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CONSTITUTIONS AND SPONTANEOUS ORDERS: A RESPONSE TO PROFESSOR MCGINNIS

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

Professor John McGinnis has written a perceptive and provocative comment on our economic analysis of the role of tradition in constitutional interpretation.¹ A brief summary of our areas of agreement and disagreement may help set the stage for this response.

It appears that Professor McGinnis substantially agrees with the two central propositions of our article. First, he appears to agree with our definition of efficient traditions as those evolving over long periods of time from decentralized processes.² Second, he explicitly agrees that Justices Scalia and Souter have adopted sub-optimal models of tradition because they rely on sources that lack the qualities which mark constitutionally-efficient traditions.³ Given our substantial agreement on these issues, we will not discuss these points here.

But McGinnis also has several penetrating critiques of our model worthy of further discussion. His critique proceeds along three general lines. First, McGinnis articulates a “strict constructionist” view of the Constitution, implicitly arguing that the process of legal change should be rooted in the states.⁴ Under this view, the primary role of the federal government is to protect federalism and state autonomy as a “precondition” for the operation of this system.⁵ Thus, McGinnis implicitly rejects any role for a federal bill of rights in limiting state discretion, except to the extent that such limitations

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1. See John O. McGinnis, *In Praise of the Efficiency of Decentralized Traditions and Their Preconditions*, 77 N.C. L. REV. 523 (1999).

2. See *id.* at 525-26.

3. See *id.* at 530.

4. See *id.* at 526.

5. See *id.*

help preserve the preconditions for robust interjurisdictional competition. Second, McGinnis argues that the need to create and enforce these preconditions limits the appropriate scope for spontaneous orders.⁶ According to McGinnis, a consciously designed constitutional structure is necessary to create the preconditions that enable spontaneous orders to develop. Third, McGinnis disagrees with our alternative model that looks to common law and state constitutional law as potential sources of constitutionally-efficient traditions—he lists three specific disadvantages of our model.⁷ We consider each of these critiques in turn.

I. STRUCTURAL LIMITS V. ENFORCEABLE RIGHTS

McGinnis argues that structural constraints on the federal government are necessary for efficient traditions to develop at the state level.⁸ But he goes further, suggesting that structural constraints also are sufficient for the development of efficient traditions at the state level.⁹ He argues that federal constitutional rights should be created and enforced against the states only to the extent that they protect structural preconditions that foster robust interjurisdictional competition.¹⁰

We agree that federalism and the other structural protections of the Constitution—such as the separation of powers and bicameralism—which fragment and decentralize power, are a necessary condition for liberty.¹¹ By forcing various government actors to struggle against one another for power, these structural protections raise the cost to government actors of misusing government power to either transfer wealth to special interests or to impose costs on society for their own benefit. When operating as the Framers intended, federalism and the separation of powers pit government actors in a zero-sum game, with the gains of one level or

6. *See id.*

7. *See id.* at 530-31.

8. *See id.* at 526.

9. *See id.*

10. *See id.* at 526-27.

11. Indeed, one of us has written extensively on the importance of federalism and bicameralism in protecting individual liberty. *See* 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, 169-83, 209-15 (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); Todd J. Zywicki, C.H. Hoebeker, *The Road to Mass Democracy: Original Intent and the Seventeenth Amendment*, 1 INDEP. REV. 439, 441-42 (1997) (book review).

branch of government coming only at the expense of another level or branch. By pitting the states against the federal government and Congress against the President, the Constitution seeks to “contriv[e] the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”¹² “Ambition,” Madison wrote, was to “counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”¹³

But those locked in this zero-sum game inevitably will try to change the rules to make it a positive-sum game for themselves. Thus, state and federal government actors seek to collude over the allocation of authority and revenues, maximizing each level’s ability to distribute rent-seeking opportunities. The federal courts have insufficient incentive to enforce violations of federalism and separation of powers, especially when those violations further policies favored by individual judges. Over time, the separation of powers deteriorates into a system of collusion of powers, with the individual elements conspiring to increase their collective powers. While the eventual distribution of the spoils of increased government power are uncertain, substantial gains from trade, coupled with a sufficiently small number of actors, ensure that the collective action necessary to create this surplus usually will be feasible.¹⁴

While there are gains to trade among the actors involved, their collective action imposes external costs on the public at-large. The public is largely powerless to stop this collusion, and individual citizens will generally lack the incentive to police these structural protections. The costs to any individual of fighting this collusion of powers will far outweigh any potential *individual* benefits. As a result, federal and state actors will gain at the expense of the general public. A close analogy exists to sellers’ gains from agreeing to cartelize a market to extract higher prices from buyers.

Federalism erects a useful barrier to rent-seeking behavior and government overreaching by allowing individuals to exit an oppressive jurisdiction. But this exit strategy is far from costless for the individuals forced to move, and it provides little protection for sunk capital investments.¹⁵ Thus, while structural limitations on

12. THE FEDERALIST NO. 51, at 347 (James Madison) (Jacob E. Cooke ed., 1961).

13. *Id.* at 349.

14. See 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*).

15. Indeed, McGinnis concedes that “[c]ompetition between governmental

government action are a necessary condition for liberty and limited government, they are not a sufficient condition.

A bill of rights supplements structural protections when it fails to constrain those who would misuse government powers for their own ends. In particular, a bill of rights vests individuals with the authority to challenge government action that imposes externalities on those individuals. A bill of rights provides private individuals who lose in this collusion-of-powers game with another chance to disrupt these externality-imposing governmental bargains. Allowing a single individual to challenge the constitutionality of a law reinforces unanimity by providing one final check to ensure that the law reflects public consensus and is not merely imposing external costs by some on others.¹⁶ Moreover, enforcement of these rights is vested in an independent judiciary, the body most independent from these collusion-of-powers tendencies.¹⁷ The general public benefits from the individual's effort to restrict the size and scope of government. Thus, a bill of rights, enforceable at the initiative of individual citizens, provides an important secondary line of defense against government and special-interest overreaching that supplements the primary protections provided by structural limitations. A bill of rights is important precisely in those situations in which structural protections have broken down. Both sets of protections are necessary for an effective constitutional system.

Notwithstanding the need for both forms of protection, we recognize that bills of rights are a secondary barrier against government overreaching. Indeed, many of the judicial errors of recent decades stem from making individual rights the primary focus of constitutionalism. In many situations, judges have created individual constitutional rights absent any showing that the structural protections of the constitutions had failed to restrain rent-seeking. Many critics, including McGinnis, have argued that this error has been reflected in overenforcement of some rights, most notably in

jurisdictions is more imperfect than competition in private markets, and the efficiency of the results is less certain." McGinnis, *supra* note 1, at 535.

16. In this sense, an individual challenging the constitutionality of a law is analogous to the common-law jury, which serves the same unanimity-reinforcing function. 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, 1010-14 (1996) (discussing the unanimity-reinforcing effect of the common-law jury).

17. See Donald J. Boudreaux & A.C. Pritchard, *Reassessing the Role of Independent Judiciary in Enforcing Interest-Group Bargains*, 5 CONST. POL. ECON. 1, (1994); Ejan Mackaay, *The Emergence of Constitutional Rights*, 8 CONST. POL. ECON. 15, 22 (1997).

the areas of criminal and civil rights.¹⁸

Two potential costs arise out of the recognition of rights: underenforcement and overenforcement. For many rights, underenforcement is the greater concern. Thus, much of the Bill of Rights protects the rights of criminal defendants, a group whose interests are not likely to be protected effectively by state legislatures. Such a disfavored group may even be underprotected by some state judiciaries. Moreover, people may not focus on the fairness of the state's criminal justice system when making decisions about where to live, especially when weighed in the balance against low crime rates. A person deciding where to live is more likely to focus on the prospects of being a victim of crime rather than the treatment if accused of committing one. Most people underestimate the magnitude of low probability events such as an arrest and therefore are likely to undervalue the importance of constitutional criminal procedures. A bill of rights provides a counterweight to these tendencies toward underenforcement.

At the same time, overaggressive enforcement of rights allows judges and criminals to externalize the costs of their preferences on society. More to the point, it undermines the incapacitation and deterrent functions of criminal law. Our requirement that constitutional rights should reflect at least a supermajority of the states responds to criticisms that federal judges sometimes overenforce rights.

II. CONSTITUTION-MAKING, CONSTITUTIONAL CHANGE, AND THE LIMITS OF SPONTANEOUS ORDER

McGinnis's second point builds on his commitment to structural constraints. He agrees that we are right to celebrate spontaneous order as a reflection of community consensus.¹⁹ In contrast to our model, however, McGinnis favors the spontaneous order of the

18. See McGinnis, *supra* note 1, at 530. To the extent that *Miranda* and the exclusionary rule have failed to accurately reflect societal consensus, we would agree with Professor McGinnis that the Supreme Court erred in those cases. Moreover, as we suggest in the main article, rights such as the right to counsel and the exclusionary rule arguably have so little connection to any textual provision of the Bill of Rights that they should be considered unenumerated rights subject to a Ninth Amendment analysis. See A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 513 (1999). Thus, rights such as these should not be subject to incorporation under our understanding of the Ninth Amendment. Nonetheless, more text-based examples could surely be found to illustrate McGinnis's point; hence we treat it as a more general critique.

19. See McGinnis, *supra* note 1, at 523.

states—exercising power as independent sovereigns—competing for residents in a Tiebout competition.²⁰ While celebrating spontaneous order, he also places strict limits on its scope. In particular, he sees a role for conscious design in constructing a constitution that will create and preserve the preconditions necessary for interstate competition to flourish.²¹ Those preconditions include federalism and other limitations on the federal government's powers, such as freedom of speech and, presumably, freedom of travel. At the same time, however, McGinnis concedes that his model does not provide a mechanism for constitutional change to respond to changing circumstances.²²

McGinnis sees constitution-making, rooted in positive law and conscious design, as necessary to create the institutions that foster spontaneous orders.²³ McGinnis focuses on the limits of spontaneous orders. He recognizes the virtues that a spontaneous order creates, but questions whether the preconditions for a spontaneous order can themselves come from spontaneous orders. As McGinnis observes: "Federalism was not simply a product of spontaneous order but a structure created as positive law by a fairly centralized process."²⁴ He adds: "[I]t is federalism—the concept embodied in the doctrine of enumerated powers—that was the Framers' most important contribution to protecting decentralized traditionmaking."²⁵

McGinnis finds himself in good company in raising this question. Even Friedrich Hayek, the great advocate of spontaneous order, questioned whether the constitutional preconditions for society could be spontaneously generated. While extolling the virtues of the classical common law as the ideal legal system, Hayek also articulated a detailed, and in some ways bizarre, "Model Constitution."²⁶ We think Hayek erred when he succumbed to the temptations of consciously-ordered constitution-making. In our view, the history of the western world suggests that constitutions evolve from spontaneous orders; they are not created. Throughout

20. *See id.* at 526-27.

21. *See id.* at 526.

22. *See id.* at 529.

23. *See id.* at 526.

24. *Id.*

25. *Id.*

26. *See* 3 FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE 105-27 (1979) (describing the provisions of a "Model Constitution"); *see also* 3 *id.* at 107-09 (arguing for the need of a constitutional tradition and shared agreement of pre-constitutional values for constitutions to be effective).

the western world, individual rights and limitations on government power have resulted from struggles that are unique to particular times and places.²⁷ Constitutions, therefore, simply have reflected the results of these struggles.

The story in the United States confirms this account. While federalism has played an essential role in protecting decentralized decisionmaking, we question the extent to which federalism was the result of conscious design by the Framers. The 1787 Convention was called at the behest of the states acting under the Articles of Confederation. The Framers themselves were delegates of the states, and ratification came through state-by-state action rather than a national plebiscite. No stronger federal government could have garnered the consent of the states; the broad sovereign role of the states under the original Constitution reflected contemporary political reality, not conscious design favoring decentralization.

This political reality arguably reflected a spontaneous order, as the states independently developed out of the original colonies. The division of the New World into separate colonies hardly sprang from conscious design; rather, it arose from arrangements that the Crown made with British entrepreneurs who were willing to venture into unknown territory. The very coming together of the colonies to form the United States in the first place occurred in order to fight the policies of the Crown, not any plan for a central government—no one colony would have had the strength to defeat the British Army. To the extent that federalism and separation of powers reflect conscious choice, they reflect a choice to imitate the British “constitution,” which evolved completely through decentralized processes.²⁸ In making this choice, the Framers relied on tradition.

Where federalism has been created by conscious design, the results do not inspire confidence. The European Union, for example, appears to function primarily as a mechanism to dampen competition between member countries and thereby bring all members up to the same level of oppressive regulation. We would suggest that American federalism has succeeded precisely because it did not arise from a central plan for the political organization of the North American continent. When the virtues of federalism were held up for examination and conscious design in drafting the Fourteenth

27. See Mackaay, *supra* note 17, at 23-27.

28. Cf. Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 6-9, 15-21 (1995) (discussing the role of federalism in protecting the economic systems in England and the United States).

Amendment, federalism was effectively gutted as a potent source of constitutional values. The result has been the steady expansion of the federal government—and indeed, government generally—that McGinnis decries. Thus, we would argue that the process of constitution-making itself usually must be the result of a spontaneous order if the resulting constitutional regime is to foster spontaneous orders. At least this observation seems to be an accurate description of the origins of the United States Constitution. .

The Constitution also was formed in an atmosphere that was especially conducive to the creation of constitutionally-efficient rights. Put differently, the political dynamics of the era were such that the Framers could create a constitutional structure that merely recognized spontaneously-generated rights, rather than bowing to the demands of special interests seeking constitutional protection for their favored projects. The political reality of active and powerful state governments limited the powers of the federal government, thereby limiting the ability of federal officials to extract rents and to impose agency costs on the country and to supply rent-seeking legislation.²⁹ At the same time, demand was low for special interest legislation, as few special interest groups were operating on the national level.³⁰

The distinction between a spontaneous order and a designed system is even more striking when considering constitutional change. McGinnis correctly identifies the Sixteenth and Seventeenth Amendments as the primary causes of the erosion of structural constraints on the federal government.³¹ But these amendments are not aberrations; they are simply high points in an overall pattern of rent-seeking in constitutional amendment under Article V.³² As soon as a constitution is created that limits government agency costs and rent-seeking by special interests, the very parties intended to be

29. See Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 *FORDHAM L. REV.* 111, 135-36 (1993).

30. In this sense, the conditions in the United States in the post-Revolutionary War period were comparable to those described by Mancur Olson as prevailing in Germany and Japan following World War II. See MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 75-77 (1982).

31. Indeed, the growth of the federal government, and particularly the growth of the federal government as a machine for the production of rent-seeking legislation on the national level, began almost immediately after the enactment of the Sixteenth and Seventeenth Amendments. See Zywicki, *Shell and Husk*, *supra* note 11, at 174-75.

32. See generally Boudreaux & Pritchard, *supra* note 29, at 140-52 (discussing the Eleventh Amendment through the Twenty-Seventh Amendment and arguing that the increase in special interest activity has altered the amendment process).

constrained will seek to remove those barriers. In short, the constitution itself becomes a target for those who would benefit from eliminating the restraints on legislative discretion that the constitution imposes. This pattern is seen in the history of constitutional amendment under Article V.

Indeed, this problem of government actors attempting to undo constitutional restrictions is exacerbated by the structure of Article V. Article V identifies two procedures for constitutional change: (1) a constitutional convention or (2) ratification by two-thirds of the House and Senate followed by ratification by three-fourths of the states.³³ The constitutional convention has never been employed. As a practical matter, then, the Constitution can be amended only when change is initiated by the action of two-thirds of both chambers of Congress. This procedure gives Congress a stranglehold on the agenda for constitutional change. Given this fact, it should not be surprising that subsequent to the first eleven amendments there have been no constitutional amendments limiting the powers of the federal government.³⁴ Indeed, the passage of the Seventeenth Amendment denied the states the most effective mechanism they had to control the agenda for proposing constitutional amendments.³⁵

Putting Congress in charge of the amendment process puts the fox in charge of guarding the hen house. The results have been predictable. Every amendment after the Bill of Rights has served either to increase the power of special interests in the federal government, increase the power of Congress and the federal government to impose agency costs on the people, or both.³⁶ Admittedly, these venal motives have resulted in some constitutional changes that are universally applauded, such as the abolition of slavery by the Thirteenth Amendment. Such amendments, however, are the exception rather than the rule. Article V cannot be relied upon as a source of efficient constitutional change because it confers agenda control on Congress, the branch of government most in need of constitutional restraint.³⁷

33. See U.S. CONST. art. V.

34. See George Anastalpo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631, 806 (1992); Boudreaux & Pritchard, *supra* note 29, at 151-52.

35. See Zywicki, *Shell and Husk*, *supra* note 11, at 213. The Seventeenth Amendment eliminated state legislatures' power to select senators in favor of popular election. See U.S. CONST. amend. XVII.

36. See Boudreaux & Pritchard, *supra* note 29, at 152.

37. See *id.* at 160.

A spontaneous order system of constitutionalism and constitutional change is relatively immune to these problems. Special interests and politicians have no single place they can go to secure their desired changes. Power is decentralized and fragmentary. Thus, a spontaneous order system of constitutional change is more likely to generate constitutionally-efficient change than a centralized, designed order.

For these reasons, we believe that both constitution-making and constitutional change must be rooted in spontaneous order. To the extent that the Constitution reflects constitutionally-efficient principles, it does so because it reflects the outcome of a spontaneous order process, rather than attempting to create a new constitutional design whole cloth. Article V of the Constitution consciously attempts to design a mechanism for constitutional change in light of new consensus—and it has proven to be an abysmal failure in achieving constitutional efficiency.

III. THE FINDING MODEL DEFENDED

To this point, McGinnis's criticism has been of the general project of using tradition as a mechanism for constitutional interpretation and change. Beyond that, however, he criticizes our invocation of common law and state constitutions as sources of constitutionally-efficient tradition. He also questions the efficacy of our model in practice should the Supreme Court adopt it.

Before addressing the substance of McGinnis's observations, it is worth noting the limited stakes at issue. A rejection of the common law or state constitutional law does not resuscitate either Scalia's or Souter's models. If our sources of tradition are rejected and our criticisms of Scalia's and Souter's models are accepted, then this rejection simply means that tradition should play no role in Supreme Court decisionmaking. Although tradition is a theoretically sound concept, under this analysis tradition should have no role in the practice of constitutional law.

McGinnis criticizes our reliance on common law and state constitutional law to develop new constitutional principles because he believes it undermines the decentralization that we espouse in our article.³⁸ McGinnis objects in part to the process of taking locally-developed rights and federalizing them. When combined with the incorporation doctrine, he argues that this portion of our model

38. See McGinnis, *supra* note 1, at 530-31.

would effectively end the experimentation and flexibility that drives our system.³⁹ Rather than allowing the tailoring of legal rules to local needs, McGinnis contends that our model would impose a national rule on all, squashing further innovation.

There are several responses to this argument. First, with respect to enumerated rights, we believe that interpretations of such rights arising from genuinely unanimity-reinforcing processes are entitled to the same protection as those specifically contemplated by the Framers. For example, to the extent that the law protects facsimile transmissions based on prior protections for handwritten letters contemplated by the Framers, facsimiles should be entitled to the same constitutional protection. In addition, just as states are not permitted to opt out of the Fourth or Fifth Amendments, we believe that they should not be permitted to opt out of interpretations of those Amendments developed through unanimity-reinforcing processes. Our model does not allow the states to experiment with unreasonable searches and seizures. Thus, while our model might have the effect of “freezing” particular doctrinal developments, we are willing to pay that price to ensure the benefits of precommitment and reduced agency costs. In short, our model of enumerated rights is premised on the view that the Framers did not intend merely to write a static laundry list of common-law rights in the Bill of Rights. We believe that when they enacted the Bill of Rights they also intended to include the common-law process for interpreting those rights. To the extent that McGinnis’s quarrel is with the incorporation doctrine generally, this point goes beyond the scope of our project. We are making a more limited claim: the Framers looked to state common law and state constitutions in drafting the Bill of Rights. We agree with that choice and believe that it should be carried forward. Incorporation is a separate issue.

For unenumerated rights, we share McGinnis’s view that incorporation would be ill-advised.⁴⁰ We note, however, that

39. *See id.* at 530. Professor McGinnis observes:

The world changes, and traditions that may have been efficient at one time may cease to be efficient. If they are made into federal constitutional rights applied against the states, the traditions themselves become resistant to change because they can only be challenged through the amendment process or through the Court overruling its own precedent. Under the jurisprudence suggested by Professors Pritchard and Zywicki, states may not be able to experiment with new traditions because they will be blocked by Supreme Court precedent based on its old predominant traditions.

Id.

40. McGinnis argues that our understanding of the Ninth Amendment is mistaken

incorporation is not an all-or-nothing proposition: One can incorporate enumerated rights against the states without also incorporating unenumerated rights. Drawing the line between these categories leaves room for judicial discretion. But the fact that a large number of states would have to recognize the right under our model reduces the risk of judicial error in drawing this line. Consequently, the recognition of new rights only comes about after long percolation in the states. Rash judgments by a bare majority of the Supreme Court would not suffice to impose a rule on all of the states. Far from fostering such percolation, the federal courts have almost always been ahead of a supermajority of the states in recognizing new constitutional rights. McGinnis's examples of the exclusionary rule and *Miranda* strongly support this proposition. To the extent that judges incorrectly draw the line between enumerated and unenumerated rights, it will affect only the minority of states who would not have to follow the right if it were classified as unenumerated, but would follow it if it is enumerated. This seems like a small efficiency loss in light of the benefits offered by our approach.

Focusing on the details of incorporation tends to obscure the real power of our mechanism for constitutional change. In the modern age, the federal government remains the primary threat to liberty. For the reasons McGinnis states so eloquently, the competitive forces of federalism place some restraint on the ability of state governments to impose agency and rent-seeking costs on their residents. The federal government lacks even this modest restraint. Thus, a system of constitutional change that is independent of political agents in the federal government is necessary so that the system can respond to rent-seeking threats by the federal government. As a result, our model primarily seeks to recognize rights enforceable against the federal government, not against the states.

McGinnis also has practical concerns with our model. First, he

and that the "best reading of the Ninth Amendment is that it simply underscores the limited enumerated powers of the federal government." *Id.* at 534 (citing Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J.L. & POL. 63, 63-64 (1987)). A full discussion of the interpretation of the Ninth Amendment goes well beyond the current project. Given the expansive language of the Ninth Amendment, however, it is our view that there is no reason to cabin its intent to one exclusive purpose, but rather that it may have several purposes. Thus, reading it to underscore the limited enumerated powers of the federal government does not rule out reading it as a source of state-law rights or even natural rights. See Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 35 (1988).

suggests that even a well-intentioned Supreme Court would have difficulty determining whether a particular state has recognized a particular right. Retreating from a particular right would be even more difficult because of the typical practice of distinguishing, rather than overruling, precedents. Second, he suggests that our criticisms of federal judges undermine our efforts to grant them law-finding authority.

We concede that often it will be difficult to determine whether a state has decided a particular issue. But, as we argue in our article, specificity in the definition of rights has the benefit of narrowing the scope of the federal judiciary's power.⁴¹ The costs of indeterminacy on some issues must be weighed against the benefits of greater determinacy on others. As to the remaining indeterminacy, the current practice of federal courts applying the Erie doctrine might provide an example of how our model could work. When there is no authority precisely on point, the federal court could make an "Erie-guess." When courts have no reasonable basis for making an educated "Erie-guess" or if the state law is unsettled, then the question could be certified to the state supreme court. Alternatively, one could imagine a state supreme court criticizing the construction of a particular state law right by the Supreme Court, thereby forcing the Supreme Court to move that state from one column to the other in the Court's survey of the law. The practical problems raised by our model seem resolvable to a tolerable degree of certainty. No theory of interpretation can eliminate judicial discretion.

McGinnis also argues that our criticisms of the motives of federal judges undermine our suggestion that they should find the law.⁴² Federal judges, we argue, are all too often unfaithful agents, serving their own interests rather than their constitutional duties or the public interest. McGinnis turns our argument against us. We specifically recognize in our article that to the extent that our model would actually constrain judicial discretion, the federal judiciary is unlikely to adopt it. McGinnis adds that to the extent the federal judiciary does purport to apply our finding model, it will not do so faithfully. Instead, federal judges will use the finding model as a smokescreen while continuing to "mak[e] up its own rules under the guise of discovery."⁴³

In recognizing that judges may attempt to evade constraints

41. See Pritchard & Zywicki, *supra* note 18, at 518.

42. See McGinnis, *supra* note 1, at 532.

43. *Id.*

imposed upon them, McGinnis identifies the central problem of constitutional interpretation. The demise of the common-law tradition in the twentieth century has undermined faith in judges as faithful constitutional agents.⁴⁴ Our model is not a panacea for the decline of common-law judging. By supplying judges with an external and neutral rule of decision, however, we believe that our model does as well as can be hoped for any constitutional theory.

Agency costs cannot be eliminated from an independent judiciary; we can only hope to maximize the benefits of an independent judiciary while minimizing its costs. We think that a law-finding model under which independent judges can alter the Constitution, but must justify their actions in light of the consensus of existing state law, maximizes the net social surplus of an independent judiciary. McGinnis argues that our purported constraints are actually no constraints at all. At its root, this question is an empirical one and unlikely to be answered. We nonetheless think that our model does more to enhance constitutional efficiency than does McGinnis's model.

CONCLUSION

Professor McGinnis has written a penetrating critique of our economic analysis of tradition's role in constitutional interpretation. He agrees with two of the central arguments of our article: the accuracy of our model of constitutionally-efficient tradition and its application to the models of Justices Scalia and Souter. He disagrees with our argument that common law and state constitutions provide superior sources of constitutionally-efficient tradition. Economic analysis, however, generally cannot answer the question of what would be socially optimal: it can only compare the efficiency of given practices. While far from perfect, we continue to believe that the finding model of constitutional interpretation better serves the efficiency purposes of constitutionalism than the available alternatives.

44. See ROBERT H. BORK, *TRADITION AND MORALITY IN CONSTITUTIONAL LAW* (1984).