nine Supreme Court Justices. Tradition is the means by which knowledge is shared over time, just as markets allow knowledge to be shared across space.⁴⁷³ Common law and state constitutional law are the products of a decentralized evolutionary process rooted in community preferences; as a result, the rules that develop will tend to be efficient, unanimity-reinforcing principles, reflecting the expectations of the individuals residing in a given community. By contrast, the positivist legal systems relied on by Scalia and Souter lack the dynamism and decentralization that generate legal rules and traditions consistent with societal consensus. Legislation and Supreme Court precedent, as products of centralized legal positivism, cannot provide a reliable basis for constitutional interpretation and development.

The efficiency purposes of constitutionalism require that the traditions found in the common law and state constitutions be used in

472. *Lochner v. New York*, 198 U.S. 45, 52-56 (1905). For a description of the rent-seeking motives that animated the bakery regulation at issue in *Lochner*, see BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 110-25 (1980).

473. On the role of markets in coordinating dispersed knowledge, see F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

interpreting the Constitution. A proper theory of tradition, Burke wrote, "furnishes a sure principle of conservation, and a sure principle of transmission; without at all excluding a principle of improvement. It leaves acquisition free; but it secures what it acquires."⁴⁷⁴ We believe that the model of tradition presented in this Article satisfies Burke's criteria of conservation, transmission, and improvement.

474. BURKE, *supra* note 6, at 33.

