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Daniel A. Farber  
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## Commentary

### The Case Against Brilliance

Daniel A. Farber\*

In most fields of intellectual endeavor, the highest praise is reserved for brilliant insights that overturn conventional thinking and common sense. Albert Einstein's theory of relativity, which changed completely the way we think about the interrelationship of time and space, is a classic case in point. Economists and legal scholars, never ones to be outdone by "hard scientists," traditionally have applied the same standards in their own fields. I will argue, however, that "brilliance" should count heavily against an economic or legal theory.<sup>1</sup> The same traits of novelty, surprise, and unconventionality that are considered marks of distinction in other fields should be considered suspect in economics and law, in which thoughtfulness may be a more important virtue.<sup>2</sup> I will further suggest that the current academic bias in favor of brilliant, "paradigm shifting" work should be abandoned in favor of the more pedestrian activity of "normal science."<sup>3</sup>

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\* Professor of Law, University of Minnesota. Friends and colleagues were generous with their time in reviewing this piece, but I will not embarrass them by naming them here.

1. Of course, this does not mean that high intelligence or novel insights are suspect in these fields. Novel insights often fill gaps in our knowledge or resolve existing controversies, as opposed to overturning a view that was previously regarded as settled and noncontroversial. "Brilliance" is used here in a restricted sense, to refer to new ideas that turn conventional thinking on its head, as Einstein did to conventional views of space and time.

2. On the related issue of the relative importance of grand theory versus thoughtful case analysis, see Frickey, *Judge Wisdom and Voting Rights: The Judicial Artist as Scholar and Pragmatist*, 60 TUL. L. REV. (forthcoming).

3. Professor Thomas Kuhn explains: "[N]ormal science' means research firmly based upon one or more past scientific achievements, achievements that some particular scientific community acknowledges for a time as supplying the foundation for its further practice." T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10 (2d ed. 1970).

## I. BRILLIANCE IN ECONOMICS

The Coase Theorem<sup>4</sup> is an especially good example of a brilliant, but practically limited, theory because it derives from the boundary between law and economics. Before Professor Ronald Coase's work, the accepted wisdom was that legal rules could improve economic efficiency by preventing firms from externalizing their costs.<sup>5</sup> Pollution is a classic example of an "externality," in that pollution victims incur costs that are properly chargeable to a firm's activities.<sup>6</sup> Coase stood this notion on its head, showing that economic efficiency may result notwithstanding the existence of legal rules because people can negotiate around these rules to reach the efficient result.<sup>7</sup> For example, even if pollution were immune to legal regulation, pollution victims could band together and bribe polluters to shut down. If the costs borne by pollution victims exceeded the total benefits to the polluter, the pollution would be economically inefficient—but these are the very circumstances in which rational victims would bribe the polluter to stop. There is a tale, possibly apocryphal, that when Coase first presented this paper at the University of Chicago, his audience was astounded and was persuaded of his theory's validity only after hours of argument.<sup>8</sup> Since then, the Coase Theorem has spawned a huge literature and has become central to much of the "law and economics" movement.<sup>9</sup>

That the Coase Theorem is indeed counterintuitive is illustrated by its proponents' failure to apply it in novel contexts. For instance, Judge Richard Posner—certainly a devotee of the Coase Theorem<sup>10</sup>—is also a leading advocate of the theory of efficient breach in contract law.<sup>11</sup> According to this theory, some

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4. See Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 43-44 (1960).

5. For the classic expression of this view, see A.C. PIGOU, *THE ECONOMICS OF WELFARE* 172-203 (4th ed. 1932).

6. See generally Davis & Kamien, *Externalities and the Quality of Air and Water*, in W. WALKER, *ECONOMICS OF AIR AND WATER POLLUTION* 12-21 (1969) (discussing "real or opportunity costs and the divergence between real costs to society and real costs to individual economic entities").

7. Coase, *supra* note 4, at 1-8, 15-19.

8. See generally *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J.L. & ECON. 163, 220-21 (E. Kitch ed. 1983) (discussing the controversy surrounding the Coase Theorem).

9. The literature of the debate is cited, summarized, and expanded in *Coase Theorem Symposium*, 13 NAT. RESOURCES J. 557 *passim* (1973); *Coase Theorem Symposium—Part II*, 14 NAT. RESOURCES J. 1 *passim* (1974).

10. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.4, at 35 (2d ed. 1977).

11. See *id.* § 4.9, at 88-92.

breaches of contract are socially beneficial because the breaching party's gain exceeds the victim's loss. Hence, Posner argues courts properly refuse to award punitive damages for breach of contract because to do so would be to deter these "efficient" breaches.<sup>12</sup> This argument, however, ignores the Coase Theorem. According to the Theorem, if the law awarded punitive damages, the parties would bypass available judicial remedies and negotiate their way to an efficient outcome, just as in the pollution example Coase used.<sup>13</sup> Unfortunately for the Theorem's advocates, however, such negotiations rarely occur in the real world. Thus even for those who, like Posner, accept it wholeheartedly, the Coase Theorem is just too contrary to common sense to keep in mind.

Although many scholars have attacked the Coase Theorem,<sup>14</sup> the best reason to reject it is that it is simply too brilliant. The reason the Theorem astounded Coase's audience is that we do not commonly observe people behaving as the Theorem contemplates.<sup>15</sup> If we did, the Theorem would hardly be surprising. No one, after all, would have been astounded if Coase had said that pollution gets some people angry, because that observation is obvious. Saying that pollution victims pay bribes, however, is quite startling, because it does not really happen.

This line of argument suggests not only that brilliance is evidence of a theory's invalidity, but also that it is a likely *cause* of its invalidity. If the idea that victims bribe polluters is startling, people are not likely to think of it themselves; if they do not think of it themselves, they are not likely to do it. If only a brilliant person can think of doing something, it is unlikely that

12. *Id.*

13. See Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 VA. L. REV. 1443, 1449-50 (1980).

14. See *supra* note 9.

15. See Kelman, *Comment on Hoffman and Spitzer's Experimental Law and Economics*, 85 COLUM. L. REV. 1037, 1044 (1985). Professor Mark Kelman has this to say about attempts to verify experimentally the Coase Theorem:

[The advocates of such experiments] grossly underestimate our powers of sensitivity and observation, the knowledge of our cultures that we all should be able to gain by living within them. It really cannot be difficult to comprehend that neighbors do not often explicitly bribe one another. . . . Living in our culture, we *know* something about the attitudes of many of its subcultures, without ever explicitly defining these subcultures in a way that makes them subject to scientific study.

*Id.* (emphasis in original).

most people will adopt that course of conduct. Most people, after all, are not brilliant.

Economics assumes that, by and large, people behave rationally, or at least that they act *as if* they were rational.<sup>16</sup> Thus, when critics argue that firms are incapable of performing the complicated mathematical optimization contemplated by economic theory,<sup>17</sup> economists respond that whatever decision-making process they use, firms acting as if they were doing the calculations will prosper and survive, while their competitors will be forced out of the market.<sup>18</sup> This response, however, really works against the validity of brilliant theories. If a brilliant theory is correct, but most people are unaware of it, someone who finds out should profit handsomely. Thus, there is a strong economic incentive for people to discover and profit from brilliant theories—which of course will then catch on and become commonplace. If the theory is true, then the market has been overlooking a profit possibility. As Professor Milton Friedman has pointed out, however, it is implausible that an economist with a purely academic interest will find profit opportunities that businesspeople, whose very economic lives are hanging on the result, have overlooked.<sup>19</sup> In sum, if a brilliant theory is true, it should have been discovered in the marketplace; because it has not been discovered—or else it would not now be considered brilliant—it is very likely false.

Examples of truly brilliant economic theories abound. Unfortunately, however, most are simply too brilliant to be true. For example,<sup>20</sup> Professor James Buchanan argued that even

16. Indeed, rationality has been said to be the core assumption of economics, distinguishing it from the other social sciences. See J. HIRSHLEIFER, *PRICE THEORY AND APPLICATIONS* 8-9 (2d ed. 1980). For a thorough recent discussion of the rationality assumption, see Scott, *Error and Rationality in Individual Decision-Making: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices*, 59 S. CAL. L. REV. (1986) (forthcoming).

17. See, e.g., Boulding, *The Theory of the Firm in the Last Ten Years*, 32 AM. ECON. REV. 791-802 (1942); Papandreou, *Some Basic Problems in the Theory of the Firm*, in 2 A SURVEY OF CONTEMPORARY ECONOMICS 183-222 (B. Haley ed. 1952). The term "firm" is distinguished from "corporation" in that a firm is a method of organizing production, see Coase, *The Nature of the Firm*, 4 ECONOMICA (n.s.) 386, 388-89 (1937), and a corporation is a method for attracting capital into the firm. The term "firm" is thus broader than "corporation."

18. See, e.g., Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211, 211-21 (1950).

19. See M. FRIEDMAN, *PRICE THEORY: A PROVISIONAL TEXT* 146-47 (rev. ed. 1962).

20. The presentation of these theories here is necessarily heuristic. See Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1233 n.6.

apart from interest payments, the national debt burdens society.<sup>21</sup> The older view was that because government debt was money "we owe to ourselves," there is no net societal burden.<sup>22</sup> Although Buchanan agreed that no burden exists when the money is borrowed, he argued that when the debt is paid off, taxpayers lose money but bondholders do not have a corresponding gain.<sup>23</sup> The reason for this anomalous result is that the bondholders are exchanging one asset—government bonds—for another asset—cash—of equal value.<sup>24</sup> The idea that a creditor gains nothing when a debt is paid off because the debt itself is an asset that is simply exchanged for the payment is certainly a brilliant one.<sup>25</sup> Only a brilliant economist could come up with such an idea, and no one but an economist would believe it.<sup>26</sup>

Similarly, rational expectations theory contemplates that the economic effects of any government action will be cancelled by the rational responses of other economic actors.<sup>27</sup> If economic actors are smart enough to cancel out all these government actions, however, they must also be smart enough to realize that the government actions cannot have any truly lasting effect. Moreover, firms realizing that government actions are always ultimately ineffective should have a major competitive advantage, because their planning will not be distorted by misconceptions about the economy's future.<sup>28</sup> Given this advan-

21. See generally J. BUCHANAN, PUBLIC PRINCIPLES OF PUBLIC DEBT 31-149 (1958).

22. See, e.g., O. BROWNLEE & E. ALLEN, ECONOMICS OF PUBLIC FINANCE 127 (2d ed. 1954).

23. J. BUCHANAN, *supra* note 21, at 51-72.

24. For an explanation of the argument, see E. BROWNING & J. BROWNING, PUBLIC FINANCE AND THE PRICE SYSTEM 406-07 (2d ed. 1983).

25. If this idea were true, a rational creditor would never be willing to expend money to collect a debt and would, therefore, save a fortune in attorneys' fees. Such creditors would by now have driven their less shrewd competitors out of business, so Buchanan's idea would be regarded as a truism.

26. Buchanan's theory does seem to suffer from a certain inconsistency. Creditors are said to have no gain when they exchange an asset, the debt, for cash. Similarly, however, the taxpayers should have no loss when they give up cash but also cancel a liability that they collectively owed.

27. See G. SMITH, MACROECONOMICS 312-31 (1985); L. THUROW, DANGEROUS CURRENTS: THE STATE OF ECONOMICS 142-72 (1983); Lucas, *Econometric Policy Evaluation: A Critique*, in THE PHILLIPS CURVE AND LABOR MARKETS (K. Brunner & A. Meltzer ed. 1976).

28. Again, these firms do not need to have worked out the whole theory of rational expectations; all they need is the conclusion that governments are economically powerless to help or hurt the economy. If the theory of rational expectations were correct, this belief in government impotence would be the

tage, these firms should dominate the marketplace. Thus, rational expectations theory, far from being considered brilliant, would be nothing more than a cliché—if only it were true.

Finally, the theory of efficient capital markets holds that private information does not really matter because it is instantly factored into the market. Hence, the government should not try to regulate various uses of insider information.<sup>29</sup> A corollary of this theory is that stock prices take a “random walk,” so information available today cannot predict tomorrow’s prices.<sup>30</sup> Because whatever information is relevant to predicting future prices has already been factored into the market by the actions of today’s investors, today’s market price summarizes everything that is now known about the stock. Again, investors who realize this fact should have a competitive edge, because they would not waste time and money on forecasting efforts.<sup>31</sup> This theory, like those discussed earlier, is just too much of a surprise to the rational economic actors who are its subjects.

The common thread in the above discussions is rationality. It is all well and good for a theory about electrons to be a total surprise to physicists. If electrons were believed to be largely rational creatures, however, we would not expect to find truths about electrons that surprised the electrons themselves. Most social sciences tend to view human behavior as irrational, so the fact that a theory is surprising is not itself suspicious, because we might lack an understanding of the irrational parts of our behavior. A claim that people behave rationally but neverthe-

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conventional wisdom, and rational expectations would simply be a clever new interpretation of a generally understood truth.

29. See Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 13-15 (1978); Manne, *In Defense of Insider Trading*, HARV. BUS. REV., Nov.-Dec. 1966, at 113. See generally Macey & McChesney, *A Theoretical Analysis of Corporate Greenmail*, 95 YALE L.J. 13 (1985) (suggesting that government should refrain from regulating negotiated stock repurchases).

30. Fama, *Random Walks in Stock Market Prices*, 23 FIN. ANALYSTS J., Sept.-Oct. 1965, at 55, 57.

31. The theory of efficient capital markets, of course, employs some sophisticated reasoning and empirical data, which ordinary investors are unlikely to discover for themselves. The basic conclusion, however, that changes in stock prices are completely unpredictable, is simple enough. Investors who trust entirely to luck, numerology, or astrology would have a competitive advantage over those who pay money to brokers, investment counselors, and other experts. Hence, these “naive” investors should dominate the market. Efficient capital market theory would then be a sophisticated explanation of a generally held conclusion. In reality, however, the theory sharply conflicts with most investors’ view of the market.

less are ignorant of the factors that make their behavior rational, however, is much more suspicious. Of course, it is not a priori impossible that investors have all been unconsciously acting as if they believed in a theory that economists themselves find startling and novel. Such a state of affairs is, however, rather unlikely.<sup>32</sup>

A return to the Coase Theorem<sup>33</sup> may clarify how these points fit together. The Coase Theorem explicitly assumes that people behave as if they were rational. Two possibilities exist. Perhaps people commonly bribe polluters, but until Coase this fact totally escaped economists' notice. This seems implausible. The other alternative is that people do not commonly bribe polluters even though they would if they were rational. This, however, is inconsistent with the assumption of rationality.

The core problem is that if an economic theory is true, then people who behave rationally will act as if they knew the theory. If people are consistently acting this way, however, it is unlikely that the theory will be a surprising novelty. If people are not consistently acting this way, the theory cannot be true. Economics is a recursive science; that is, its subjects are themselves guided by economic ideas. The basic rationality assumption of economics thus makes it unlikely that bad economic ideas will survive in the marketplace.

Comparing this notion to a standard economic theory may be helpful. Most economists believe that irrational employment discrimination cannot survive in the marketplace.<sup>34</sup> If most employers irrationally pay women less than men, an employer hiring only women would have lower costs and could drive its male-oriented competitors out of business.<sup>35</sup> Even if most employers are irrational sexists, the theory argues, irrational discrimination cannot survive the rigors of marketplace competition. Precisely the same argument, however, applies to irrational economic theories. Firms adhering to those theories

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32. To clarify again, this is not simply the familiar argument that people's subjective thought processes do not correspond with the economic optimization theory used to describe their behavior. A startling economic theory does not merely require that people behave as if the theory was true. Generally, it also requires that they behave as if they knew the theory was true, even though they do not. Thus, the fact that an economic theory is startling makes it implausible.

33. See *supra* text accompanying notes 4-9.

34. See, e.g., R. POSNER, *THE ECONOMICS OF JUSTICE* 352 (1981); T. SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* 96 (1984); L. THURLOW, *GENERATING INEQUALITY: MECHANISMS OF DISTRIBUTION IN THE U.S. ECONOMY* 160 (1975).

35. See T. SOWELL, *supra* note 34, at 96.

will suffer a competitive disadvantage and, over time, will be eliminated from the market. Thus, the predominant economic ideas in a free market society theoretically should be correct.

The case against brilliance is strongest in economics simply because economics takes the most positive view of human rationality. If a theory is brilliant, by definition everyone in history prior to its discovery was systematically wrong about something. The whole thrust of economic theory, however, is *against* the likelihood of universal error.

## II. BRILLIANCE IN CONSTITUTIONAL LAW

Economics is not the only field in which brilliance should count against a theory. Another such field is constitutional law, in which brilliant scholarship has recently become rampant. Because there are too many recent examples to discuss here, two particularly brilliant theories will have to do as examples.<sup>36</sup> First, Dean John Hart Ely argues that certain portions of the Constitution, notably the privileges and immunities clause of the fourteenth amendment and the ninth amendment, are open-ended and have no fixed limits.<sup>37</sup> Allowing judges simply to make policy under these clauses would be undemocratic, but to ignore the clauses would also be improper. Hence, Ely argues, judges should apply the clauses to strengthen democracy by striking down legislation that in some way encumbers the democratic process.<sup>38</sup> This is Ely's famous "representation-reinforcing" theory of judicial review, so-called because the courts reinforce representative democracy.<sup>39</sup> Second, Professor Ronald Dworkin argues that the open-ended clauses of the Constitution are based on specific conceptions of equality, freedom, and justice.<sup>40</sup> In interpreting these clauses, however, judges should not rely on the particular conceptions of the framers, but rather on the deeper philosophical concepts that lie behind these conceptions. Thus, in exercising judicial review, judges should not be concerned with how the framers of the equal protection clause construed the concept of equality, or even with how the average citizen today understands equality, but rather

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36. As before, descriptions of these theories will necessarily be heuristic. See *supra* note 20.

37. See J. ELY, *DEMOCRACY AND DISTRUST* 22-30 (1980).

38. For example, Ely approves of judicial decisions requiring legislative reapportionment, because these decisions strengthen majority rule. *Id.* at 87.

39. *Id.*

40. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 134-36, 226 (1977).

with the true meaning of equality.<sup>41</sup> Both theories take the constitutional text as the starting point, but then add a brilliant gloss of their own.

Both theories also share a common flaw, a flaw endemic to brilliant constitutional theories. Most theories of constitutional law rest on some notion of the consent of the governed, either through tacit institutional acquiescence or through some kind of social contract theory. A brilliant theory is by definition one that would not occur to most people. It is hard to see how the vast majority of the population can be presumed to have agreed to something that they could not conceive of. Who would know better than the average person what the average person has consented to? How can someone have consented to a position that is so novel and clever that only one person on earth has ever thought of it?<sup>42</sup>

A homely example may help illustrate the point. Suppose that Paul Pedestrian is a law professor. The Dean asks him to teach Contracts next year. Paul has taught Contracts before, using a standard Socratic case analysis as his teaching method. Because that worked pretty well, and because it will not be too much trouble to teach the course again the same way, he agrees. Now two much smarter people enter the scene. Ronald Dworkin argues that Paul's view of the course is only one specific conception of teaching Contracts. The concept of teaching Contracts, however, really is more properly embodied in a different conception of the course, in which philosophical writings are the foundation for the contracts course. Although Paul had only his own specific conception in mind, he was really committing himself to the true meaning of the concept instead. John Hart Ely then enters the discussion and points out that the word "course" is inherently open-ended. The proper interpretation, then, is "pedagogy-reinforcing." As it turns out, the "pedagogy-reinforcing" interpretation of "course" requires much the same teaching method that Dworkin advocates.

Let us assume that Dworkin and Ely are correct. The problem is that they are much smarter than Paul Pedestrian. If he had been as clever as they are, he would have realized that his agreement to teach Contracts logically committed him

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41. *Id.*

42. Because constitutional law is not wholly wedded to ideas of consent, brilliance is a less fundamental flaw than it is in economics, in which rationality, the individualistic counterpart of consent, is a much more fundamental assumption.

to a certain way of teaching the course. He was not smart enough to figure that out, however, and in fact would never have agreed to teach the course if he had realized what he "really" meant. In determining what Paul has promised the Dean, it is useless to know what Paul would have meant, if he had not been Paul at all, but instead had been someone else as smart as John Hart Ely.<sup>43</sup>

To bring this example back to constitutional law, it is necessary to make only two simple substitutions. First, substitute the words of the fourteenth amendment for Paul's agreement to teach Contracts. Second, substitute John Bingham, the primary drafter of the fourteenth amendment, for Paul Pedestrian.<sup>44</sup> Or if you do not favor interpretivism, substitute the average citizen of today, or a current member of the Supreme Court, or a member of some oppressed class, or whomever else you favor as the benchmark for constitutional theory.

A related kind of brilliant argument is to show that some judicial opinion, or set of judicial opinions, has a dazzlingly unexpected meaning. The most famous example is the attempt, again by two brilliant professors, to show that Justice Rehnquist's opinion in *National League of Cities v. Usery*,<sup>45</sup> which struck down the federal minimum wage for state employees, really established a constitutional right to welfare.<sup>46</sup> In defense of this interpretation, one of these professors explains that Justice Rehnquist "seemed sometimes to lay the foundations for precisely such a theory;" that some of the language of the opinion "may be read to suggest" this theory; that the theory makes sense of "an otherwise problematic distinction that persists in

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43. If Paul had been as smart as Ely, presumably *he* would be the Dean at Stanford and would not have to worry about teaching Contracts.

44. Bingham had a certain flair for sermonizing, but based on his public speeches, it seems doubtful that he was as intelligent as the average law professor, let alone Dworkin and Ely. For samples of Bingham's thought, see Farber & Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENTARY 235, 246, 251-53, 261, 270, 273 (1984).

45. 426 U.S. 833 (1976).

46. See Michelman, *States' Rights and States' Roles: The Permutations of 'Sovereignty' in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1181-92 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1075-76 (1977).

*National League of Cities* was recently overruled in *Garcia v. San Antonio Metropolitan Transit Auth.*, 105 S. Ct. 1005 (1985). So far, no one has offered a brilliant interpretation of *Garcia*, but presumably it is only a matter of time until some scholar establishes that *Garcia*, too, established a constitutional right to welfare.

the cases;" and that a tension in the cases "may well reflect an unarticulated perception" or an "intuitive sense" that the theory is correct.<sup>47</sup> A footnote adds that the author doubts whether any explanation for the decision based on state autonomy "can be offered along lines that both support the result in National League of Cities and comport with the distinctions drawn by the Court."<sup>48</sup> Only through this brilliant reinterpretation, then, can the Court's decision be salvaged.

Of course, this interpretation was so dazzlingly brilliant just because it was painfully obvious that Justice Rehnquist had no such thing in mind. Indeed, the only members of the Court who were remotely likely to be receptive to a constitutional right to welfare were the liberals, who all dissented from Justice Rehnquist's opinion. Again, there is something inherently suspect about an interpretation so clever that it never would have occurred to the speaker or the audience. If Paul Pedestrian asks someone to pass the salt, one might argue that he "really" must mean, "pass a healthful and taste-enhancing condiment"—a description that does not apply to salt, if current medical theories are correct. So in some sense, what Paul "really" means is "pass the pepper." In the same sense, what Justice Rehnquist "really" meant was to establish a constitutional right to welfare—which is, as the professors explained, what he would have meant if he had been as clever as they were. But he wasn't that clever, so it wasn't what he meant after all.

Still another, and possibly even more brilliant, approach to constitutional law is to point out that Justice Rehnquist's opinion actually means whatever the reader wants it to mean. If "pass the salt" can mean "pass the pepper," it can also mean "pass the sugar," or maybe even "have some herring." As Professor Mark Tushnet, an undeniably brilliant scholar, has explained:

In a legal system with a relatively extensive body of precedent and with well-developed techniques of legal reasoning, it will always be possible to show how today's decision is consistent with the relevant past decisions. Conversely, however, it will also always be possible to show how today's decision is inconsistent with precedents.

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.. [I]t turns out that the limits of [legal] craft are so broad that in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants. The craft interpretation thus fails to constrain the results that a reasonably skilled judge can reach, and leaves the

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47. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 312-13 (1978).

48. *Id.* at 313 n.28.

judge free to enforce his or her personal values, as long as the opinions enforcing those values are well written.<sup>49</sup>

In a sense, then, Justice Rehnquist's opinion means nothing at all, because a lower court judge is perfectly free to rule any way he or she wants in any future case. Indeed, Tushnet has come fairly close to saying that, in a capitalist society, language is totally incoherent:

[C]ritics of unsophisticated textualism claim that radical indeterminacy of meaning is, within a liberal community, inevitable. It is no answer to that criticism to say that indeterminacy gives boundless discretion to judges. I agree that it does, but that merely demonstrates the contradictions within liberal thought; it does not vitiate the critique.<sup>50</sup>

Thus, any interpretation of a judicial opinion is about as good as any other.

This theory is brilliant because people seem to be under the impression that language means something, so they are surprised to learn that it does not. Still, if the incoherence theory is right, it seems odd that no one has noticed. If the speaker

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49. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 818-19 (1983) (footnotes omitted).

50. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 691 (1985). In his earlier article, Professor Tushnet suggested that understanding any speaker is a Herculean, though not entirely impossible, task:

Consider an ordinary conversation between two people. Alice hears Arthur use the word "arbogast." She thinks she knows what he means, but as the conversation continues Alice realizes that Arthur is using the word in a way that comes to seem a little strange. She interrupts, so that Arthur can explain what he means. But things get worse. His explanation shows that his entire vocabulary rests on the way that he has lived until that moment. Because Arthur's life is by definition different from Alice's, Alice finds herself left with only an illusory understanding of what Arthur says. Her task is then to identify the point at which she can, so to speak, think her way into Arthur's life, so that she can understand what he means through understanding how he has developed. In this story, "understanding what Arthur means when he says 'arbogast'" plays the role of "following the rule in *Roe v. Wade*" or "remaining faithful to the framers' meaning of 'due process.'"

Tushnet, *supra* note 49, at 825. Thus, to learn whether Justice Rehnquist was indeed trying to establish a constitutional right to welfare, a full course of psychoanalysis is apparently required. Indeed, extensive biographical knowledge is apparently needed to determine whether "pass the salt" is a request for salt or pepper. (Recall that Arthur's "entire vocabulary" is under discussion here, not just legal language.)

The reader who finds these portions of Tushnet's arguments bizarre would be mistaken to dismiss his writings out of hand. When he is not trying to confound common sense, much of what he has to say is quite insightful.

and the audience share a common illusion that a statement has a particular meaning, the illusion seems awfully hard to tell from the reality. Perhaps the audience simply lacks the brilliance to imagine all the meanings the speaker did not have in mind. The same point can be made for the argument that precedent and valid legal argument can justify any conclusion, if one is clever enough. Perhaps this is true, but because judges are not as clever as the scholars who take this view,<sup>51</sup> judges really are constrained by legal methods. Unlike scholars, judges find themselves in situations where they can see only one legally valid conclusion, because they are not clever enough to see how all conclusions are legally valid. If this is true, however, then legal methodology really does constrain judicial decision making.<sup>52</sup> Once more, we have a thesis that can only be brilliant because it is actually false.

### CONCLUSION

If these arguments are correct, then the standards for judging academic work in economics and constitutional law should be reconsidered.<sup>53</sup> Perhaps the current bias in favor of brilliant, "paradigm shifting" work should be abandoned.<sup>54</sup> The more pedestrian "normal science,"<sup>55</sup> may be the worthier endeavor.

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51. With unusual candor, a Minnesota trial judge recently acknowledged that "[i]f IQ tests were used in grading judges, I wouldn't be a judge." *Minneapolis Star & Tribune*, Oct. 10, 1985, at 1B, col. 6.

52. Indeed, if legal methodology is defined as "the methods of reasoning used by judges," then legal methodology actually does not allow one to reach every possible conclusion. The arguments used must be those that judges can understand, and this limits the range of conclusions.

53. Two caveats are in order. First, reversals of conventional thinking are unlikely to be valid in these fields, but some exceptions may exist. Second, this observation applies to constitutional law only to the extent that the scholarly goal is to interpret either the Constitution or the Supreme Court's decisions. The common element in the fields of law and economics is that both are devoted to understanding purposive human behavior. Psychology, on the other hand, is much more concerned with irrational or involuntary behavior and hence is more likely to find that traditional views are wrong. In those areas in which our behavior itself is nonrational, there is less reason to expect our views of that behavior to be correct. A gap between rational purposive behavior and our introspective understanding of that behavior, on the other hand, is much less likely. See J. SEARLE, *MINDS, BRAINS AND SCIENCE* 71-85 (1984).

54. I once received a letter of recommendation advising me that a job candidate would do "extremely intelligent conventional legal scholarship" but was "unlikely to be a paradigm-shaker."

55. See *supra* note 3.

There is a tendency today for high-flying theorists to scoff at those whose work stays closer to the ground. Icarus, too, was undoubtedly scornful of pedestrianism.<sup>56</sup>

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56. What if, as several readers have wittily suggested, this Article itself were found to suffer from the vice of brilliance? Would not its thesis then be self-contradictory and, hence, necessarily false? Although clever, such an argument is misplaced. Even if this Article were brilliant, its thesis is only that brilliant first-order theories about the legal system and the economy are generally false. Thus, the attempted contradiction fails at three points: (1) the charge that this Article is "brilliant" is damaging but unproven; (2) the thesis is that *most* brilliant articles are false; this could be one of the rare exceptions; and, most importantly, (3) this Article does not present a first-order theory about economics or law, but rather a meta-theory about scholarship in those areas. The Article's thesis, therefore, does not apply to itself.