UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 77 | Number 2 Article 3

1-1-1999

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IN PRAISE OF THE EFFICIENCY OF DECENTRALIZED TRADITIONS AND THEIR PRECONDITIONS

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It is a pleasure to have the opportunity to comment on *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation.*[1] I first summarize the argument of the article. I then question some of its underlying premises, particularly its astringent criticism of all centralized processes of lawmaking and its assumption that states today represent substantial sources of decentralized traditions. I then critique the normative claims of the article. I fear its proposal to use predominant state constitutional law to interpret ambiguous provisions in the Bill of Rights will not lead to a more decentralized system of lawmaking, which, in my view, is the key to creating efficient traditions. Moreover, the proposal is likely to lead to the creation of rules that are in fact inefficient for some times and places. I close by suggesting that the analysis offered by Professors Pritchard and Zywicki would better support a strict construction of the Constitution of a kind similar to that advocated by Thomas Jefferson in the early nineteenth century.

In their article, Professors Pritchard and Zywicki address two very important questions in constitutional law. The first, and more directly examined, question is determining what the proper role of tradition in constitutional interpretation should be. Specifically, the article asks what traditions should be incorporated into constitutional law—those emerging from national democracy or those from a more decentralized process of generation such as the common law or state constitutions. The second question—just as important, if more

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I am grateful to the International Centre for Economic Research at the University of Turin, where this essay was drafted. I also want to thank the Institute for Humane Studies, which asked me to a seminar to comment on a previous draft of *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation.* At that seminar the comments of Akhil Amar and Mark Grady, among others, stimulated further thought.

1. 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 (1999).

implicit—is how can constitutions be made to change efficiently as the world changes.

To answer these questions, the article relies on a rich mixture of two methodologies: (1) public choice analysis;[2] and (2) the spontaneous order theory of Hayek.[3] Public choice is deployed to critique the efficiency of traditions that emerge from centralized, hierarchical orders, such as the legislative process of a national democracy or the precedents of a national court.[4] The national democratic process is so riven with rent-seeking and rational ignorance that the traditions based on legislation or consensus that emerge from it are unlikely to be efficient;[5] therefore, traditions emerging from that process are not a reliable source of norms facilitating the provision of public goods. To the contrary, such traditions are likely to help a private interest gain goods for itself because of its undue influence in the political process. They are thus poor candidates for incorporation into the Constitution, because constitutional law should ideally include precommitments that enhance the prospect of government's providing public goods and restrain the efforts of interest groups to gain resources at the expense of the rest of the polity.

Precedent from a national, centralized judiciary fares no better under public choice analysis. Without the restraint of competition, judges in a national system will seek to advance their status by advancing the values of the professional class of which they are members—lawyers.[6] The income that these individuals earn from complex regulations biases them to an inefficiently large state.[7] Moreover, the same interest groups that make legislation inefficient will wield influence in the confirmation process, leading to the appointment of judges who are predisposed to the creation of inefficient law.[8] Thus, the body of precedent of a national court is also an unpromising lode for mining norms that facilitate the provision of public goods.

The authors believe, on the other hand, that Hayek's theory of spontaneous order suggests that traditions emerging from more

2. *See id.* at 477-89.
3. *See id.* at 457-60.
4. *See id.* at 477-93.
5. *See id.* at 472-77, 480-81, 483.
6. *See id.* at 494-97.
7. *See id.* at 496-97.
8. *See id.* at 500-01.

decentralized forms of order are valuable.[9] Traditions from decentralized ordering are more likely to enhance the constitutional precommitments necessary to obtain a high ratio of public interest goods to private interest goods.[10] The most important advantage of decentralized orders is jurisdictional competition. Efficient social norms are more likely to emerge from competing jurisdictions because capital and people can exit from jurisdictions that impose inefficient norms. Thus, state constitutional traditions may provide useful sources of tradition for federal constitutional law because states are in competition with one another. Competing precedents from non-geographic jurisdictions—whether the law merchant or canon law—may also be the source of efficient traditions.

Based on its skepticism of centralized order and its celebration of decentralization, the article offers innovative proposals for incorporating traditions from decentralized processes into the constitutional order. It argues that where the scope of enumerated rights in the Constitution is ambiguous, courts should interpret these rights in accordance with predominant state constitutional and common-law traditions.[11] This approach will allow the incorporation of efficient traditions into the Federal Constitution. Such an approach may be necessary to keep precommitments of the Constitution up to date, because the constitutional amendment process suffers from the defects of a centralized legislative process.

According to Professors Pritchard and Zywicki, the Court should follow a similar course when applying unenumerated rights against the federal government.[12] This canon of interpretation would generate new, good precommitments that will restrain the federal government. But the article suggests that to invalidate state laws on the basis of unenumerated rights—even those rights found to be predominant state constitutional traditions—would be a mistake because it might retard the jurisdictional competition among the states.

I admire the methodology that the article deploys to map the efficiency of norms that emerge from the various institutions of our legal order. The marriage between Hayek and public choice is

9. *See id.* at 457-59.

10. *See id.* at 451-57.

11. *See id.* at 502.

12. *See id.* at 508-09. Professors Pritchard and Zywicki, however, suggest that a super-majority—rather than a mere majority—of state court common-law and state constitutional law decisions should be required before an interpretation of an unenumerated right would be applied against the federal government. *See id.*

original and skillfully executed. Nevertheless, I have certain caveats. First, I think the almost blanket condemnation of top-down, hierarchical order is too strong.[13] The Constitution itself appears to be the result of national lawmaking of a hierarchical, positivist kind. Its very enactment shows that it is possible for a centralized process to address some of the prisoners' dilemmas and "tragedies of the commons" that affect political life. Ideally, we need to probe more deeply into the conditions under which the centralized creation of efficient norms is possible, because only then can one evaluate how centralized and decentralized order appropriately fit together.

The process of decentralized tradition-making often depends on the centralized order to create the conditions or, at the very least, facilitate the creation of the conditions that make decentralized decisionmaking possible. Such conditions include, among others, protecting the ability of individuals to choose jurisdictions in which to live and in which to invest their capital. Professors Pritchard and Zywicki do *not* suggest that all these necessary conditions can be generated by spontaneous order: the conditions often appear to be products of more conscious top-down design.

Indeed, our own system appears to be a mixed regime of centralized structures and decentralized processes in which consciously-framed centralized structures maximize the potentially good traditions that can emerge from spontaneous order. Federalism was not simply a product of spontaneous order but a structure created as positive law by a fairly centralized process. Moreover, it is federalism—the concept embodied in the doctrine of enumerated powers—that was the Framers' most important contribution to protecting decentralized traditionmaking. In the language of the article, one might say that federalism created a centralized process of federal government just powerful enough to sustain the conditions for spontaneous order and the production of efficient traditions by the states.

For instance, the enumerated powers laid down by the Constitution of 1789 constrained the federal government from undertaking redistribution by confining its domestic powers. For the Framers, the essential economic function of the national government was to provide for a common currency and sustain a free trade zone

13. *See id.* at 488-89. The authors recognize that some traditions which have emerged from centralized order, such as civil rights, are good, but I believe the authors do not sufficiently acknowledge that centralized order seems indispensable to the creation of centralized traditions.

to dismantle customs duties and other barriers that would frustrate exchange of goods and services among the former colonies.[14] The original Constitution did not give the federal government unconstrained taxing power.[15] Under the original Constitution, the federal government was substantially constrained from itself creating inefficient traditions.

The Constitution left the rest of economic and domestic regulation to the states. Although the states were thus repositories of enormous and potentially tyrannical powers, the free movement of goods and people among them restrained their ability to use their power to extract wealth from their citizens. If the states exercised their power unwisely, people could exit, taking themselves or their capital elsewhere.[16] Thus, federalism's structural solution to the problem of creating efficient traditions was to restrain the federal government through the enumerated powers and to restrain the states through the competition that the federal government maintained by keeping open the avenues of trade and investment.

The federal system of the United States was the most carefully planned example of a form of social structure that has repeatedly been a key to economic growth in world history. In medieval and Renaissance Europe, monarchs facilitated growth by keeping open avenues of trade between various centers immediately ruled by certain members of the nobility.[17] In this way the monarch both generated more revenues for himself and checked the power of the nobility by putting the jurisdictions in competition with one another.[18] Similarly, in eighteenth and nineteenth century Japan, the different *hans* competed with one another while remaining under the umbrella of the *shogun* and, after the Meiji restoration, under the

14. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 3 (providing Congress with the power to regulate interstate commerce); *see also* Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 17 (1987) (viewing the Commerce Clause as "a charter for free trade"); David G. Wille, *The Commerce Clause: A Time for Reevaluation*, 70 TUL. L. REV. 1069, 1077 (1996) (stating that the original purpose of the Commerce Clause was to promote free trade).

15. *See* THE FEDERALIST NO. 21, at 133-35 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (discussing the manner in which the power of taxation given to the federal government was limited).

16. *See* Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS., Winter 1992, at 147, 149-50 (arguing that federalism is a check on the monopoly power of state government because individuals and capital can migrate from state to state).

17. *See* DAVID S. LANDES, THE WEALTH AND POVERTY OF NATIONS 36-38 (1998) (discussing the manner in which medieval structures sustained a "right of exit" and thus generated wealth).

18. *See id.* at 37.

emperor.[19]

Because of the limits it placed on expropriation, economists contend that the original constitutional design of a federalist free trading system was at the heart of the steady growth of the United States. This growth allowed the country to become an economic superpower by the beginning of the twentieth century.[20] But federalism was more than just a political engine of economic expansion; it also limited utopian schemes that are an important carrier of the virus of bad social norms. In the nineteenth century, when the states rather than the federal government were responsible for general economic and social regulation, the states did not cause inefficient social norms to arise because they were in competition with one another. Social security, for example—in its current form as a vast intergenerational transfer—and the inefficient social norms that the program generates would not have been possible because no state could have afforded to impose high payroll taxes on its productive workers and businesses.[21]

This structure endured for one hundred and fifty years. In the Progressive Era, however, the states became more centralized because of the then prevailing belief in the beneficence of national power.[22] The Sixteenth Amendment, providing for a federal income tax, removed a major constraint on the federal government by giving it access to almost unlimited revenues.[23] The Seventeenth Amendment, providing for the direct election of Senators, weakened the structure of federalism by stripping the states of their institutional protectors in the Senate.[24] In the 1930s, the Supreme Court, under intense pressure generated by the New Deal, delivered the coup de grâce. It abandoned the remaining constitutional limitations that prevented the federal government from directly regulating

19. *See id.* at 360-61.

20. *See* Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 24-27 (1995).

21. *See generally* PETER J. FERRARA, SOCIAL SECURITY: THE INHERENT CONTRADICTION 3-308 (1980) (discussing the inefficiency of the social security system).

22. For a history of such ideas in the Progressive Era, see RICHARD HOFSTADTER, THE AGE OF REFORM 215-69 (1955).

23. For a discussion of the restrictions on the federal government's taxing power in the original Constitution, see THE FEDERALIST NO. 23, at 133-35 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

24. *See* Roger G. Brooks, Comment, Garcia, *the Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 HARV. J.L. & PUB. POL'Y 189, 196-208 (1987) (discussing the Seventeenth Amendment's crippling effect on Senators' interest in protecting the states).

manufacturing and the conditions of labor, thereby gravely weakening regulatory competition among the states and centralizing power in Washington.[25]

As a result, the production of inefficient traditions through centralized legislative power has increased and the conditions for the creation of efficient traditions have deteriorated. If this is a correct description of the real obstacles to the creation of efficient traditions in the United States, Professors Pritchard and Zywicki's major proposal will not remove them. We no longer have a system for creating good centralized traditions, and incorporating even a few good state traditions into the federal system will not move us toward a system for decentralized tradition creation.

Indeed, without a revival of a system that can create good centralized traditions, one may question whether state constitutional traditions carry a presumption of efficiency. The article assumes that state jurisdictions are in competition with one another and they are therefore likely to generate good traditions, while the nation as a whole is not subject to effective jurisdictional competition and thus is not as likely to generate such good traditions. While this assumption was true at the time of the original Constitution, it is open to doubt now. The federal government plays a role in almost every aspect of social policy. This fact may distort the traditions that emerge from the states. One may deplore the loss of autonomy to the states but it is doubtful that such autonomy can be revived.[26] Such a loss of autonomy raises questions about the extent to which our federalist system is today a generator of sound traditions.

On the other hand, because of the General Agreement on Tariffs and Trade ("GATT")[27] and global capital markets (and to some degree, fairly open immigration), the United States is in a position of substantial jurisdictional competition with other nation-states.[28] Thus, the world trading system as a whole may now be the successor of the federalist systems that generated both efficient social norms and economic growth. If that is true we might expect efficient

25. For a description of this process, see Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1443-54 (1987).

26. *See Disciplining Congress: The Boundaries of Legislative Power*, 13 J.L. & POL. 585, 588 (1997) (statement by Professor John O. McGinnis).

27. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

28. I discuss the analogy between the federalism of 1787 and the global economic structure of today at length in John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903, 913-18 (1996).

norms to begin emerging at the level of the nation-state rather than at the level of the states.

With respect to the normative conclusions of the article, I have larger reservations. I agree with the claim that Scalia's and Souter's use of traditions is defective because of their dependence on hierarchical structures—Scalia on the legislature and Souter on the precedent of the Supreme Court—rather than spontaneous order. But I do question the notion that state constitutional or common-law traditions should be used to help interpret the Constitution where it is ambiguous.

An interpretative assumption encouraging the incorporation of state traditions into the Federal Constitution has several disadvantages. The first disadvantage is that incorporating traditions will make it harder to change those traditions when they cease to be optimal. 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.

The exclusionary rule and Miranda warnings offer cases in point. Their efficiency at any moment depends on the absence of less costly alternatives that would prevent police misbehavior. Perhaps because of changes in culture and technology, there are better alternatives today than there were in the 1960s.[29] Even if these rights become predominant in state traditions, their federalization prevents experimentation with new traditions as circumstances change.

The article suggests that state courts may be able to encourage change by chipping away at outdated precedents.[30] Distinguishing cases, however, is not the same as overruling them. Under the article's own standards for incorporating traditions into federal law, distinctions by even a large number of states would not enable the Supreme Court to revive an old tradition because the tradition's revival at the state level would be blocked by the Court's own

29. For instance, a requirement of videotaping confessions might well prevent coercion without discouraging true confessions—thus providing the benefits of Miranda warnings without their costs.

30. *See* Pritchard & Zywicki, *supra* note 1, at 505-06.

precedent.

In addition, a second disadvantage is that even in the absence of changes in technology or culture, incorporating predominant state traditions into federal law could create efficiency losses because predominant state traditions may not be efficient for all states. For instance, it may be that the constitutional restrictions on gun ownership should be different in states with populations that are so essentially rural that they are outliers from the rest of the population of the United States. It is quite possible that rules of thumb for what is a reasonable search and seizure should vary depending on the crime rate.[31] After all, the Fourth Amendment itself is not phrased in absolute terms but seems to be designed to maximize the sum of security and privacy depending on the facts and circumstances of the world.[32] One of the prime advantages of federalism is that state constitutional and common-law norms can be adapted to the peculiar circumstances of individual states precisely when those circumstances differ substantially from their fellow states.[33]

A final disadvantage is that this interpretative presumption also would tend to undermine the efficiencies that federalism creates by sustaining different bundles of rights that appeal to individuals with different preferences.[34] For instance, individuals who have different tradeoffs for privacy and crime can move to a state with more—or less—relaxed standards for permitting searches and seizures. Thus, the proposal may disadvantage not only people in outlier states but also outlier people who may gain in satisfaction from moving to a state with a peculiar—to the predominant majority—bundle of rights.

These disadvantages of the proposal exist even if we assume a judiciary that is going to follow faithfully the jurisprudential standards the article recommends for finding efficient state traditions. The article itself, however, demonstrates that at least under current conditions we are unlikely to enjoy the services of faithful judges. Our judges are subject to innate biases of the legal profession and of the judicial confirmation process that are likely to make them favor, in the long run, the centralized, regulatory

31. The reasonable expectation of privacy in Los Angeles also may differ from the expectations in a rural area and thus may mean that the efficient rules of thumb for justifiable searches and seizures in those areas may be quite different.

32. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 793 n.135 (1994) (suggesting that the reasonableness requirement should be interpreted so as to maximize protection of natural rights from the dangers of private violence and governmental intrusion).

33. *See* DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 77 (1996).

34. *See id.* at 86-87.

tradition of aggrandizing their own power along with that of the federal government.[35] Thus, a national judiciary is inherently a poor instrument for discovering decentralized, efficiency-enhancing traditions.

The article's proposed jurisprudence for discovering efficient traditions would not provide much of an impediment for a centralized judiciary pursuing the course that a public choice analysis would predict—making up its own rules under the guise of discovery. The article suggests that judges should adopt an expansive interpretation of federal constitutional rights against the states when there is a majority consensus by states to adopt such a constitutional right.[36] But judges are not going to be constrained much by such jurisprudence. Statements about particular traditions emerging from different state courts will never be identical or labeled in the same manner. It will also often be unclear to what extent the traditions referenced in state cases contribute to a legal holding or are merely dicta. Ascertaining whether a particular tradition is recognized as a constitutional right by a majority of states thus will require substantial discretionary judgment.

The article itself is rightly skeptical about the manner in which the Court exercises discretion, and thus, on the article's own premises, one would predict that the Supreme Court would develop elastic doctrines to determine whether traditions are identical. One would expect to see much subtlety in discerning similarity of precedent that may benefit lawyers and related professional classes and much obtuseness in failing to discern the similarity of state traditions that do not.

In light of all these disadvantages, I believe the burden is on those who want to incorporate efficient state traditions into the Constitution to show that incorporation would have very substantial advantages. I am not persuaded that Professors Pritchard and Zywicki have met this burden. If a good decentralized system is operating, then their proposal is unnecessary because states already will be under pressure to adopt efficient traditions. A state that has a

35. Professors Pritchard and Zywicki's article is not the first to see this; the Anti-Federalist Brutus predicted the centralizing course of the federalist judiciary in what are essentially public choice terms. *See Brutus XI*, N.Y. J., Jan. 31, 1788, *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 293-98 (Ralph Ketcham ed., 1986); *see also* John O. McGinnis, *Legal Lawbreaking*, NAT'L REV., Feb. 24, 1997, at 38, 39-40 (explaining why our own legal culture applauds faithless judges).

36. *See* Pritchard & Zywicki, *supra* note 1, at 502-04.

suboptimal bundle of rights should be under pressure from loss of capital and people to move toward a more optimal set. The existence of efficient traditions in other states should help them do so.

On the other hand, if we do not have a good system for decentralized-norm creations, incorporating traditions that are predominant in state constitutions would not facilitate the dispersion of efficient traditions because we would have no assurance that they would be more efficient. Moreover, it is not clear from the article how incorporating predominant state traditions would move the nation toward a good system of decentralized-norm creation. If federalism was the keystone to the original structure, as I have argued, the kind of rights in criminal law that the article suggests incorporating would neither revive that structure nor develop some other system for the creation of decentralized norms.

This critique applies to the article's argument for incorporation as well as to its argument for interpreting ambiguities in the incorporated rights against the background of state traditions. I recognize that incorporation may well be supported by legal arguments based on the meaning of the Fourteenth Amendment as understood at the time of its ratification.[37] I certainly do not believe that efficiency is the only touchstone of law. But the *efficiency* arguments that are the article's principal concern seem to cut against incorporation for all the reasons previously stated—the loss in efficiency when such rights become inappropriate in light of changing circumstances and the loss of efficiency for states with unusual circumstances and people with unusual preferences. Thus, I believe the article would more faithfully follow the implications of its methodology if it were to create a presumption—defeasible to be sure—against incorporation if the evidence for and against that doctrine were in equipoise or were otherwise ambiguous.

It is true that many of the protections contained in the Bill of Rights seem to be so sound that there is little reason to fear that changes in circumstances would suggest that they be repealed or that outlier states would not benefit from them. But this judgment does not depend on decentralized competition, and so it is not supported by the model. Indeed, the strongest argument based on the beneficence of decentralized traditions for incorporating some of the

37. *See generally* William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954) (arguing that the Fourteenth Amendment at the time of its ratification was understood to incorporate the Bill of Rights).

Bill of Rights would defend the distinction that I have drawn between the conditions creating decentralized traditions and the decentralized traditions themselves. Some of the rights in the Bill of Rights facilitate the conditions for the creation of decentralized traditions. For instance, the First Amendment protects the free flow of information. Applying it to the states would intensify the competition among states for the optimal bundle of rights. On the other hand, it is hard to see how the right to a speedy trial intensifies that competition and thus hard to see why, on efficiency grounds, it should be incorporated.

I agree with the article's conclusion that its model suggests that no unenumerated rights should be applied against state governments. Permitting states, rather than the federal government, to determine the content of unenumerated rights preserves decentralized competition and prevents roadblocks to future constitutional change. The article also suggests, however, that the Ninth Amendment should be a source of unenumerated rights against the federal government. At least as formulated, I again doubt that this conclusion is in accord with the article's underlying methodology.

In my view, the best reading of the Ninth Amendment is that it simply underscores the limited enumerated powers of the federal government.[38] That amendment makes clear that if the Constitution does not give the federal government the authority to regulate a particular activity, the citizen has a corresponding right vis-à-vis the federal government to engage in the activity.[39] This formulation comports with the methodological underpinnings of the article's model. By reading the enumerated powers strictly, we confine the federal government to a position of ensuring that the conditions for regulatory competition do not interfere with that competition.

The formulation of unenumerated rights—at least as rights are understood today—is potentially dangerous to a structure for creating efficient traditions if it is understood as something other than another way of saying that the federal government has only enumerated powers. For instance, what if the courts looked at state constitutions after the New Deal and detected an emerging trend to give individuals the right to welfare against their states and, on this basis, provided such a right? This result is not fanciful, as a fair

38. *See* Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J.L. & POL. 63, 63-64 (1987) (suggesting that by limiting the powers of the federal government, the Ninth Amendment gives rights to the people vis-à-vis the federal government).

39. *See id.* at 64.

number of states still have provisions that can be construed as providing a right to welfare.[40] If decisionmaking by the federal courts is as prone to error in the direction of regulation as the article suggests, the jurisprudence of unenumerated rights could actually be deployed to aggrandize the power of the state. A recognition of constitutional federal welfare rights obviously would retard the process of creating efficient traditions by making it harder to avoid inefficient exactions. In particular, this recognition would have made welfare reform far more difficult.[41]

The danger of recognizing welfare rights raises one final problem for the normative jurisprudence suggested by the article. Competition between governmental jurisdictions is more imperfect than competition in private markets, and the efficiency of the results is less certain. As a result, inefficient traditions sometimes arise even if the right tradition-generating structure is in place. For instance, a crisis like the Great Depression can occur and collectivist ideas with their inefficient social norms may gain influence, even in a relatively decentralized order. Such perturbations may lead even decentralized processes to create bad traditions. Empowering the federal judiciary to entrench further these traditions in the federal structure may nationalize local errors. The judiciary should instead simply preserve the structure that allows these bad traditions to dissipate in the long run.

Thus, my own view is that this article's persuasive combination of the celebration of decentralization and the critique of centralization more logically would encourage an interpretation of the Constitution that simply would attempt to preserve the structural conditions that lead to competition among jurisdictions. Such a methodology would look a lot like the venerable theory of the Constitution—the strict construction espoused by, among others, Thomas Jefferson. This theory consists of a refusal to interpret constitutional provisions as either authorities for the federal government or restrictions on the states except where such authorities or restrictions are clearly indicated.[42] Such provisions include, as described above, the provisions protecting the conditions

40. *See, e.g.*, N.Y. CONST. art. XVII, § 1.

41. I acknowledge that the article at least creates a sensible hurdle to applying unenumerated rights against the federal government by requiring three-fourths of the states to have created the unenumerated right to be applied. *See* Pritchard & Zywicki, *supra* note 1, at 508-09.

42. For a description of Jefferson's strict constructionism, see H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 667-68 (1993).

for competition—a common currency and free flow of people across state boundaries.[43]

In addition, this very restrained jurisprudence would also be supported by the article's own appropriate skepticism about the role of the national judiciary. Such skepticism suggests the need for a jurisprudence, like a traditional strict-constructionist jurisprudence, that would bring strict and rigid standards to the federal judiciary. By requiring that federal judges justify their invalidation of state laws with clear reference to express provisions, such a jurisprudence would provide a simple means for the citizenry to judge the fidelity of their interpretation.

Of course, this approach today would not be as effective as it would have been in the nineteenth century because constitutional federalism has been so vitiated.[44] Thus, I recognize that such an approach still leaves open the important question of how the constitutional structure—the system which creates efficient decentralized traditions—will be updated in the long run. That question brings us back to an inquiry into (1) what conditions can the hierarchical structures of positive law generate good frameworks or (2) what conditions can frameworks spontaneously generate themselves. These questions are among the hardest in constitutional law. Even if the article does not answer these questions, it is a tribute to its innovative insight into constitutionalism that it brings them into such sharp focus.

43. Judge Richard Posner is wrong to suggest that we need a variety of judicial methodologies in the federal judiciary to test the "robustness of judge-made law." Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1638, 1681 (1998). That robustness can be tested only through jurisdictional competition, and the non-originalist judges of the New Deal contributed to the destruction of the conditions for such competition.

44. *See supra* note 26 and accompanying text.