

T H E
C R I T E R I O N
J O U R N A L O N I N N O V A T I O N

VOL. 4



2019

Capitalism, Socialism, and the Constitution

*J. Gregory Sidak**

Given the growing popularity of socialism in the United States as reflected in the positions taken by certain candidates in the presidential campaign of 2020, I have decided to republish, without revision, the following essay from 2001. The essay begins by recounting a brief conversation that I had with an unidentified member of the Supreme Court of the United States, whom I called Justice Nemo, regarding the collapse of Soviet communism. Justice Nemo was in fact the late Chief Justice William Rehnquist. To borrow a phrase from one who wrote powerfully about the topics addressed here, I dedicate this essay to the socialists of all parties.

* * *

Between the time that President George Herbert Walker Bush was defeated for reelection in November 1992 and President Clinton took office in January 1993, a Justice of the Supreme Court was invited to address a group of conservative lawyers in the White House, many of whom would be cleaning out their desks in a matter of days. (To conceal this Justice's identity, and to lend an element of mystery and irony, I will call the person Justice Nemo and ascribe to him or her the masculine pronoun.) The thrust of Justice Nemo's informal and unpublished remarks was that the Court does not operate in a political vacuum. The appointment and confirmation of new Justices to the Court, Justice Nemo said, represent a process that actively and properly involves the two political branches, and those already on the Court keenly notice the political themes that emerge from that political process.

* Chairman, Criterion Economics, Washington, D.C. Email: jgsidak@criterioneconomics.com. I thank Robert F. Nagel, Michael Novak, Richard A. Posner, and Stephen F. Williams for generous comments, Thomas A. Smith for many thoughtful conversations about the future of freedom in the year 1989, and Karol Wojtyła for his example of courage and hope. The views expressed are solely the author's. The original version of this essay appeared as J. Gregory Sidak, *Mr. Justice Nemo's Social Statics*, 79 TEX. L. REV. 737 (2001). At the time, I was the F.K. Weyerhaeuser Fellow in Law and Economics, American Enterprise Institute for Public Policy Research. Copyright 2019 by J. Gregory Sidak. All rights reserved.

When the time came for questions, I asked the first one. During the Bush administration, I said, the greatest political change was clearly the fall of the Berlin Wall and the collapse of communism in eastern Europe and the former Soviet Union. How had that momentous political change affected the way in which the Court had since approached its work? Dumbfounded, Justice Nemo asked me to restate my question. I accommodated. Had the fall of communism caused the Court to appreciate better how democratic capitalism has advanced not only economic liberty, but also political liberty? If so, how had the Court subsequently approached its decisions differently? Justice Nemo regained his bearings. Without a hint of irony, Justice Nemo explained that the collapse of communism had had no effect on the Court because the Constitution could as easily accommodate socialism as democratic capitalism. Alluding to Justice Holmes's famous dictum in *Lochner*, Justice Nemo said that the Constitution does not enact Mr. Herbert Spencer's *Social Statics*.¹

My purpose in recounting this vignette is not to castigate Justice Nemo, but rather to show how such a view by a Justice of the Supreme Court on the significance of the fall of communism helps to distinguish two conflicting conceptions of law. One view is that law is consciously devised by human ingenuity, that it defines how individuals and organizations shall interact with one another, and that the authority of the lawgiver grants law its legitimacy. Thomas Hobbes wrote that "the law is a command"² and that "all laws, written and unwritten, have their authority and force from the will of the commonwealth."³ This view of law was embraced by John Austin⁴ and is epitomized by Oliver Wendell Holmes's famous remark, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."⁵ H.L.A. Hart called this the "imperative theory" of law, for which "the key to the understanding of law is to be found in the simple notion of an order backed by threats."⁶

The other view is that law is an evolutionary institution, that it reflects and summarizes information that has been revealed over centuries regarding the optimal ordering of relationships among individuals and organizations. On this view, law's legitimacy arises from objective knowledge that the particular legal rule at issue is superior to all other known means of ordering a specific kind of relationship or transaction. This view of law is associated with the works of a community of distinguished economists—Armen

¹ The precise statement by Justice Holmes is: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

² THOMAS HOBBS, *LEVIATHAN* ch. 26, ¶ 8, at 187 (Cambridge Univ. Press 1991) (1651).

³ *Id.* ch. 26, ¶ 6, at 186.

⁴ JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832).

⁵ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV L. REV. 457, 461 (1897). For a contemporary reaffirmation, see *MindGames Inc. v. Western Publ'g Co.*, 218 F.3d 652, 655–56 (7th Cir. 2000) (Posner, C.J.).

⁶ H.L.A. HART, *THE CONCEPT OF LAW* 16 (Clarendon Press 1961).

Alchian,⁷ Ronald Coase,⁸ Aaron Director,⁹ Milton Friedman,¹⁰ Thomas Sowell,¹¹ George Stigler,¹² and, most significantly, Friedrich Hayek.¹³ Hayek even coined the word “catallaxy” to describe the evolutionary process of a market economy, and the word “catallactics” to describe its study.¹⁴

The difference between the two views of law is illustrated by the following nonlegal example. Two persons inspect a chart showing all of the jobs and lines of reporting in a factory. The first person sees a consciously devised network of authority. The second person sees the same chart as the summation of a vast quantity of knowledge. To the second observer, the hierarchy within the factory reveals the knowledge that has been gleaned from years of experience, in which alternative and less productive hierarchies have been tried and rejected or, if not rejected, have caused the companies that have continued to adhere to them to wither. Thus, to the second person, the legitimacy of the management chart does not lie in the fact that the chief executive officer or the board of directors has the authority to draw and redraw the chart however it likes, but rather in the objective inferiority of all predecessors to this particular ordering of management responsibilities. If a superior ordering subsequently becomes known, then even this present management chart will cease to have legitimacy for the second observer, regardless of how uninterrupted the reign of authority of the board or CEO who imposed this ordering.

In the remainder of this essay, I examine, against the backdrop of these two theories of law, the methodologies and approaches employed by the Supreme Court in constitutional adjudication and by prominent constitutional theorists in their scholarly writings. In Part I, I describe the substance and implications of Hayek’s catallactic view of law. In particular, the evolutionary view of law builds upon, and therefore reveres, objective knowledge. The discovery of objective knowledge is inherently antimajoritarian. It does not result from democratic forces and, indeed, may arise in spite of them. Judicial review is also inherently antimajoritarian. In this respect, the role

⁷ Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972).

⁸ Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA (n.s.) 386, 404–05 (1937).

⁹ Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1 (1964).

¹⁰ MILTON FRIEDMAN, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3, 5–7 (Univ. of Chicago Press 1953).

¹¹ THOMAS SOWELL, *KNOWLEDGE AND DECISIONS* 284 (Basic Books 1980).

¹² George J. Stigler, *The Economics of Scale*, 1 J.L. & ECON. 54 (1958). Stigler argued that the optimum scale of a firm in an industry could be inferred from what he called “the survivor principle,” whose “fundamental postulate is that the competition of different sizes of firms sifts out the more efficient enterprises.” *Id.* at 55.

¹³ Hayek’s voluminous writings are summarized in FRIEDRICH A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* (W.W. Bartley III ed., Univ. of Chicago Press 1988).

¹⁴ *Id.* at 112.

of judges in constitutional adjudication resembles the discovery of objective knowledge. But, currently, the resemblance stops there.

In Part II, I argue that the Supreme Court and constitutional scholars do not merely eschew an evolutionary view of law that builds upon objective knowledge. They do far more, by constructing utterly nonfalsifiable doctrines and models of constitutional interpretation. To show this, I ask: when scrutinized in the way that theories in the social sciences are scrutinized, do these constitutional decisions and theories provide reliable predictions of future events? Are they predictors or merely descriptors? Are these decisions and theories even susceptible to being refuted? My conclusion is that, by the epistemological standards of the social sciences (let alone the physical sciences), the “models” that the Court and traditional constitutional scholars offer are inherently nonfalsifiable. The Court and scholars do not acknowledge that the nonfalsifiability of their models counsels caution or humility in their use. To the contrary, as Hayek wrote, “[t]he power of abstract ideas rests largely on the very fact that they are not consciously held as theories but are treated by most people as self-evident truths which act as tacit presuppositions.”¹⁵ One hypothesis that would explain the Supreme Court’s and constitutional scholars’ hostility to any epistemological rationale relying on objective knowledge is that adopting such reasoning would limit one’s discretion relative to the status quo. Nonfalsifiable rationales for constitutional decisions tend to increase the size of the state, which derivatively increases the power and prestige of the Supreme Court, the lower courts, and the legal clerisy in which law professors rank highly. Given the conceit of each generation to believe that it has devised a way of viewing the world that is shockingly new, it should not be surprising that the insights of Hayek and his colleagues tend to be ignored by contemporary legal scholars. In their place, the imperative theory of law, which indulges each generation of utopians to impose its own design on human order, has become more prevalent than the evolutionary theory.

In Part III, I conduct a thought experiment. Suppose that judicial review were predicated, at least in part, on objective knowledge in the sense that laws based on demonstrably false premises would be struck down as unconstitutional (for example, because the due process component of equal protection would require that every law be subject to empirical falsification). If, rather than seeking justice, judges pursued truth, or at least the resemblance of truth, how would the role of the judiciary change? I argue that individual liberty would probably increase relative to the state.

¹⁵ FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 70 (Univ. of Chicago Press 1973).

I. THE AVERSION TO OBJECTIVE KNOWLEDGE
IN CONSTITUTIONAL ADJUDICATION AND SCHOLARSHIP

The Supreme Court and many influential constitutional scholars are averse to the notion that knowledge accretes in an evolutionary, inherently nonmajoritarian manner. They embrace an imperative vision of law, acting in ignorance or disbelief of the possibility that an extended spontaneous order might exist wholly independent of their conscious design.

A. Objective Knowledge and the Catallaxy of Law

Legal scholars speak of “private ordering” and “public ordering.” This talk of “order” sounds curiously antithetical to liberty, even if the order is one voluntarily constructed by contract. Why does “order” matter, whether it is publicly or privately imposed? Hayek’s answer is distinctly anti-imperative: “Order is desirable not for keeping everything in place but for generating new powers that would otherwise not exist.”¹⁶ Thus, the evolutionary perspective on the need for order posits that the alternative to order—the anarchic state of Rousseau’s noble savage—is in fact no feasible alternative at all. Hayek posits that man never was a noble savage, that his survival and advancement have always depended on his ability to cooperate with other individuals.¹⁷ In Hayek’s view, the noble savage would not enjoy ultimate freedom, but would be doomed to a cruel existence of poverty and adversity. Consequently, Rousseau’s vision of unconditioned, anarchic liberty was never more than a romantic fiction. Liberty, therefore, has always been a concept conditioned on the need of individuals to cooperate with others for their mutual security, comfort, advancement, and survival. In short, order emerges from necessity rather than conscious design.

Private ordering refers to institutions built on contract and property, which are administered atomistically by individuals rather than centrally by government. It is, in Hayek’s words, a spontaneous “extended order of human cooperation.”¹⁸ Private ordering is the direct product of the evolutionary development of law. In its purest form, private ordering is an atomistic market economy. Public ordering, on the other hand, epitomizes the imperative model of law. It is not spontaneous and evolutionary, but consciously designed. It imposes restrictions and conditions on the use of contract and property, replacing the atomistic decision making of individuals with centralized decision making of a government, which attempts to compile and digest vast quantities of information on the workings of society in order to

¹⁶ HAYEK, *THE FATAL CONCEIT*, *supra* note 13, at 79.

¹⁷ *Id.* at 49–50.

¹⁸ *Id.* at 6.

command and control human action so as to advance collective goals. In its purest form, public ordering is socialism. When the public ordering of socialism is backed by threats of violence or terror, it becomes totalitarianism of the sort witnessed during the twentieth century.

In addition to Hayek, one of the twentieth century's most trenchant intellectual foes of totalitarianism was Sir Karl Popper. His concept of "objective knowledge" created a new branch of epistemology, which asserts that the falsity, but never the truth, of a theory can be ascertained through either *a priori* reasoning or *a posteriori* empiricism.¹⁹ But, because life must go on even in the face of not knowing that important conjectures are really "true," we must instead evaluate and act upon the "verisimilitude" of a theory—that is, its resemblance to truth—until further attempts at falsification have narrowed the field of competing explanations for a given phenomenon.²⁰ The survival of a hypothesis in the face of sustained efforts to refute it provides an objective basis to believe that it is true knowledge, and not merely conjecture, even though the possibility remains that the hypothesis may eventually be refuted. Much of the difference between the imperative and evolutionary models of law, particularly as they can be observed in contemporary legal scholarship and the contemporary jurisprudence of the Supreme Court, relates to the vastly different significance that the two models place on objective knowledge.

Private ordering makes greater use of objective knowledge than does public ordering. Falsifiability is critical to the spontaneous and noncoercive ordering of society. In such a system, the efficacy of a particular transaction or institution will determine whether it will continue, mutate, or be discarded altogether. Because the legitimacy of private ordering flows from the fact that, in an evolutionary sense, it is empirically superior to any other ordering of which individuals are aware, objective truth or falsity is essential. In the evolutionary world view, verisimilitude legitimates law. In the imperative world view, authority legitimates law; the objective truth or falsity of the order consciously imposed by law is not regarded as the least bit relevant to its legitimacy. To render a law legitimate, it is enough for the lawgiver to conceive of it. Of course, how the lawgiver derives and retains the authority to announce the law is another matter.

A similar argument applies to the use and meaning of language: a prerequisite to private ordering is the ability to express concepts in a language with sufficient clarity and objectivity that rights and obligations under legal rules can be articulated and subsequently evaluated. If authority alone determines how the society will be ordered, then discourse and refutation diminish in

¹⁹ KARL POPPER, *OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH* (Clarendon Press rev. ed. 1979).

²⁰ *Id.* at 47–60.

importance, and the efficacy of particular institutions and transactions will cease to determine whether or not they will continue to exist in their present form. In such a society, the meaning of language depends on the authority of the interpreter, and thus language can be stripped of the ability to communicate objective knowledge—knowledge which, as Popper demonstrated, exists regardless of the consciousness or willingness of any human observer.

It is important to recognize that the use of objective knowledge to legitimate law does not itself fall prey to a form of what Hayek called “constructivist rationalism.”²¹ One who adheres to an evolutionary view of law in no way necessarily employs objective knowledge to indulge the conceit of replacing the spontaneous extended order with a blueprint for a society crafted from human reason. To the contrary, objective knowledge enables one to hasten the evolutionary process of rejecting inferior, falsified hypotheses—and thus to hasten the repudiation of whatever human institutions might have been predicated upon those objectively false conjectures.

B. The Vilification of the Corporate Form as a Vehicle for Collective Speech in Defense of Property

We have seen that the imperative and evolutionary views of law are fundamentally contradictory visions of the ordering of society. Let us now examine how the clash between those visions of law has manifested itself in the reasoning of the Supreme Court.

Two important events in legal and economic theory are associated with the year 1937. The first was the Court’s abandonment of its willingness to protect contract and property under the Constitution, about which I will have more to say later. Although the Court’s metamorphosis is most closely associated with the year 1937,²² the process spanned nearly a decade. By 1937, the Court had already repudiated the Contract Clause three years earlier in *Home Building & Loan Association v. Blaisdell*.²³ The crown jewel of the Court’s new jurisprudence, footnote 4 of *United States v. Carolene Products*,²⁴ came a year later. By 1942, *Wickard v. Filburn*²⁵ had eliminated any practical constraint on the scope of the federal commerce power,²⁶ a development that stood unchecked in the Court’s decisions for more than a half century until *United States v. Lopez*.²⁷

²¹ HAYEK, THE FATAL CONCEIT, *supra* note 13, at 22–23.

²² See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

²³ 290 U.S. 398 (1934).

²⁴ 304 U.S. 144, 153 n.4 (1938).

²⁵ 317 U.S. 111 (1942).

²⁶ *Id.*

²⁷ 514 U.S. 549 (1995). The Court has since interpreted the Commerce Clause to invalidate or limit other federal statutes. See *Jones v. United States*, 529 U.S. 848 (2000) (excluding from the coverage of a

Perhaps the most succinct and articulate summation of this transformation in American constitutional law appears in Laurence Tribe's influential treatise:

National economic upheaval [of the Great Depression and the New Deal], and the conceptual revolution that attended it, devastated the belief that property and its contractually realizable advantages were attributable to some natural order of things implicit in a revealed structure of common-law rights. Who had property and who did not, who enjoyed power to contract freely and who had to be satisfied with terms offered by others, became a function of whom government had chosen to protect through its legal rules and whom it had decided to abandon to the power of others. Liberty of any meaningful sort came to be seen by growing numbers as a function of positive action by the state—not simply a function of leaving undisturbed the economic results of blind social forces and adventitious circumstance. In such a universe, the conduct of federal judges in policing preconceived limitations on governmental powers came to be viewed ever more broadly as an exercise in will rather than a study in logic, and the invisible hand of reason became instead the all too visible hand of entrenched wealth and power.²⁸

Since 1937, the legitimacy of a benevolent but imperial administrative state has gained wide if not unanimous acceptance among legal scholars. Tribe observes: “No longer content with securing justice by defining the inherent limits and internal boundaries of governmental institutions, judges and advocates were consumed by the search for an alternative conception of the just in matters of government power. The years since 1937 are best understood in terms of that search; its triumphs and failures mark the history of modern constitutional thought.”²⁹ Tribe's eloquent summation exemplifies what Hayek, lacking any suitable word in English, described with the German word *Machbarkeit*: the view “that anything produced by evolution could have been done better by the use of human ingenuity.”³⁰

The second significant intellectual event of 1937 was the publication of Ronald Coase's essay, *The Nature of the Firm*.³¹ Coase's insight that the firm is the nexus of contracts between the owners of various factors of production also has gained widespread acceptance among legal scholars. His theory, as

federal arson statute a private residence not used for any commercial purpose); *United States v. Morrison*, 529 U.S. 598 (2000) (ruling that no civil remedy is available under the federal Violence Against Women Act because the activity regulated does not substantially affect interstate commerce).

²⁸ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 1–5, at 13 (Foundation Press 3d ed. 2000).

²⁹ *Id.* at 14.

³⁰ HAYEK, *THE FATAL CONCEIT*, *supra* note 13, at 83.

³¹ Coase, *The Nature of the Firm*, *supra* note 8.

further refined by other economists and lawyers,³² emphasizes the transparency of the corporate form, and its cost advantage over other structures for privately ordering the ownership and control of productive activity.

Since 1937, however, these two bodies of thought—one quintessentially imperative, the other quintessentially evolutionary—have been ships passing in the night. What has been overlooked is that characterizing the corporation as the evolutionary nexus of contracts also challenges much of the traditional constitutional discourse on the legitimacy of the imperative administrative state to regulate economic activity, as well as the speech arising from that activity. If, as a vehicle for (private) collective action, the corporate form evolved because it is distinguished by its lower relative transaction costs, then the corporation can function simultaneously not only as an enterprise for producing goods and services, but also as a conduit for exercising the liberty interests of its diverse owners. The joint exercise of shareholders' liberty interests—through corporate speech, for example—is critical to protecting the property interests that these same persons own in the corporation. This proposition should appeal to those who regard economic liberty and political liberty as inseparable. It is also a proposition whose practical significance cannot be doubted in light of the steady growth in the late twentieth century of the percentage of Americans investing in stocks, either individually or through pension funds and mutual funds. The modern opinions of the Supreme Court, however, implicitly repudiate such a proposition because they are imperative rather than evolutionary in orientation. The Court considers the corporation to be a creation of the state. The corporation's liberty interests are circumscribed and qualified. Because the state has the power to refrain from creating the corporation, the Court seems to reason, the state has the power to impose any condition that it chooses on the corporation's liberty, on its ability to contract freely, and on the use of its private property. In 1990, for example, the Court in effect said in *Austin v. Michigan Chamber of Commerce*³³ that a corporation has a very limited right to freedom of speech.³⁴ The Court's opinion, by the late Justice Thurgood Marshall, warned of "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's

³² See, e.g., OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* 19 (Oxford Univ. Press 1996); OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* (Free Press 1985).

³³ 494 U.S. 652 (1990).

³⁴ *Id.* at 655, 657 (holding that freedom of speech for corporations is limited, in part, because the corporate structure is state-conferred). To be sure, the firm of which Coase wrote in 1937 is not identical to the corporation. For present purposes, however, the distinction is not critical, for surely the corporation represents a major, if not the prevalent, form in which economic production has been organized in the United States and other nations that have embraced democratic capitalism.

political ideas.”³⁵ Justice Marshall’s opinion, however, cannot be dismissed as the product of the split between liberals and conservatives on the Court, for its rationale, if not its florid rhetoric, closely followed from the earlier opinions written by Chief Justice Rehnquist and the late Justice Brennan in a series of corporate speech cases.³⁶

Nowhere did the majority in *Austin* consider the corporation to be a legitimate structure for minimizing the transactions costs of enabling diffuse and anonymous shareholders to speak in the defense of their private property when the administrative state seeks to redistribute or regulate it. Instead, the Court employed an authoritarian, anti-evolutionary model of the corporation, asserting: “State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders’ investments.”³⁷ These attributes of the corporate form were, in the Court’s view, “state-created advantages” that enable the corporation “to play a dominant role in the Nation’s economy[.]”³⁸ The underpinnings of the Court’s imperative premise, however, are easily removed. The example of limited liability is illustrative. The default assignment of liability embodied in corporate law is “limited liability.” The appellations “Incorporated” and “Limited” reinforce this common view in American law that the distinguishing characteristic of the corporate form is limited liability and that this economic institution consequently exists at the sufferance of the state. In contrast, a French corporation carries the appellation S.A. (which stands for *société anonyme*, meaning a society of anonymous persons), which suggests a conception of the corporation that places greater emphasis on the separation of ownership and control, the anonymity of shareholders, and the resulting liquidity from both of these features—none of which flows from the acquiescence or oversight of the state.³⁹

Although the Court’s vilification of the corporate form in *Austin* is largely dicta, it is more significant as a matter of political economy and constitutional theory than the precise holdings of *Austin* and its predecessors. The Court’s rhetoric and reasoning suggest that the corporation’s management

³⁵ *Id.* at 660.

³⁶ See, e.g., *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 826 (1978) (Rehnquist, J., dissenting). In *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986), Justice Brennan wrote for the Court: “The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation’s political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.” *Id.* at 258.

³⁷ *Austin*, 494 U.S. at 658–59.

³⁸ *Id.* at 659.

³⁹ See generally J. Gregory Sidak & Susan E. Woodward, *Corporate Takeovers, the Commerce Clause, and the Efficient Anonymity of Shareholders*, 84 Nw. U. L. Rev. 1092 (1990).

can be directed in significant ways by the state—and, eventually, one might suspect, by the state’s central economic planners. The Court has diminished the liberty interest of shareholders to speak collectively (though privately) through the corporate form. This infringement is significant: the repudiation of substantive due process, the decline of the Takings and Contract Clauses since the New Deal, and the simultaneous rise of the administrative state as a regulator of economic activity have made it increasingly difficult for individuals to defend their property against expropriation by the state. With any probing level of judicial review of economic regulation having been foreclosed as an option since *Carolene Products* in 1937, freedom of speech has acquired new significance to the defense of property and contract. Indeed, this relationship between speech and the defense of property and contract in the imperative administrative state should have been painfully obvious to the Court from the facts of the *Austin* case, which concerned restrictions on corporate spending in an election.

C. *Mr. Herbert Spencer’s Social Statics and the Year 1989*

The declining importance ascribed to structural rules also may have altered constitutional jurisprudence and scholarship in a manner reflecting the greater conflicts between evolutionary and imperative visions of law and between individual liberty and America’s flirtation with socialism since the New Deal. In particular, the growing expanse and opacity of equal protection law coincided with the demise of judicial protection of the Contracts Clause and the Takings Clause, which otherwise would have protected private property from the depredations of the expanding regulatory state and its redistributive purpose. The subordination of traditional rights of private property and of factor mobility has been accompanied by the creation of a new genre of public collective property and of individual rights to the redistribution of wealth by the government. Why, on its way to discovering “fundamental values,” did the Court not find the relations and institutions of democratic capitalism to reify principles elemental to the constitutional order established by the Framers? Why, to the prejudice of such relations and institutions, has the Court instead discovered fundamental economic rights that the state must provide its citizenry—the “new property” of government largess, welfare payments, and “minimal entitlements”? Is it even conceivable that, as Akhil Amar has more than playfully asserted, the Thirteenth Amendment in 1865 prohibiting slavery and the Sixteenth Amendment in 1913 permitting a redistributive federal income tax can be read together to create for each citizen a constitutional right to receive some minimum amount of property

from the government, property which obviously must be coercively taken from other citizens since it cannot be plucked from thin air?⁴⁰

One need not focus solely on the legal academy to discern the intellectual hostility to the notion that democratic capitalism is unique among known systems of government in an epistemological sense. Consider again Justice Nemo's invocation of Justice Holmes's *Lochner* dissent to justify the Court's ambivalence in 1993 between socialism and democratic capitalism. Missing from Justice Nemo's answer was any recognition that the collapse of communism was a piece of objective knowledge evidencing that socialism as practiced in its most aggressive form in the twentieth century—that is, Soviet central planning coupled with political repression, violence, and terror⁴¹—was demonstrably inferior in producing prosperity and freedom than was democratic capitalism over the same period. Justice Nemo's agnosticism on the constitutional superiority of democratic capitalism was tantamount to ignoring the objective knowledge that had resulted from the twentieth century's tragic experiment with communism.

One might argue that it does not follow from the fact that democratic capitalism is demonstrably superior to Soviet communism that democratic capitalism is also superior to democratic socialism, such as that practiced in Sweden or the United Kingdom. This observation prompts two lines of rebuttal. First, during the final years of Soviet communism, the nations adhering to democratic socialism were themselves recognizing and discarding an unproductive form of economic organization—as evidenced, for example, by the widespread growth of privatization of state enterprises in western Europe.⁴² Second, as a practical matter of geopolitics, it would be naïve to presume, certainly in western Europe, that nations embracing democratic socialism after World War II could have survived against the expansionist designs of Soviet communism unless the United States, the most ardently democratically capitalist of all the western democracies, had not sworn to defend them militarily, with nuclear weapons if necessary. In other words, one must ask whether, in the absence of a more powerful nation dedicated to democratic capitalism, nations predicated on democratic socialism could have endured in the face of Soviet aggression any longer than Hungary, Czechoslovakia, and Poland were able to endure as free nations after World War II.

Having answered this argument, let us return to the language and reasoning of *Lochner* itself. Justice Holmes's dissent in *Lochner* has been called by Judge Richard Posner “the greatest judicial opinion of the last hundred

⁴⁰ See Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37, 39–41 (1990).

⁴¹ See, e.g., ROBERT CONQUEST, *THE GREAT TERROR: A REASSESSMENT* (Oxford Univ. Press 1990).

⁴² See, e.g., JOHN VICKERS & GEORGE YARROW, *PRIVATIZATION: AN ECONOMIC ANALYSIS* 155–69 (MIT Press 1988) (discussing the British privatization program).

years.”⁴³ The dissent is remarkably succinct by modern standards. To understand the epistemological fallacy of the opinion, it is useful to present the dissent in its entirety, as Judge Posner does in his critique of it as a work of legal literature:

I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. Two years ago we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. The decision sustaining an eight hour law for miners is still recent. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think

⁴³ RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATIONSHIP* 285 (Harvard Univ. Press 1988).

that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.⁴⁴

What is most immediately striking about Justice Holmes's dissent is its premise that majoritarianism can validate an empirical proposition. Justice Holmes chose to ignore the fact that knowledge, revealed through the process of scientific discovery, depends in no way on the operation of some majoritarian mechanism. Scientific discovery applies as much to political and economic institutions as it does to natural properties of physics or chemistry. Einstein's theory of relativity cannot be proven or refuted by the enactment of a statute or by a referendum passed by fifty-one percent of the electorate. Neither can the Black-Scholes option pricing model or the Coase Theorem. If Fabian socialism was in 1905 the most extreme alternative to capitalism that Justice Holmes might have observed, it was a cheap gesture for him to say that the Constitution was not predicated on a system of private property and entrepreneurship. As long as socialism was not perceived as a threat to democratic capitalism, socialism would never garner the support of "a majority to embody their opinions in law."⁴⁵ It was therefore costless for Justice Holmes to strike the pose that the Constitution is so open-minded as to be agnostic about the choice between capitalism and forms of government antithetical to it.

Focusing again on Justice Nemo's reliance on Justice Holmes's dissent in *Lochner*, it is not convincing to defend agnosticism regarding the significance for American constitutional law of the fall of Soviet communism by pretending to adhere to some purer degree of constitutional fidelity. Such textual provisions as the Takings Clause and the Contracts Clause would be drained of any meaning if the Framers are to be regarded as having been indifferent between socialism and capitalism. If Justice Holmes's dictum in *Lochner* was at the time anything more than rhetorical flourish, it was a prediction about the relationship between personal liberty and economic liberty that the rise and fall of totalitarian communism subsequently proved to be empirically

⁴⁴ *Lochner v. New York*, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting) (emphasis in original) (citations omitted).

⁴⁵ *Id.* at 75.

false. One cannot fault Justice Holmes for failing in 1905 to foresee the ultimate consequences of the Russian Revolution, still a dozen years off. But it is not possible to grant the same indulgence to Justice Nemo, who had personally witnessed the events of 1989. It is regrettable that not every Justice of the Supreme Court—left, right, or center—recognized by January 1993 that the individual liberty promised in the Constitution cannot be delivered by a political order that purports to be indifferent between a market economy subject to limited government and a command-and-control economy that has merged entirely with limitless government.

This point may have been lost on Justice Nemo in 1993, but it was not lost two years earlier on a Polish priest, Karol Wojtyła, who, from firsthand experience from the Solidarity movement, wrote of the significance of the year 1989:

Socialism considers the individual person simply as an element, a molecule within the social organism, so that the good of the individual is completely subordinated to the functioning of the socioeconomic mechanism. Socialism likewise maintains that the good of the individual can be realized without reference to his free choice, to the unique and exclusive responsibility which he exercises in the face of good or evil. Man is thus reduced to a series of social relationships, and the concept of the person as the autonomous subject of moral decision disappears, the very subject whose decisions build the social order. From this mistaken conception of the person there arise both a distortion of law, which defines the sphere of the exercise of freedom, and an opposition to private property. A person who is deprived of something he can call “his own,” and of the possibility of earning a living through his own initiative, comes to depend on the social machine and on those who control it. This makes it much more difficult for him to recognize his dignity as a person, and hinders progress towards the building up of an authentic human community.⁴⁶

While Justice Nemo could not find any larger meaning in the collapse of communism, Wojtyła, the one “called from ‘a faraway country’”⁴⁷ to lead the Roman Catholic Church, was compelled to ask nothing less transcendent than the question, “Was God at work in the fall of communism?”⁴⁸ Pope John Paul II saw in that historic event the fundamental struggle between good and evil, and the lesson that liberty *and* property are essential to realizing human dignity.

⁴⁶ JOHN PAUL II, ENCYCLICAL LETTER: *CENTESIMUS ANNUS: ON THE HUNDRETH ANNIVERSARY OF RERUM NOVARUM* ¶ 13, at 27–28 (May 1, 1991).

⁴⁷ HIS HOLINESS JOHN PAUL II, *CROSSING THE THRESHOLD OF HOPE* 131 (Vittorio Messori ed., Alfred A. Knopf 1994) (quoting without attribution the prophesy of the first apparition of Fátima).

⁴⁸ *Id.* at 127–34.

Moreover, in contrast to Justice Holmes's imperative view of law expressed in *Lochner*, Wojtyła disputed the reasoning behind the belief that a democracy could survive if it rejected objective knowledge—this being a conclusion distilled in 1991 from the actual experience of enduring the subjugation of eastern Europe following World War II. Wojtyła wrote:

Nowadays there is a tendency to claim that agnosticism and sceptical relativism are the philosophy and the basic attitude which correspond to democratic forms of political life. Those who are convinced that they know the truth and firmly adhere to it are considered unreliable from a democratic point of view, since they do not accept that truth is determined by the majority, or that it is subject to variation according to different political trends. It must be observed in this regard that if there is no ultimate truth to guide and direct political activity, then ideas and convictions can easily be manipulated for reasons of power. As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism.⁴⁹

Carried to American constitutional discourse, this view would be considered heretical in light of the reigning orthodoxy that Justice Holmes was correct to argue in *Lochner* that the Constitution is thoroughly malleable, thoroughly agnostic on the question of democratic capitalism versus socialism. But it was the same Justice Holmes who later wrote that “a page of history is worth a volume of logic.”⁵⁰ And there can be no dispute that, on the questions of the beneficence and efficacy of socialism, and of the relationship of property to liberty, the experience of the twentieth century simply proved Justice Holmes's logic in *Lochner* to be on the wrong side of history.

II. CONSTRUCTING A NONFALSIFIABLE CONSTITUTION

The Supreme Court and constitutional scholars do not merely act in ignorance—or feigned ignorance—of the extended spontaneous order. They construct a nonfalsifiable edifice of constitutional law that embodies the imperative view of law. This embrace of the imperative view of law is critical: when one repudiates the evolutionary view of law in favor of an imperative view, the legitimacy of law ultimately turns upon who shall exercise the power of imperator. One can discern the imperial nature of the Court and of constitutional scholarship in many instances. Three examples will suffice to illustrate the point: (1) the Court's enthusiasm to create in constitutional law a priority of rights over structure, (2) the prominence accorded utterly nonfalsifiable theories of constitutional interpretation, and (3) the absence of any budget constraint on the pronouncements of the Court.

⁴⁹ JOHN PAUL II, *CENTESIMUS ANNUS*, *supra* note 46, ¶ 46, at 89.

⁵⁰ *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

A. The Priority of Rights Over Structure

The Supreme Court is generally thought to interpret the Constitution expansively to restrain government intrusions on individual rights. But on matters relating to the structure of government, such as federalism and the separation of powers, the modern Court reads the same Constitution with less zeal. To be sure, over the past decade the Court has shown renewed interest in federalism and the separation of powers.⁵¹ It is probably too early, however, to conclude that recent decisions do more than enforce structural principles in limited areas. The lower level of interest in matters of constitutional structure is evident in the Court's selection of cases, in its discourse over what is at stake in structural cases, in the intellectual rigor with which it probes competing theories on matters of structure, and ultimately in the constitutional interpretations that it renders. Although the nation's founders did add the Bill of Rights to the Constitution in 1791, this priority of rights over structure that exists today did not exist in the text of the Constitution, or in the historical records of the Convention of 1787 and of the ratification of the Bill of Rights. It was invented by twentieth century jurisprudence and politics.

The eagerness of the Court to decide issues involving constitutional rights has, to put it bluntly, cheapened the Constitution. It has caused the electorate to rely overwhelmingly on the Court for constitutional interpretation. The Court has obliged by issuing lawyer-like decisions on increasingly narrow points of arcane "constitutional" law. One example is the revelation that the free speech clause of the First Amendment protects nude dancing.⁵² Twice in roughly a decade the Court has issued learned opinions that start from the proposition that nude dancing is protected speech under the First Amendment and then analyze in detail whether the Constitution permits such speech to be regulated in the sense that a female dancer be required to wear pasties and a G-string.⁵³ To a Court—with a discretionary docket—that believes that such are the pressing legal issues of the day, it is understandable why the implications of the collapse of communism might not have registered. The Court, having elevated the judicial review of rights since 1937 to ever greater heights of solicitude, neglects to offer any cogent explanation why alleged breaches of constitutional structure should not be considered with equal solemnity. To the uninitiated, the edifice erected for vindicating constitutional rights might seem utterly capricious in its blueprint.

⁵¹ See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *New York v. United States*, 505 U.S. 144 (1992).

⁵² For a devastating critique of earlier discussions in this field, see ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* 45 (Univ. of California Press 1989).

⁵³ *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

One could accurately say that nude dancing is a market institution and that the Court's problem is its failure to protect market institutions as a whole. Although this observation is correct, it misses the larger point—that the Court reveals an odd sense of proportion and priority in what it chooses to protect. Nude dancing is considered unquestionably protected under the First Amendment; corporate speech, to take only one conspicuous rights-based example, is not.

Why does the Supreme Court seem to devote more effort to defining the permissible limits of the regulation of nude dancing than to reinvigorating the key provisions of the Constitution that define structures to diffuse political power? The answer may relate to the neglected role of objective knowledge in judicial decision making. The effect of this underdevelopment of the law of constitutional structures is to reduce competition among regimes for self-governance—and, importantly, among regimes for the collective expression of the demand for governmental action. The reinvigoration of structural principles would expand the choices available to the people for producing what might be termed the *collective expression of individual preferences*.

The neglect of structural principles can profitably be read alongside Hayek's classic warnings on the incompatibility of socialism and the rule of law.⁵⁴ Hayek's encomium to atomistic markets operating free of central planning supplies the argument why structure matters for individual liberty. The more the state—the administrative welfare and regulatory state in America today—expands, focusing on the promulgation of rights rather than the preservation of structural constraints, the more it in fact displaces autonomy. The preservation of the structure of diffused power envisioned by the Framers is not simply enlightened (if fortuitous) political theory but an economic necessity in light of the costliness of information and the insuperable task of centrally gathering and evaluating information. As Hayek argued, markets are superior institutions to bureaucracies for making information-intensive decisions.⁵⁵ By extension, a model of public governance that employs structural rules to disaggregate and diffuse decision making will use information more productively—more efficaciously—than will a model of public governance that permits structural rules to atrophy and decisions to be centralized. Maintaining structural constraints is an abstract goal, one less viscerally satisfying than having it revealed by the Supreme Court that the Constitution does or does not guarantee one's right to engage in some controversial course of personal behavior, such as nude dancing sans pasties. But the reality of

⁵⁴ FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* (Univ. of Chicago Press 1960); FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (Univ. of Chicago Press 1944); HAYEK, *LAW, LIBERTY AND LEGISLATION*, *supra* note 15.

⁵⁵ Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 *AM. ECON. REV.* 519 (1945).

this abstraction is no less palpable, its importance perhaps far greater to a society's security, prosperity, and freedom.

The resistance shown toward the use of objective knowledge in judicial review is consistent with a distaste for allowing the view that evolutionary processes order society. The Supreme Court's role in permitting the demise of structural rules in constitutional law since 1937 exemplifies the triumph of imperative law over catallaxy. Put bluntly, the present approach to judicial review helps to replace a market economy with something closer to socialism because it implicitly embraces the conceit that economic relationships resulting from evolutionary processes are merely conjured at will and thus necessarily can be improved upon by some centralized expression of human design.⁵⁶ The shifting purpose of the federal government to redistribute property rather than produce public goods has elevated the importance of (1) competition from alternative governmental regimes, by virtue of the principles of federalism and the separation of powers, to regulate more salubriously (that is, less destructively) particular transactions and institutions; and (2) protecting private means of expressing, on a collective basis, the opposition of individuals to further attempts by the state to appropriate and redistribute property or vitiate the right of contract. The same forces that propel the government toward redistributionist aims have an incentive to favor interpretations of the Constitution that reduce competition among regulatory regimes and diminish as well the ability of individuals to overcome collective action problems (through corporations, private associations and clubs, and other private orderings of property) to petition government not to take their property.

In addition, the Court's relative disregard for structure, and its selective elevation of "preferred" rights, tends to permit the Court to dominate moral discourse in the United States. The Court is the institution to which the citizenry turns to learn whether abortion, the death penalty, gay marriage, or any one of a score of other controversies is "constitutional" or "constitutionally guaranteed." The priorities and modes of analysis that the Court brings to interpreting the Constitution substitute for—indeed they tend to drown out—other voices of moral authority, whether they are the family, the church, the local community, the university, labor unions, the military, or business institutions. These constitutional labels issued by the Court are crude, secular substitutes for assessments of the morality of the conduct or government policy giving rise to the public controversy. Affording less respect to structure, the Court aggrandizes its role as the nation's oracle and

⁵⁶ Wojtyła argues that "totalitarianism arises out of a denial of truth in the objective sense." JOHN PAUL II, *CENTESIMUS ANNUS*, *supra* note 46, ¶ 44, at 87. "If one does not acknowledge transcendent truth, then the force of power takes over, and each person tends to make full use of the means at his disposal in order to impose his own interests or his own opinion, with no regard for the rights of others. People are then respected only to the extent that they can be exploited for selfish ends." *Id.*

conscience, transforming itself into the very “bevy of Platonic Guardians” by which Judge Learned Hand thought that it “would be most irksome to be ruled.”⁵⁷

Thus, the Court aggrandizes its own power by facilitating the displacement of private ordering and by repudiating an evolutionary model of law in which objective knowledge constrains the legitimacy of the lawgiver. Two obvious examples of this phenomenon are the Court’s hostility to religion in its interpretation of the Establishment Clause of the First Amendment and, as noted earlier in the discussion of the *Austin* decision, to corporate speech in its interpretation of the Free Speech Clause of the First Amendment. This tendency on the part of the Court bears a disturbing resemblance to a characteristic of totalitarian regimes that Wojtyła described in 1991, following the collapse of communism:

The State or the party which claims to be able to lead history towards perfect goodness, and which sets itself above all values, cannot tolerate the affirmation of an *objective criterion of good and evil* beyond the will of those in power, since such a criterion, in given circumstances, could be used to judge their actions. This explains why totalitarianism attempts to destroy the Church, or at least to reduce her to submission, making her an instrument of its own ideological apparatus.⁵⁸

This self-aggrandizement by the Court obviously grants judges greater power. But why do the law professors so readily embrace the moral domination of the Court’s political role? The explanation may lie in simple vanity. As purveyors of ideas, law professors (and their handmaidens, the student editors of the law reviews) long to see their ideas used by others as rapidly as possible, and not merely placed in competition with thousands of other ideas, only to gain acceptance years hence (if ever), as if discovered in a time capsule. For the legal philosopher to submit to an atomistic and evolutionary process of evaluation is to risk obscurity during his lifetime. In Hayek’s words, “For intellectuals generally, the feeling of being mere tools of concealed, even if impersonal, market forces appears almost as a personal humiliation.”⁵⁹

B. The Proliferation of “Fundamental Rights” and “Compelling Governmental Interests”

The system of rights being protected by the Court would command greater legitimacy and moral authority if the Court acted as though it recognized that its decisions (like all other decisions in society) involved a tradeoff of

⁵⁷ LEARNED HAND, *THE BILL OF RIGHTS* 73 (Harvard Univ. Press 1958).

⁵⁸ JOHN PAUL II, *CENTESIMUS ANNUS*, *supra* note 46, ¶ 45, at 87–88 (emphasis in original).

⁵⁹ HAYEK, *THE FATAL CONCEIT*, *supra* note 13, at 82.

scarce resources. The operative constraint is not simply the number of cases to which the Court grants review on its discretionary docket—a number that has fallen during the Rehnquist Court. The Court needs to impose on itself a quite different form of budget constraint. Like a debtor nation that resorts to the printing press to pay its creditors, the Court has cheapened the currency of its constitutional pronouncements by inflating the number of “fundamental rights” and “compelling governmental interests.” By pronouncing fewer rights “fundamental” to American constitutionalism, the Court would preserve the constitutionally elevated status of those truly dear. In the same manner, one need not desire a minimalist libertarian state to believe that the phrase “compelling governmental interest” would command more respect if there were not a proliferating number of interests that the Court could announce to an unsuspecting electorate to be “compelling.”

The Court limits the scope of government by scrutinizing the fit between means and ends. It is rare that the Court limits the reach of government by rejecting, as an anterior question, whether some restraint on liberty or property serves a “necessary” or “compelling” governmental purpose. In 1990, for example, the Court upheld an affirmative action policy of the Federal Communications Commission that discriminated on the basis of race in the licensing of radio and television stations.⁶⁰ The Court never paused to consider whether the asserted governmental interest—using racial preferences to ensure the correct amount of “diversity” of broadcast speech—was a legitimate, let alone “compelling,” objective of government in light of the First Amendment’s prohibition on any law abridging the freedom of speech.⁶¹ What a difference it would make if a constitutional amendment simply stated that there shall be no more than fifty compelling governmental interests, and, when the Court has reached its budget, it may not announce a new compelling interest of the government without removing another government interest from the list. Such a rule would constrain the Court to make the same tradeoffs that characterize every other aspect of human choice in the face of less-than-infinite resources.

C. The Implosion of Free Speech

The New Deal vision of the administrative state rests on an anti-evolutionary conception of knowledge and epistemology. By now, there is ample empirical falsification of that model in eastern Europe and the former republics of the Soviet Union, at the least. So the proponents of the imperative view of law, and of the socialist political outcomes to which that view is so readily

⁶⁰ *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

⁶¹ For further discussion, see J. Gregory Sidak, *Telecommunications in Jericho*, 81 CALIF. L. REV. 1209, 1228–31 (1993).

amenable, instead must resort to attacking the legitimacy of objective knowledge itself. Thus, the 1990s witnessed in legal scholarship a fascination with deconstruction, Critical Legal Studies, hostility to empiricism in general and to economic empiricism in particular, and so forth. Legal scholars emphasize arguments that tend to grind intellectual debate to a halt entirely—the irremediable, predisposing bias of the observer’s race, gender, sexual preference, or class; the mutability of language; and, among the economic cognoscente, pervasive externalities, exorbitant transactions costs, the indeterminacy of game-theoretic outcomes, and the recurrent recourse to the theory of the second best.

It is indeed ironic that the contemporary rejection of empiricism has coincided with a collapse of any common understanding of the right to freedom of speech under the First Amendment—whether at prestigious universities or in the unpretentious heartland. “Freedom of speech” is a pervasive notion in American life, yet among legal scholars it has spawned perhaps more theorizing than any other single area of law. It would be no exaggeration to say that a legal scholar could devote years, if not an entire career, to mastering this enormous body of thought on such a small number of words in the Constitution. But the vast majority of lawyers, let alone nonlawyers, will never have the time to wade through all of this scholarship. How are they supposed to understand “freedom of speech”? Is it not some indication that our erudition on the free speech clause of the First Amendment is of doubtful worth, given its sheer volume and the continuing disagreement over whether or not some new kind of behavior is or is not “speech” entitled to protection from governmental interference?

Furthermore, our scholarship on free speech is probably the best example of constitutional theory that is not susceptible to falsification. How would we ever know, particularly if one rejects originalism as a mode of interpretation, whether one theory of free speech is true or false? Given the large number of eloquent theories of freedom of speech, how can we reject one and accept another? In this environment, it is most interesting to see what kind of speech—such as that in *Austin*—is *not* regarded as worthy of protection from interference by the state or its surrogate.

D. The Indeterminacy of Constitutional Moments

One of the most audacious constitutional theories presented by a contemporary legal scholar is Bruce Ackerman’s theory that the Constitution was informally amended in the late 1930s, without resort to the formal amendment process outlined in Article V.⁶² According to Ackerman, this “constitutional moment” legitimated as constitutional principles the civic values upon which

⁶² BRUCE ACKERMAN, *I WE THE PEOPLE: FOUNDATIONS* 262 (Harvard Univ. Press 1993).

the New Deal was built. Thus, for the federal government subsequently to retreat from this American brand of socialism is not simply bad politics, but unconstitutional. The Constitution, it would seem, enacts Mr. Franklin Roosevelt's social statics.

It is not clear whether Ackerman regards the constitutional moment of the New Deal as a spontaneous order (and hence an embodiment of evolutionary law), or whether he regards that constitutional moment as a conscious design (and hence an embodiment of imperative law). To the extent that Ackerman's theory relies on an evolutionary rather than imperative view of law, the larger problem presented by the theory is its conceit that the evolutionary process that produced the constitutional moment can be arrested, and that a new anti-evolutionary design can be put in its place, permanently and immutably.

Ackerman's theory illustrates the conflict between objective knowledge and the imperative view of law. Perhaps more than any other prominent constitutional theory, Ackerman's theory of constitutional moments is nonfalsifiable. How would a person prove or disprove that she has passed through a constitutional moment? One might have thought that the victory in 1989 of American democratic capitalism over Soviet communism would be as "constitutionally momentous" in Ackerman's schema as the New Deal's creation of Social Security and the alphabet agencies, but Justice Nemo for one did not see any change. One wonders whether Ackerman would recognize the year 1989 as a constitutional moment, since the victory of American democratic capitalism over Soviet communism in a sense falsified and thus repudiated the socialist underpinnings of the New Deal, to which Ackerman seems sympathetic. Does Ackerman's theory enable us to predict future phenomena? Plainly, Ackerman's theory is framed in such a way that it can never be falsified. Thus, at the same time, one can never have any confidence that such a theory has verisimilitude. Is Ackerman's conjecture therefore more than an epic? Or is it simply the stuff of intellectual sparring over cocktails at the faculty club? As Thomas Sowell has said, "policy preferences of 'experts' do not become empirical facts by consensual approval or by sheer repetition."⁶³

To illustrate the problem of nonfalsifiability, consider as another possible constitutional moment President Bush's prosecution of the Gulf War.⁶⁴ President Bush lobbied the most influential members of the United Nations to condemn the Iraqi invasion of Kuwait and to authorize member nations to use force if necessary to expel Iraq from Kuwait. Meanwhile, Mr. Bush and his cabinet secretaries told Congress that they needed no prior congressional

⁶³ SOWELL, KNOWLEDGE AND DECISIONS, *supra* note 11, at 284.

⁶⁴ See J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991).

authorization, pursuant to the War Clause in Article I,⁶⁵ to wage war on Iraq. Rather than vote on a declaration of war against Iraq, Congress on January 12, 1991 passed a resolution “authorizing” the President to use American military forces to implement the United Nations Security Council resolution. Mr. Bush thereafter ordered the attack on Iraq, commencing January 17, 1991, which culminated after several weeks of intense bombing in a 100-hour ground invasion that liberated Kuwait with remarkably low casualties to American and allied forces—although with the loss of tens of thousands of Iraqi troops. Mr. Bush thereafter enjoyed the highest approval ratings ever recorded for a President. Pundits speculated whether any serious Democratic candidate would be willing to run against President Bush in 1992, and Democratic leaders defensively insisted that their votes against the congressional resolution authorizing the use of force against Iraq ought not to be a campaign issue to be used against them in the next election.

On the basis of these events, Ackerman’s theory might permit us to infer that a constitutional moment had occurred, and that “We the People” had spoken by a commanding supermajority (a 90-percent approval rating for President Bush) that the power to declare war ought to be lodged in the Executive (as Mr. Bush in effect asserted) rather than in Congress. Ackerman presumably would find this proposition abhorrent, as he joined with a number of other distinguished law professors in challenging President Bush’s deployment of U.S. armed forces to Saudi Arabia as a violation of the War Powers Resolution and the War Clause.⁶⁶ Others might argue that the proposition is farcical in light of the electorate’s rejection of President Bush in November 1992. But one searches in vain for a limiting principle in Ackerman’s theory that would permit him convincingly to assert that the Gulf War was *not* a transformative constitutional moment—an exorcism of America’s “Vietnam syndrome” of self-doubt that made possible a kind of reverse *Youngstown*⁶⁷ that shifted the authority to initiate a foreign war from Congress to the President.

Finally, it is possible that, even if Ackerman’s theory of “transformative” events in constitutional law should be regarded as a system of nonfactual beliefs (and not as a system of knowledge), the theory should be accepted as if it were true, even though it is utterly nonfalsifiable. This is how one must regard much of the moral content of organized religions. Re-evaluated in these terms, Ackerman’s theory manifests a theological quality that provides

⁶⁵ U.S. CONST. art. I, § 8, cl. II.

⁶⁶ The law professors’ brief was spearheaded by Harold Hongju Koh of Yale. See Harold Hongju Koh, *Presidential War and Congressional Consent: The Law Professors’ Memorandum in Dellums v. Bush*, 27 STAN. J. INT’L L. 247, 249–50 (1991) (describing the drafting of the law professors’ brief).

⁶⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Upon winning the Gulf War, President Bush exclaimed, “by God, we’ve kicked the Vietnam syndrome once and for all.” Remarks to the American Legislative Exchange Council, 1991–1 PUB. PAPERS 195, 197 (Mar. 1, 1991).

an entirely new insight into Thomas Jefferson's vision of the perfectibility of mankind.⁶⁸ Ackerman's theory would have the American people be their own messiah at transformative moments akin to the Resurrection and the Second Coming. These moments might be the New Deal, Camelot, and *Sergeant Pepper*. But why these moments and not others—such as the defeat of the “Evil Empire” by the intellectual force of democratic capitalism, without the firing of a single shot?⁶⁹

III. AN EVOLUTIONARY APPROACH TO JUDICIAL REVIEW

John Rawls⁷⁰—and, before him, Thomas Aquinas⁷¹—have asked whether there is a duty to comply with an unjust law. But what of the duty to comply with an *untrue* law? Suppose that Congress enacts legislation that depends on congressional findings that are utterly contrived or demonstrably false. To be sure, such legislation rests on authority in the imperative sense. But is it legitimately “law”? Suppose further that the Supreme Court renders a decision that hinges on an explicit assertion that other persons, but not the Court, know to be factually disproved on the basis of objective knowledge. Does

⁶⁸ See DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 306 (1994) (“[T]he mind of man [is] perfectible to a degree of which we cannot as yet form any conception.” (quoting a 1799 letter from Jefferson to Elbridge Gerry)). Wojtyła has commented on the ominous implications of this vision of human perfectibility: “when people think they possess the secret of a perfect social organization which makes evil impossible, they also think that they can use any means, including violence and deceit, in order to bring that organization into being. Politics then becomes a secular religion which operates under the illusion of creating paradise in this world.” JOHN PAUL II, *CENTESIMUS ANNUS*, *supra* note 46, ¶ 25, at 49.

⁶⁹ Writing about the year 1989, Wojtyła has observed:

[W]orthy of emphasis is the fact that the fall of this kind of “bloc” or empire was accomplished almost everywhere by means of peaceful protest, using only the weapons of truth and justice. While Marxism held that only by exacerbating social conflicts was it possible to resolve them through violent confrontation, the protests which led to the collapse of Marxism tenaciously insisted on trying every avenue of negotiation, dialogue, and witness to the truth, appealing to the conscience of the adversary and seeking to reawaken in him a sense of shared human dignity.

It seemed that the European order resulting from the Second World War and sanctioned by the *Yalta Agreement* could only be overturned by another war. Instead, it has been overcome by the nonviolent commitment of people who, while always refusing to yield to the force of power, succeeded time after time in finding effective ways of bearing witness to the truth.

Id. ¶ 23, at 45 (emphasis in original).

⁷⁰ JOHN RAWLS, *A THEORY OF JUSTICE* 350 (Harvard Univ. Press 1971) (“The real question is under which circumstances and to what extent we are bound to comply with unjust arrangements.”).

⁷¹ THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. I-II, question 96, art. 6 (Fathers of the English Dominican Province trans., Benziger Bros. 1947) (1485) (“[I]f a case arise wherein the observance of law would be hurtful to the general welfare, it should not be observed.”).

ignorance of objective knowledge invalidate the Court's otherwise legitimate exercise of lawgiving authority in such a case?

I began to ask these questions in the late 1980s, while working on regulatory issues as a lawyer in the federal government. I observed, perhaps naively, that empirical evidence on public policy issues appeared to matter little in the production of new legislation or regulation. The perverse development of the *Chevron* doctrine has heightened this concern.⁷² Those who insisted that coercive state action not be predicated on empirically false premises, or that government not pursue legitimate goals through means that could be shown empirically to be inefficacious or even counterproductive, would invite derision for being either hopelessly pedantic or ideological.

The seeming irrelevance of empiricism to the legitimacy of legislation or of judicial review raises provocative questions of jurisprudence and constitutional theory. Can a legislature ignore empirical evidence relevant to the means or end of its legislation yet still claim to have obeyed the rule of law? Do the principles of due process and equal protection require that the means employed in legislation rest on the best evidence that reason and scientific analysis can offer on the subject? To ask these questions, particularly the latter one regarding the Constitution, is to enquire into the content of rationalism in legal theory. As Robert Nagel has demonstrated,⁷³ the Supreme Court's view of rationalism permits the language and logic of law to be used duplicitously despite their appearance of rigor. He might have added that the malleability of legal argumentation on the rationality of statutes plays into the hands of rent-seeking factions, whose demands for favored legislation often rests on premises that are falsifiable, and indeed (one would suspect) often demonstrably false.

The conflict between imperative and evolutionary conceptions of law is highly relevant to the task of judging and reviewing the work of legislatures. Specifically, objective knowledge offers a paradigm for rationality analysis, principally in its ability to reveal the objective falsity of a particular means chosen to achieve stated legislative goals. The means devised in a statute to achieve the statute's legislative purpose can be regarded as a hypothesis. That hypothesis is subject to refutation. It never can be "proven" to be true; but it can be rejected (that is, "falsified") by empirical testing through the scientific method. The more the statute survives attempts at empirical refutation, the more confident that we become that the hypothesis underlying it—namely, that the restriction on liberty or property is necessary to achieve the legislative purpose—is actually true. By invalidating as "irrational" those laws that

⁷² *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).

⁷³ See NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW*, *supra* note 52, at 106–20 (criticizing the judiciary's reliance on rationalism as an intellectual habit that denigrates moral and political dialogue).

are predicated on legislative premises that are demonstrably false, the Court would reinvigorate the institution of judicial review in a Madisonian sense by providing an additional check against the self-interestedness of factions.⁷⁴ It is possible that a statute's purpose may also lend itself to falsification, though the instances of that being so would seem relatively rare, limited presumably to situations in which the legislative goal that has been articulated is in fact the intermediate means of achieving some larger governmental purpose.

The preceding model would impose a different standard of judicial review—one that might be characterized, for lack of better terminology, as “heightened.” But it would be a standard not focused on any particular “fundamental interest” or “suspect class.” Rather, it would be a standard that would require a legislature to be forthright about what it objectively knows and does not know when it enacts a law. It would be as well an attempt to require clarity and candor from a legislature when it predicates legislation on an inherently nonfalsifiable objective, as in the case of vague recitations of the “public interest, necessity, and convenience.” It would result in courts deferring less than they do today to self-serving legislative pronouncements that a statutory goal is “legitimate” or “important” or “compelling,” and that a selected means is “rationally related” or “narrowly tailored” or “essential” to effecting that goal. This evolutionary approach to judicial review would recognize objective knowledge to be an implied component of the rule of law as a matter of jurisprudence, and of due process and equal protection as a matter of American constitutional law.

Such a model of judicial review would rest on a number of assumptions and would contain a number of provocative implications:

1. Most obviously, the model would presuppose that objective knowledge exists, and that it is susceptible to being communicated with relative clarity through language, including the language of legislatures and courts.
2. Although objective knowledge is inherently antimajoritarian because the scientific method does not rely on majority voting, the model would not threaten liberty or property or contract, because objective knowledge results from an atomistic process that resembles the functioning of a marketplace in which power is diffuse.
3. Predicating judicial review on objective knowledge would limit the durability of legislation, because the rationality of legislation's means or ends might disappear at any time when relevant knowledge is newly discovered. For this reason, objective knowledge should enhance the protection of liberty and property by expediting the removal (through judicial review, if necessary) of unnecessary restrictions on the individual.

⁷⁴ See J. Gregory Sidak, *The Petty Larceny of the Police Power*, 86 CALIF. L. REV. 655, 667–69 (1998).

4. To the extent that legislators act consistently with the predictions of public choice theory, objective knowledge should be disfavored by legislatures because it might (a) reveal the irrationality of either legislative means or legislative ends, and thus raise the cost (to legislatures and to Madisonian factions) of producing regulation on demand, and (b) reduce the durability of such regulation once it has been produced.

5. Although reliance on objective knowledge might cause courts to review the constitutionality of more laws, judicial discretion in those cases would be narrower than at present because courts would be less free to base decisions on nonfalsifiable propositions embodied (or asserted, after the fact, to have been embodied) in legislation.

Finally, one must ask whether attempting to predicate a theory of judicial review on objective knowledge is itself an example of what Hayek would call a fatal conceit: would it not simply arrogate to judges the power to make decisions that are just as likely as legislation to attempt futilely to direct the progress of evolutionary processes that are, in fact, beyond the control of human reason? One cannot be sure.

One likely criticism of the evolutionary approach to judicial review is that it would make the business of government more difficult. Relative to the status quo, more existing laws would be struck down by courts, and legislatures would have to expend more resources to ensure that new legislation would survive challenge on the grounds that objective knowledge would enable a reviewing court to falsify the new legislation's goal or the means specified for achieving that goal. The argument is analogous to Justice Holmes's argument in *Pennsylvania Coal Co. v. Mahon*⁷⁵ that "[g]overnment could hardly go on" if it had to compensate citizens for every diminution in the value of their private property caused by the exercise of the police power (or commerce power).⁷⁶ The requirement of just compensation in the Takings Clause imposes a market test that ensures that the government values the private property that it confiscates at its opportunity cost.⁷⁷ The result is less regulatory intervention, but "better" intervention. In the same manner, an evolutionary approach to judicial review would tolerate less infringement of liberty or property, but that should not be regarded as a bad outcome because the laws that would fall would be those for which the means or end of the government intervention lacked verisimilitude.

⁷⁵ 260 U.S. 393 (1922).

⁷⁶ *Id.* at 413.

⁷⁷ See J. GREGORY SIDAK & DANIEL F. SPULBER, DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES 219–22 (Cambridge Univ. Press 1997) (attacking the use of the Kaldor-Hicks criterion for compensation of regulatory takings).

CONCLUSION

The imperative and evolutionary models of law imply different answers about where the boundary should be drawn (or even can be drawn) between individual liberty and the coercive powers of the state. In legislation, in judicial opinions, and in legal scholarship there is found today the indelible mark of many who believe that law is, at bottom, the embodiment of authority.

An alternative view is that law is the embodiment of knowledge, and that objective knowledge is a nobler source of legitimacy for law than is sheer authority. Wojtyła observed after the collapse of Soviet communism: “Man remains above all a being who seeks the truth and strives to live in that truth, deepening his understanding of it through a dialogue which involves past and future generations. From this open search for truth, which is renewed in every generation, *the culture of a nation* derives its character.”⁷⁸ If, at this late date, Justice Nemo were to attempt to draw a single lesson from the collapse of Soviet communism, let it be this: if legislators, judges, and legal scholars were to premise their work on objective knowledge, individual liberty would more likely prevail over the recurrent and inevitable efforts of the state to circumscribe it.

⁷⁸ JOHN PAUL II, *CENTESIMUS ANNUS*, *supra* note 46, ¶¶ 49–50, at 97 (emphasis in original) (citations omitted).