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F. Gordon Keckeissen

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Introduction

Most of the Constitution's language is so general, vague, and comprehensive that the document can be read to bear almost any meaning that the interpreter imputes to it. Hence, whether and to what extent the Constitution constrains government and protects the individual depends to a very large degree on who is interpreting what provision and when.

The commentators are hopelessly divided in their attempts to address this problem. At one extreme, the originalists would constrain constitutional interpretation by binding the interpreter to some combination of the text and the general intentions and values of those who framed it. Aside from its impossible indeterminacy, this

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theory renders the Constitution incapable of explaining very much in a modern context, and hence makes it of little use as a Rule.[1] At the other extreme, some of the non-originalists seek to constrain interpretation by appeal to such extra-constitutional sources as "fundamental values." The problem with this view is that it universalizes the text to such a broad and indeterminate extent that almost any individual value held by the interpreter can then be reinstantiated in place of the text when a given case is decided. To reduce the problem to logic, this is tantamount to moving invalidly from the statement that "certain basic values are embodied in the Constitution," to the universal proposition that "all basic values are embodied in the Constitution," so that the otherwise valid instantiation of the statement, "therefore, basic value '*D*' is implicit in the Constitution" can then be made.[2] If arguments were permitted to be constructed in

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1. The limitations of a strict interpretivist theory are well illustrated by Professor Tushnet's rejoinder to the argument that interpretivism guards against judicial tyranny. The interpretivist argument is that the risk of legislative tyranny is significantly outweighed by the risk of judicial tyranny that would arise if judges were not bound to the text of the Constitution. Professor Tushnet responds as follows:

> This [argument] is, I think, fairly powerful. But it rests in part on an empirical claim about novelty, a claim that is open to obvious external attacks. First, the possibilities of innovative legislative tyranny are in fact great because the social and material world in which we live has changed drastically since 1789. Wiretapping provides a standard example of innovation that interpretivism can accommodate only with great difficulty. The drafters of the fourth amendment obviously could not have contemplated wiretapping when they thought about searches. Yet if interpretivism means that we cannot respond to that kind of innovation, it fails to guard against legislative tyranny. Wiretapping is thus a prime illustration for the claim that, because of the broader scope of legislative action, the domain of innovation in legislative tyranny is more extensive than that in judicial tyranny.

Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 787-88 (1983) (footnotes omitted).

In short, the criticism is that since the legislature is not bound by the text, it can create limitless forms of tyranny (*e.g.*, wiretapping), to which the judiciary, since it *is* bound to the text on the interpretivist view, will not be able to respond. On a strict interpretivist view, the Constitution simply cannot deal with such modern phenomena as wiretapping.

2. The proposition would be formally expressed thus:

(Ga, Gb, Gc)	——————→	(x) (Gx) (invalid)
∴(*x*) *Gx*	——————→	*G*(*d*) ("valid")

Let *a*, *b*, and *c* all be basic values which everyone would concede are derivable from the text of the Constitution (*e.g.*, freedom from tyranny). If we then substitute "*G*" for the predicate "is embodied in the Constitution," and let the variable "*x*" range over all "basic values," the argument would then proceed (invalidly) from the statement that "Basic values *a*, *b*, and *c* are embodied in the Constitution" to the conclusion that "Therefore, all basic values are embodied in the Constitution." Having thus *invalidly* "derived" the latter universal proposition, we could now *validly* instantiate anything that could be called a "basic value." Thus we could say that such values as freedom from fanaticism, compassion, respect for authority, or motherhood, for that matter, are all "basic values" embodied in the Constitution.

this way, virtually any statement could be "derived" from any text.

Thus, the apparent dilemma of constitutional interpretation emerges: by insisting on a too-strict adherence to the text, we derive a theory which is incapable of explaining all that it will properly be called upon to explain, but by going outside of the text we invite the construction of theories which can prove far more than the document warrants.

Among the more promising attempts to shoot between the horns of this dilemma are the so-called "general/particular" theories and the closely related "concept/conception" theory of interpretation. Central to this group of theories is the hypothesis that when the Framers drafted the Constitution, they were not merely enacting the particularized provisions which appear in the text, such as "freedom of speech," and "equal protection," but rather were enacting a single, overarching moral or political philosophy, of which the textual provisions are but instances.

The two most serious criticisms of these theories[3] may be summarized as follows. First, it is argued that the theories reintroduce the very value-injection they seek to avoid at two points in the interpretive process: in the selection of "particulars" from which the general theory is to be derived,[4] and in the selection of the level of generality at which the concept or theory so derived is stated.[5] The second criticism is that even if the possibility of value-neutrality in the interpretative process is conceded, it is still not the case that any one general theory can be uniquely derived from any given set of particulars or instances. Thus, it is argued, since any number of theories may be generated from, and be equally consistent with, the same set of particulars and yet yield different results for future cases, all such theories are underdeterminative, and cannot claim to be derived from the text.[6]

It will be the object of this paper to attempt to meet these criticisms by appealing to a theory of knowledge as opposed to a theory of "meaning." Specifically, my thesis is that constitutional interpre-

3. To the extent that Tushnet's criticism of the concept/conception theory (no evidence that Framers knew they were enacting provisions that embodied a moral content richer than their own moral conceptions) and Schauer's criticism of the general/particular theory (since text does not determine the choice among theories equally consistent with it, no such theories can claim to be generated by the text) are directed at the authoritativeness claims of the respective theories, the author does not take issue with them. For full statements of these criticisms, see Tushnet, *supra* note 1, at 791, and Schauer, *An Essay on Constitutional Language*, 29 U.C.L.A. L. REV. 797, 816-18 (1982).

4. Schauer, *supra* note 3, at 818-19.

5. Tushnet, *supra* note 1, at 791.

6. Schauer, *supra* note 3, at 816-18.

tation, like the construction of scientific theory, may be most effectively constrained, and personal value-injection avoided, by imposing upon the interpreter a set of rules which requires him to accommodate as much *knowledge* as is at his disposal in a way that will produce a theory which is at once optimally modest and descriptive. In other words, a theory is sought that neither asserts more nor describes less than the available data, including the text, warrants.

In attempting to construct a model for such interpretation, I have turned to the epistemology of W.V. Quine, which is principally directed at responsible belief-formation in the context of interpreting scientific data.

The paper will proceed in three parts. In Part I, the need for a theory of knowledge in constitutional interpretation is identified. Part II consists of a general description of the five major points of Quine's theory, with references, where applicable, to pertinent constitutional cases and literature. In Part III, the theories and criticisms noted above will be reconsidered, and an attempt will be made to answer the latter in light of Quine's observations.

I. The Need for a Theory of Knowledge

Before discussing Quine's epistemology, it will be necessary to indicate briefly the precise function a theory of knowledge should be expected to perform in a model of constitutional interpretation.

In his article, "Objectivity and Interpretation,"[7] Owen Fiss notes that absolute objectivity is more than can be expected from any interpretive activity, be it constitutional lawmaking or scientific observation of the physical world. He insists, rather, that what he calls "bounded objectivity" is the only kind of objectivity we can hope for.[8] Bounded objectivity, Fiss argues, is achieved by imposing upon the interpretive process what he calls disciplining rules[9] which are recognized as authoritative by an interpretive community. These rules, Fiss concludes, simultaneously constrain the interpreter *and* accommodate creativity by allowing the interpreter to interact with the text and build bridges between it and man's other intellectual endeavors in the humanities. It is from this interaction between the text and our fund of knowledge in other disciplines at any given time

7. 34 STAN. L. REV. 739 (1982).

8. "To insist on more, to search for the brooding omnipresence in the sky, is to create a false issue." *Id.* at 745-46 (footnote omitted).

9. An example of a disciplinary rule is one which requires the decisionmaker to look to history or some other area of social or moral knowledge external to the document.

that meaning is derived.[10]

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10. In responding to the argument, which Fiss calls the "new nihilism," that the generality and comprehensiveness of the text render objective interpretation (and hence, legitimate constitutional adjudication) impossible, Fiss states:

> In coming to terms with this nihilism, one must begin by acknowledging the generality and comprehensiveness of the constitutional text and also by insisting that in this regard the Constitution is no different from a poem or any legal instrument. Generality and comprehensiveness are features of any text. Though the Constitution may be more general and comprehend more than a sonnet or a contract, it is comparable in this regard to an epic poem or some national statutes. Few, if any, statutes touch as many activities as the Constitution itself (which, after all, establishes the machinery of government) but many, if not most, embody conflicting values and are in that sense comprehensive. *It should also be understood that generality and comprehensiveness do not discourage interpretation but are the very qualities that usually provoke it. Interpretation is a process of generating meaning, and one important (and very common) way of both understanding and expressing the meaning of a text is to render it specific and concrete.*
>
> There are some legal theorists who would limit legal interpretation to highly specific constitutional clauses. This school, misleadingly called "interpretivism," but more properly called "textual determinism," operates with a most arid and artificial conception of interpretation. For an interpretivist only a specific text can be interpreted. Interpretation is thus confused with execution — the application of a determinate meaning to a situation — and is unproblematic only with regard to clauses like that requiring the President to be at least 35 years old. Most interpretivists, including Justice Black, would recognize the narrowness of such a perspective and want to acknowledge a role for less specific clauses, like freedom of speech; but in truth such provisions are hardly obvious in their meaning and require substantial judicial interpretation to be given their proper effect. Does "speech" embrace movies, flags, picketing, and campaign expenditures? What is meant by "freedom?" Does it, as Isaiah Berlin wondered, pertain exclusively to the absence of restraint, or does it also embrace an affirmative capacity for self-realization?
>
> To endorse active judicial interpretation of specific clauses and to caution against judicial interpretation of the more general and potentially more far-reaching clauses, such as due process and equal protection, represents an attempt at line-drawing that cannot itself be textually justified. It is instead motivated by a desire — resting on the most questionable of premises — to limit the role of constitutional values in American government and the role of the judiciary in expressing those values. And the line itself would be illogical. It would require that small effect be given to the comprehensive constitutional protections while full effect is given to the narrow ones. I reject this attempt at line-drawing because I reject the premises and the result, but it must be emphasized that . . . *the critical question is not whether judicial interpretation of specific clauses, understood in any realistic sense, is legitimate and that of general clauses is not, since, as we saw in the case of the first amendment, both require substantial interpretation. Rather, the question is whether any judicial interpretation can achieve the measure of objectivity required by the idea of law.*

Id. at 742-44 (footnotes omitted) (emphasis added).

While Fiss thus satisfactorily demonstrates that meaning cannot be derived without interpretation, he seems to tacitly concede the "nihilists' " point that the kind of objectivity which is necessary to legitimate *constitutional* interpretation is impossible. This is so because while the disciplining rules he suggests provide some outside constraints sufficient to preclude sheer judicial fiat, they do not confer any guarantee against result-oriented interpretation, even if full compliance with them is assumed. It is entirely possible, for example, for a judge to claim to be (and even believe himself to be) guided by *stare decisis*, or history, or rules of construction, or indeed any convention one cares to name, and yet in reality to be entirely governed by his own predispositions about what is "just" or "right." In short, while the rules require inter-

Fiss' model, like the general/particular group of theories, appears to provide a promising middle-ground between the limitations of the originalist theories and the potential excesses of the basic value theories. It stops short, however, of providing any kind of "procedural" framework to assure responsible hypothesis or belief-formation *within* the theory, for the disciplining rules themselves neither guard against result-oriented interpretation nor assure that whatever theory the interpreter ultimately generates will excel rival theories which could be generated from the same data. These criticisms, of course, are the same which were noted above in connection with the "general/particular" group of theories, and which indeed apply with equal force to any non-interpretivist model. Hence, the need for a theory of knowledge or, more precisely, of belief-formation, to provide the requisite "procedural" framework is evident.

II. Quine's Epistemology

Quine's epistemology stems from the recognition that absolute demonstrability of anything that we commonly count as knowledge is impossible. The soundness of this premise is indicated by the fact that neither of the two means by which we claim to obtain knowledge, deduction from self-evident truths and enumerative induction, are sufficient conditions for proving the truth of any given proposition. Deduction from self-evident truths is insufficient simply because the set of such truths is now recognized to be confined to the laws of logic and mathematics — and only part of mathematics at that.[11] That absolute demonstrability of all logical and some mathematical truths is possible is cold comfort, since such truths will not take us very far in trying to explain natural phenomena or predict future

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action with external sources, they do nothing to ensure that the interaction itself will be an objective intellectual process.

11. It was once held to be a self-evident truth of set theory, for example, that a set could be specified for any conceivable condition, until Bertrand Russell demonstrated that it was impossible to designate a set whose members were all sets which satisfied the condition of non-self-membership. (The set of all prime numbers, not being itself a prime number, is an example of a set that satisfies this condition, as is almost any set which can be conceived of. The set of sets, being a member of itself, would not satisfy the condition.)

Assuming that we designated such a set, there are only two possibilities with regard to *its* self-membership: that it is a member of itself and that it is not. If it *is* a member of itself, however, it *cannot* be a member of itself, since the condition for membership in it is that it be a set which is not a member of itself. If on the other hand it is *not* a member of itself, then it *is* a member of itself, since it would then satisfy the condition, but in so doing it would destroy the set. Thus, the very designation of the set simultaneously satisfies and violates the condition. The set of all sets which are not members of themselves cannot be designated. Hence, far from being a self-evident truth, the proposition that a set can be designated for any condition is simply false.

occurrences thereof. As to enumerative induction, while repeated observation has long been deemed a necessary condition of proof,[12] it has never been held that the observation of 100 white swans licenses the conclusion that the 101st swan observed will likewise be white.

Since it is thus evident that deduction and observation cannot even together provide adequate means of arriving at knowledge (or even reasonable belief), Quine submits that we must resort to hypothesis[13] to make up the shortfall.

While hypothesis is by definition guesswork, Quine notes that it can nonetheless be enlightened guesswork. To the extent it is so enlightened, the beliefs we form from it may be counted as reasonable beliefs. Hence, in order to determine the reasonableness of any belief or interpretation of data, we must have a means of objectively evaluating the hypothesis or hypotheses that led to its formation. To this end, Quine, in his book *The Web of Belief*,[14] lists five criteria, or "virtues," which any given hypothesis may enjoy in varying degrees; conservatism (of prior beliefs), simplicity, modesty, generality, and refutability. These will now be considered.

A. Conservatism

The virtue of conservatism plays a paramount role in Quine's epistemology. Because of its centrality to the arguments that follow, it is crucial to note at the outset that Quine's use of the term refers

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12. Although it is noted that such rationalist philosophers as Plato, St. Augustine, and Descartes argued convincingly that but for our intellectual limitations, we could, at least in theory, discover truth by pure unaided reason, *i.e.*, without resort to experience. The rationalists' arguments are far from unsalvageable, logical positivism notwithstanding, but that is a subject for another paper.

13. Quine gives a fresh definition of hypothesis which bears quotation:

> Calling a belief a hypothesis says nothing as to what the belief is about, how firmly it is held, or how well founded it is. Calling it a hypothesis suggests rather what sort of reason we have for adopting or entertaining it. People adopt or entertain a hypothesis because it would explain, *if it were true*, some things that they already believe. Its evidence is seen in its consequences . . . .
>
> Hypothesis, where successful, is a two-way street, extending back to explain the past and forward to predict the future. What we try to do in framing hypotheses is *to explain some otherwise unexplained happenings by inventing a plausible story, a plausible description or history of relevant portions of the world.* What counts in favor of a hypothesis is a question not to be lightly answered.

W.V. QUINE & J.S. ULLIAN, THE WEB OF BELIEF 66 (2d ed. 1978) (emphasis added) [hereinafter QUINE]. As the *underscored* phrases indicate, the formation or adoption of a hypothesis is for Quine a very non-committal move in theory-formation. Even the most sophisticated and fully developed hypotheses are to be regarded only as bridges to a tentative sort of knowledge, or quasi-knowledge; they are at any time subject to major renovation or, in extreme cases, abandonment, upon the receipt of evidence that they fail to predict or explain.

14. QUINE, *supra* note 13.

strictly to a neutral principle of epistemology, and is not to be conflated with the term's common dictionary denotation of "resistant to change." That the two meanings are in fact at odds with each other will become clear when conservatism's corollary, the virtue of generality, is considered below.

Conservatism comes into play when an event occurs whose explanation requires a hypothesis that conflicts with one or more of our prior beliefs. Many events are explainable by hypotheses which are entirely consistent with our prior beliefs (*e.g.*, the steam has stopped rising from my coffee, so the coffee must be cold). Those events which give rise to our more interesting and descriptive hypotheses, however, often conflict with such prior beliefs.

For example, the observation by nineteenth-century scientists that Uranus was orbiting at more than two minutes out of its calculated arc gave rise to two possible hypotheses, both of which conflicted with prior beliefs: that Uranus was a "renegade" planet which defied the laws of celestial mechanics, or that there was an eighth planet, hitherto unknown and as yet unobserved, which was exerting gravitational force on Uranus. When the virtue of conservatism is brought to bear on such a problem, it will favor that hypothesis which requires the least rejection of prior beliefs. In the Uranus case, the hypothesis that the solar system included an eighth planet, Neptune, in addition to the seven it had traditionally been believed to contain, was properly favored over the hypothesis that the established laws of celestial mechanics were entirely wrong. Thus, accommodation of the new knowledge (Uranus's aberrant orbital arc) was accomplished with the least possible damage to our total repertoire, or "web," of beliefs. Moreover, the fact that the scientists may have been wrong (or underdeterminative) in their conservative choice of hypothesis counts for, not against, their decision. As Quine notes, the reason that conservatism is sound strategy is that

> [A]t each step it sacrifices as little as possible of the evidential support, whatever that may have been, that our overall system of beliefs has hitherto been enjoying. The truth may indeed be radically remote from our present system of beliefs, so that we may need a long series of conservative steps to attain what might have been attained in one rash leap. The longer the leap, however, the more serious the angular error in direction. For a leap in the dark the likelihood of a happy landing is severely limited. Conservatism holds out the advantages of limited liabil-

ity and *a maximum of live options for the next move.*[15]

That Quine's principle of conservatism can serve as well in ensuring responsible hypothesis in constitutional interpretation as it does in the construction of scientific theory may be illustrated by considering the history of the eleventh amendment. The eleventh amendment by its terms bars only federal suits brought against states *by citizens of other states.* Notwithstanding the amendment's unequivocal language to this effect, the Supreme Court in *Hans v. Louisiana*[16] held that the states' sovereign immunity extended also to federal suits brought against them by their *own* citizens. This decision gave rise to several possible hypotheses, two of which are considered here.

One hypothesis regarded the *Hans* decision as an extension of the eleventh amendment, so that the amendment was to be construed as a *constitutional bar* on *all* suits brought against states in federal courts. This hypothesis was highly unconservative in that it entailed a direct contradiction of the explicit language of the eleventh amendment. Nonetheless, a majority of the Supreme Court adopted it, with the consequence of later having to indulge in two legal fictions and one logical contradiction in order to maintain it.

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15. *Id.* at 67-68 (emphasis added). The notion that conservatism and its corollary, generality, are necessary attributes of responsible theory-formation, did not, of course, originate with Quine. Nor is it new to the law. In discussing the requirements of principled explanation, Professor Perry states:

> Contrary to the claim of others, *the requirement of principled explanation is not inconsistent with the common-law method of developing constitutional doctrine incrementally and even tentatively.* Addressing the problem of "how the court's reasons must 'indicate to us how future cases are to be decided,'" Wechsler says:
>
> > [T]he court decides the case at hand and not the cases that have not arisen . . . . But it is one thing to anticipate such future cases that perhaps *may* be distinguishable, without deciding the sufficiency of the distinction [the conservatism consideration]. It is quite another thing to judge the instant case in terms that are quite plainly unacceptable in light of other cases that it is now clear are covered by the principle affirmed in reaching judgment and indistinguishable on valid grounds [the generality consideration] . . . . [T]he principle of the decision must be viable in reference to applications that are now foreseeable; and *that viability implies a similar decision or the existence of a possibly acceptable distinction.* Nothing less will satisfy the elements of generality and of neutrality implicit in the concept of a legal judgment as distinguished from the fiat of a court.

M.J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 27 (1982) (emphasis added) (quoting Wechsler, *The Nature of Judicial Reasoning* in LAW AND PHILOSOPHY 297-98 (S. Hooked 1964)). In essence, Professor Wechsler's point is the same as Quine's: that principled theory-formation requires that hypotheses and prior beliefs (including legal doctrines) are to be sacrificed *precisely* (no more *and* no less) to the extent required to accommodate new data or foreseeable cases with indistinguishable facts.

16. 134 U.S. 1 (1890).

The first legal fiction was created in *Ex Parte Young*,[17] which held that when a state acted in violation of the fourteenth amendment, the action was deemed to be not that of the state, but rather of the officer through whom the state acted, so that relief could be sought against the officer without violating the eleventh amendment's "absolute bar" of suits against the state. The second fiction was created in *Edelman v. Jordan*,[18] which held that when a suit brought against a state officer under *Young* sought monetary compensation, instead of mere injunctive relief, the suit was deemed to be "in reality" against the state, and hence barred by the eleventh amendment. Thus, under these fictions, state action in violation of the fourteenth amendment is transformed into non-state action when the state's agent, instead of the state, is named as defendant, but is transformed back into state action as soon as monetary compensation is sought, so that sovereign immunity can then be invoked under the eleventh amendment.

The logical contradiction the hypothesis entails stems from its construction of the eleventh amendment as a *constitutional bar* on *all* suits brought against the states in federal courts. If the eleventh amendment *were* such a constitutional bar, Congress could not override it with legislation authorizing suits against states (with the arguable exception of legislation enacted pursuant to section five of the fourteenth amendment),[19] since such an override would constitute an addition to the federal courts' Article III subject matter jurisdiction in violation of *Marbury v. Madison*.[20] In spite of this fact, the Supreme Court repeatedly sanctions such overriding legislation.[21] But

17. 209 U.S. 123 (1908).

18. 415 U.S. 651 (1974).

19. In Fitzpatrick v. Bitzer, an eleventh amendment challenge to the 1972 amendments to the employment discrimination provisions of the 1964 Civil Rights Act (42 U.S.C. §§ 2000e *et seq.* (1970 ed. and Supp. IV)), the Court held that even damage suits against states were permissible, notwithstanding the eleventh amendment, where they are authorized by legislation enacted pursuant to Congress' power under section 5 of the fourteenth amendment. The Court's rationale was that "[a]s ratified by the States after the Civil War, [the Fourteenth] Amendment quite clearly contemplates limitations on their authority." 427 U.S. 445, 453 (1976). *See also* Hutto v. Finney, 437 U.S. 678 (1978) (award of attorney's fees pursuant to Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988 (1976 ed.)) upheld, notwithstanding that award would be paid out of state funds).

20. 5 U.S. (1 Cranch) 137, 173-179 (1803).

21. *See, e.g.*, Parden v. Terminal Ry. Co., 377 U.S. 184 (1964) (Federal Employer's Liability Act held to authorize suits against state as operator of interstate railroad); Jennings v. Illinois Office of Educ., 589 F.2d 935 (7th Cir.), *cert. denied*, 441 U.S. 967 (1979) (Congress' authorization of suits against state under Veterans' Reemployment Rights Act (38 U.S.C. §§ 2021 *et seq.* (1970 ed. and Supp. IV)) upheld as valid exercise of its war powers under Article I of the Constitution). *Accord*, Garcia v. San Antonio Metro. Transit. Auth., 469 U.S. 528 (1985) (five to four decision) (Fair Labor Standards Act held to apply to employees of municipal mass transit authority, overruling National League of Cities v. Usery,

in order to do so, it must at least tacitly maintain two contrary propositions at the same time: that the eleventh amendment is a constitutional limitation on federal subject matter jurisdiction and that it is not.

A second hypothesis, attributable to Justice Brennan, is much more conservative, and as a result suffers none of the illogical consequences of the first. That hypothesis regards the *Hans* decision not as an extension of the eleventh amendment to suits brought against states by their own citizens, but rather as merely a reaffirmation of the states' common-law sovereign immunity. As Professor Redish explains:

> Brennan . . . identifies two sources of sovereign immunity: the bar of the eleventh amendment against suits brought by out-of-staters and the common-law bar against suits by in-state citizens. The significant difference between the two, he argues, is that unlike the Constitutional type of immunity, the common-law form of sovereign immunity was waived by the states at the time of the Constitution's ratification to the extent that Congress was given power to legislate under its enumerated powers in Article I. Thus, if Congress, in the exercise of one of its powers, renders the state subject to suit by in-state citizens, the common-law doctrine of sovereign immunity does not act as a bar.[22]

Because Justice Brennan's hypothesis conflicts with no prior beliefs, and gives full effect to all and only that language which is actually set forth in the eleventh amendment, it furnishes a paradigm example of an optimally conservative and descriptive move. Since it allows for federal suits against states by their own citizens, pursuant either to their consent or to a Congressional override of their common-law sovereign immunity, it achieves substantially the same result as the first hypothesis, with one important difference: it involves no contradiction. Not having denied the plain meaning of the eleventh amendment to begin with, Brennan's theory enjoys the benefit of remaining consistent with whatever other beliefs or textual provisions are bound up with, or are dependent upon, that plain meaning. In Quine's words, Brennan's theory enjoys the advantages of "limited liability and a maximum of live options for the next move."[23]

In contrast, the first hypothesis, having once denied the eleventh

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426 U.S. 833 (1976)).

22. M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 141-42 (1980) (footnote omitted).

23. QUINE, *supra* note 13, at 68.

amendment its plain meaning, must resort to further contradiction in order to justify its first, unconservative move. It is rather like lying. Just as one fabrication begets another, so one unwarranted tear in our web of belief (*i.e.*, one unnecessary sacrifice of an important prior belief) requires the adjustment of all affected strands. The more unwarranted or unconservative the tear in the web, the more radical is the adjustment of strands required, and the more room for error in the resulting theory.

It is important to recognize at this point that the transferability of Quine's theory from philosophy of science to constitutional interpretation is not a mere accident or coincidence, dependent upon choice of example. Like Newton's laws of celestial mechanics, or indeed any theory or "law" in any discipline, constitutional provisions and doctrines both imply, and are implied by, a vast concatenation of observations, beliefs, and data (including past and future cases). Because this concatenation, or, to use Quine's metaphor, web, is the sole means by which we are able, *at any given moment* (the web is constantly changing) to consistently explain the past and predict the future, it is not to be altered, much less overhauled, without justification which is commensurate with the extent of the proposed alteration. Such justification is to be found, if at all, where data presents itself for the first time. In science, this occurs when new phenomena are observed; in law, when new cases with peculiar facts arise, or when old cases require reconsideration in light of new knowledge. In each case, we try to frame a hypothesis which can reconcile the new data with our entire repertoire of prior beliefs. If we are able to frame a hypothesis that sacrifices no prior beliefs, such as Justice Brennan's theory in the foregoing example, so much the better — a more conservative hypothesis cannot exist. When one or more beliefs must go, however, in order to accommodate the new data, as in the Neptune example above, conservatism can only tell us to sacrifice as few prior beliefs as possible. For further guidance, one must look to the remaining virtues.

B. Simplicity

The initial appeal of a simple hypothesis is plausibility. Somehow, the fewer the exceptions, qualifications, exceptions to exceptions, caveats, fictions and the like that are contained in a hypothesis, the more plausible it is. Quine illustrates this point by considering the practice of plotting measurements on a graph in attempting to frame hypotheses to explain or predict them. No matter

what pattern of distribution the points that we plot take on, there will be infinitely many curves that can be drawn through all of the points. Of that infinite number of curves, however, we will always select the simplest which passes through, or reasonably close to, all of the points. Consider, for example, the following two figures, each of which represents a familiar hypothesis.

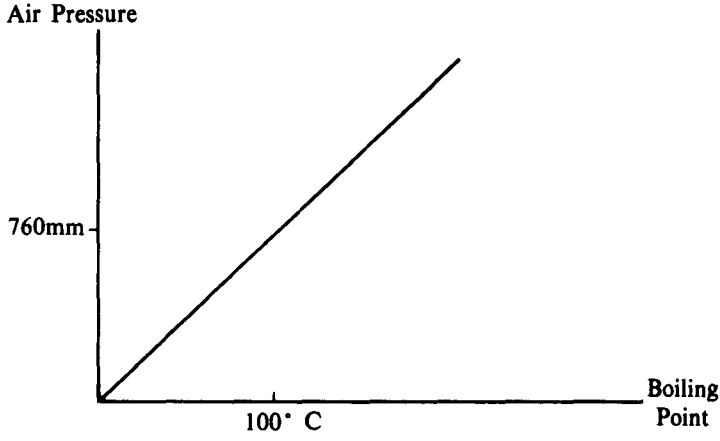

Figure 1: The boiling point of water increases proportionately with air pressure.

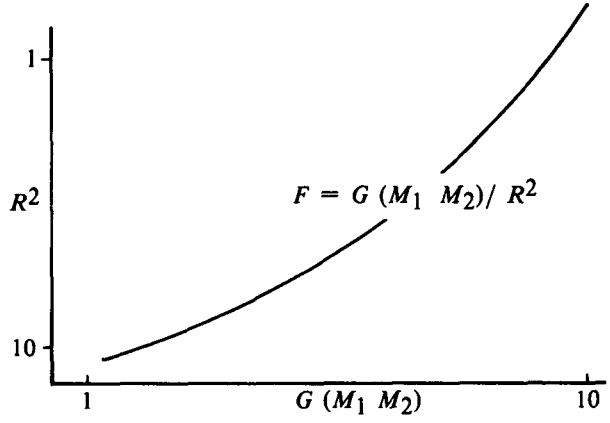

Figure 2: Any particle of matter in the universe attracts any other with a force (F) which varies directly as the product of the masses ($G\ (M_1\ M_2)$) and inversely as the square of the distance between them (R). Thus, $F = G\ (M_1\ M_2)/R_2$. (Newton's law of universal gravitation.)

The benefit that simplicity confers on a hypothesis is that it enables the hypothesis to explain many diverse phenomena in a brief, unified, elegant account, as opposed to an exhaustive, apparently *ad hoc*, cataloging. Thus, the boiling point hypothesis, above, is able to explain in a brief sentence countless observations of different boiling points under different conditions which would not otherwise seem to admit of any unifying principle. Similarly, Newton's formula states a single law which is capable of explaining both celestial and terrestrial mechanics. Because these hypotheses are, at once, simple and very descriptive, they recommend themselves as especially plausible.

The problem with this view of simplicity, as Quine points out, is that it contains a very strong subjective element; for what makes a hypothesis brief, unified and coherent, and hence plausible, is largely a function of our language and how we catalog and structure our experience. Why then, Quine asks, "should the *subjectively* simpler of two hypotheses stand a better chance of predicting *objective* events?"[24]

The answer is that it should not; that is, there is no reason to expect hypotheses which are framed according to our subjective linguistic and psychological limitations to entirely conform with the objective structure of nature. Nonetheless, simplicity of hypothesis remains good strategy. To see why this is so, let us turn again to the two examples considered above.

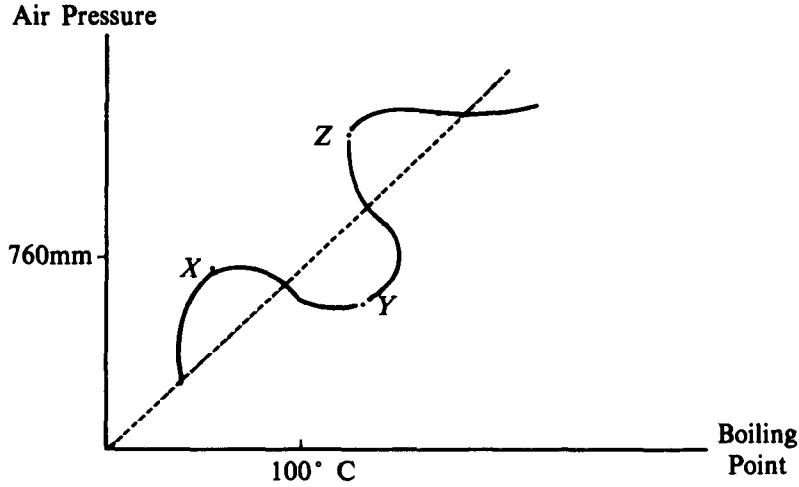

Figure 1.1: The boiling point of water increases proportionately with air pressure.

24. *Id.* at 71-72 (emphasis added).

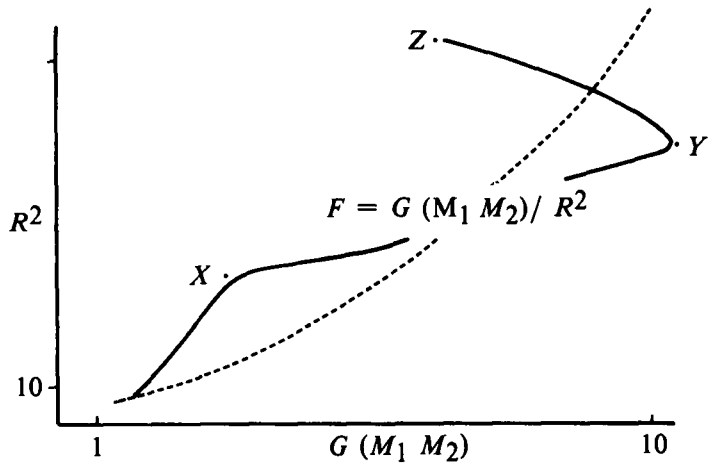

Figure 2.1: Any particle of matter in the universe attracts any other with a force (F) which varies directly as the product of the masses ($G\ (M_1\ M_2)$) and inversely as the square of the distance between them (R).

Assume that points X, Y and Z on each graph represent the most extreme instances of actual measurements which deviate from the simpler predictions of the first set of graphs, represented here by the broken curves. In Figure 1.1, these points might represent water drawn from various lakes, streams and ponds; in Figure 2.1, perhaps masses containing magnetic ore are involved. The point is that the more complex curves shown here, which result from taking account of the new measurements, more closely approximate the objective structure of nature than did their counterparts in the first set of graphs. But note the price that is paid. First, because of their asymmetrical complexity, the new graphs will not enable us to even roughly predict future phenomena. Standing alone, of course, this would not be a valid complaint, as we cannot ignore the facts to maintain simplicity of theory. The more serious problem is that in attempting to accommodate all the exceptions or aberrations, the rule is totally obscured; it is no longer possible to isolate the exceptions to determine why they deviate. It is for this reason that simplicity of hypothesis makes for sound theorizing, in spite of its built-in subjectivity and consequent limitations. As Quine notes:

> [We] are continually finding that [we] have to complicate . . . theories to accommodate new data. At each stage, however, when choosing a hypothesis subject to subsequent correction, it

> is still best to choose the simplest that is not yet excluded. This strategy recommends itself on much the same grounds as conservatism and modesty. The longer the leap, we reflected [in connection with conservatism], the more and wilder ways of going wrong. But likewise, the more complex the hypothesis, the more and wilder ways of going wrong; *for how can we tell which complexities to adopt*? Simplicity, like conservatism and modesty, limits liability. Conservatism can be good strategy even though one's present theory be ever so far from the truth, and simplicity can be good strategy even though the world be ever so complicated. Our steps toward the complicated truth can usually be laid out most dependably if the simplest hypothesis that is still tenable is chosen at each step. It has even been argued that this policy will lead us at least asymptotically toward a theory that is true.[25]

To say that the simplest available hypotheses should be adopted, however, is not to say that we may ignore those phenomena that they fail to predict. Rather, we tentatively define the problem away by stating the hypotheses more precisely. To continue with the preceding examples, consider the effect which some minor revisions in the two hypotheses will have on their respective graphs.

25. *Id.* at 72 (emphasis added).

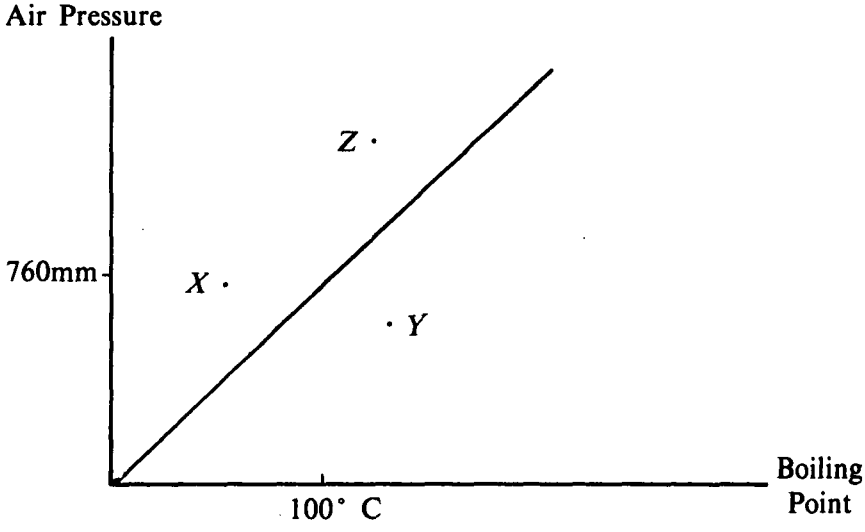

Figure 1.2: The boiling point of water *which is free from impurities* increases proportionately with air pressure.

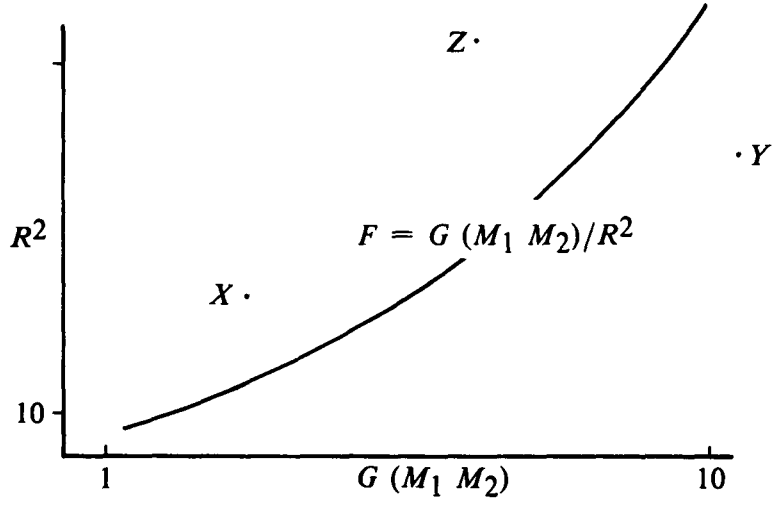

Figure 2.2: *Other things being equal*, any particle of matter in the universe attracts any other with a force (F) which varies directly as the product of the masses ($G\ (M_1\ M_2)$) and inversely as the square of the distance between them (R).

Not only have we preserved the hypotheses, a point in our favor on conservatism grounds alone, but, and more significant overall, we

have isolated the exceptions for further study as to why the hypotheses failed to predict them, an advantage we would not have enjoyed had we opted for more complex hypotheses at the outset.

It must be conceded that simplicity is not as easy to recognize or comply with in non-scientific contexts, such as textual interpretation, where theories cannot be plotted as curves on a graph. Nonetheless, upon some reflection it becomes clear that as more and more exceptions, qualifications and multiple standards are imposed on our theories, for example, of equality and property, they cease to resemble theories at all, and become more like *ad hoc* catalogings of unproven "axioms" which evince no unifying principles. Consequently, as with the hypotheses considered above, the exceptions become blurred with the rules, so that not only prediction, but also principled accommodation of novel cases, becomes impossible. While negative illustrations of simplicity are legion in constitutional law, the only significant positive example which immediately comes to mind is Justice Marshall's suggested "sliding scale" approach to the equal protection cases.[26]

C. *Modesty*

The virtue of modesty is in large part coextensive with simplicity and conservatism. Hypotheses which are brief and unified, and which conflict with few or no prior beliefs, tend to be modest as well. Modesty becomes an independent concern only in those cases where a hypothesis, while in full conformity with prior beliefs, is yet highly extraordinary. The following statements are examples of such immodest hypotheses: "The sun will nova tomorrow;" "Christopher Marlowe wrote all of Shakespeare's plays 'from the grave;'" "Aus-

26. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, (1972), wherein Justice Marshall, in dissent, stated as follows:

> The majority is, of course, correct when it suggests that the process of determining which interests are fundamental is a difficult one. But I do not think the problem is insurmountable. And I certainly do not accept the view that the process need necessarily degenerate into an unprincipled, subjective "picking-and-choosing" between various interests or that it must involve this court in creating "substantive constitutional rights in the name of guaranteeing equal protection of the laws,". . . . Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.

Id. at 102-103. (Marshall, J., dissenting).

tralopiths still roam the savanna;" and "Charlemagne never aspired to Emperor."

Examples of immodest hypotheses in law are those cases and doctrines which are said to be "cut from whole cloth." One such doctrine is that of "Our Federalism" which the Supreme Court established in *Younger v. Harris*,[27] when it held that, in the absence of very narrow exceptions, federal courts could not enjoin state criminal prosecutions which threatened constitutional rights. Because *Younger* involved an action to enjoin an *ongoing* state prosecution, whereas its predecessors had all involved actions to enjoin *future* state prosecutions,[28] the Court could have distinguished the case on that ground alone and achieved the same result of prohibiting the injunction. Instead, in a totally unnecessary and highly immodest move, it announced the doctrine of "Our Federalism" as the grounds for its decision, and thereby spawned at least a dozen cases whose holdings bear no relation whatsoever to the central concern of *Younger* itself.[29]

What the *Younger* case and the other examples above have in common is that while they do not specifically contradict any prior beliefs, neither are they implied or in any way logically necessitated by them. If we again invoke Quine's metaphor of a web of belief, immodest hypotheses may be visualized as points lying off the plane of the web. They neither imply, nor are implied by, any segment of the concatenation of beliefs and data — in short, they are irrelevant. The price of incorporating such irrelevant hypotheses into our web is that in doing so we necessarily incorporate all their likewise irrelevant implications and thus needlessly (and hopelessly) complicate our theory, as the *Younger* line of cases demonstrates.

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27. 401 U.S. 37 (1971).

28. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479 (1965); Douglas v. City of Jeannette, 319 U.S. 157 (1943); Fenner v. Boykin, 271 U.S. 240 (1926); *Ex Parte* Young, 209 U.S. 123 (1908).

29. The post-*Younger* decisions have invoked "Our Federalism" to deny injunctive relief against enforcement of allegedly unconstitutional state laws in purely *civil* cases in which no state judicial officer is even involved. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434 (1977) (no federal injunction against enforcement of allegedly unconstitutional state attachment law); Juidice v. Vail, 430 U.S. 327 (1977) (no federal injunction against state's allegedly unconstitutional statutory contempt procedures in purely private civil action); Rizzo v. Goode, 423 U.S. 362 (1976) (no federal injunction against allegedly unconstitutional disciplinary proceeding brought against plaintiff by fellow police officers, notwithstanding that plaintiff asserted a section 1983 claim, that no state judicial proceeding was pending or threatened, and that the decision effectively rendered a police administrative board the ultimate arbiter of plaintiff's federal constitutional rights); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (federal injunction may not issue against state prosecution under allegedly unconstitutional nuisance laws providing for seizure of personal property used in connection with exhibition of obscene films).

Modesty, like the other virtues, admits of degrees. Hence, while some hypotheses, such as "Our Federalism" and the nova example, are easily identifiable as immodest, other cases are not so clear. A good example of the latter sort of case is the Supreme Court's decision in *Goldberg v. Kelly*,[30] wherein it held that statutory entitlements to welfare benefits were sufficiently akin to "property" to require procedural due process as a precondition to their termination. In support of its position, the Court, in a footnote, stated:

> It may be realistic to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that
>
> "[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced."[31]

Whether this theory of entitlement as property should count as modest or immodest is open to question. In favor of modesty, it is noted that the Court limited its holding to entitlements which impacted important private interests such as the public assistance benefits at issue, and explicitly excluded such peripheral entitlements as SEC registration exemptions.[32] On the other hand, Justice Black, in dissent, advanced several arguments upon which a contrary result could arguably be based.[33]

Fortunately, a determination as to the reasonableness of hypotheses in such unclear cases as *Goldberg* need not be based solely on

30. 397 U.S. 254 (1970).

31. *Id.* at 262 n.8 (quoting Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)).

32. *Id.* at 262-63 and n.10.

33. *Id.* at 272-79.

grounds of modesty, conservatism or simplicity. These virtues, taken together, help to ensure cautious theory-formation. As important as caution is to any theoretical enterprise, however, it represents only half the equation. When new data must be accounted for, or novel cases decided, the foregoing virtues must give way, at least in part, to generality.

D. Generality

A corollary to the rule of conservatism, that a good hypothesis must sacrifice as little of the evidentiary support for our prior beliefs as possible, is the rule of generality, which holds that such a hypothesis must also be able to account for the entire complement of data and beliefs which are not so sacrificed. For to the extent that a hypothesis ignores relevant, available data, it runs the risk of inadvertently conflicting with the beliefs which that data implies and of running afoul of the virtue of conservatism. The importance of this point may be illustrated by comparing the Supreme Court's decisions in *Plessy v. Ferguson*[34] and *Brown v. Board of Education*.[35]

When the Court in *Plessy* framed the hypothesis that "separate but equal" satisfied the concept of equality set forth in the fourteenth amendment, it was operating in an intellectual milieu in which there presumably was little, if any, available data from which a belief contrary to this proposition could be derived. Since the *Plessy* hypothesis was thus able to account for whatever data was available as of 1896, it could claim to be general, and hence principled, even though it turned out later to be objectively incorrect. In contrast, the Court in *Brown* had before it a wealth of data[36] which indicated that segregation had pernicious effects on blacks, and hence was inconsistent with the concept of equality. To retain the *Plessy* hypothesis under such circumstances would not only fail to satisfy the virtue of generality, by failing to account for relevant, available data, but would also run afoul of the virtue of conservatism, in that it would require the wholesale rejection of all the beliefs that the new data on segregation implied.

Moreover, upon reflection, the originalist argument, that we ascribe too much of our values to the Framers when we interpret equality to mean anything more than "separate but equal," is illogical. In light of the evidence that segregation is psychologically and

34. 163 U.S. 537 (1896).
35. 347 U.S. 483 (1953).
36. *See id.* at 489 n.4, 494-95 n.11.

socially more disadvantageous to blacks than it is to whites, it is clear that it represents an instance of "inequality" in that term's strictest, almost tautologous, dictionary definition. Hence, no matter *what* concept of equality we ascribe to the Framers, if we wish, as the originalists seem to, to hold that this concept could be satisfied by segregation in light of the current evidence, we would have to be prepared to say that their concept could as well be satisfied by the proposition that two plus two equals five.

The idea that generality is a prerequisite to principled explanation did not, of course, originate with Quine. As Professor Wechsler explained:

> [T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?
>
> A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.[37]

In order to be sufficiently general, however, a decision must consider not only other foreseeable applications of the rule it states, but all other relevant and available data as well. Thus, Professor Brest, in pointing out that original intent theory requires the rejection of much of the present body of constitutional law, notes that no theory can be sound that fails to account for so much of the data that it is called upon to explain.[38] Hence, a constitutional theory that fails to account for such facts as statutory entitlements to welfare benefits, or wiretapping by the government, or the psycho-sociological impact of segregation on blacks as compared to whites, is unwarrantedly underdescriptive. Theories which are maintainable only at the expense

37. PERRY, *supra* note 15, at 26 (quoting Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12 (1959)).

38. Brest, *The Misconceived Quest or the Original Understanding*, 60 B.U.L. REV. 204, 223-31 (1980).

of ignoring the facts are simply bad theories.

As Quine notes, when new data are observed which cannot be explained by existing theories, conservatism and modesty must give way to generality. When this occurs in science, scientific revolution ensues, as it did when Einstein's theory of relativity cut through earlier physical theories, including Newton's, which were unable to explain why the earth failed to travel through the legendary ether at predicted speeds.[39] When similarly unexplainable cases arise in a constitutional context, generality likewise demands that new theories be generated to account for them, if the Constitution is to remain viable as a Rule over time.

E. Refutability

Retaining a hypothesis in the face of much conflicting data has two major consequences. First, any beliefs and subsequent hypotheses which are implied by the new data must be ignored. Second, a series of false distinctions must be made in the form of *ad hoc* hypotheses in order to "explain" the discrepancies and retain the hypothesis. In the extreme case, to hold a hypothesis totally irrefutable requires the complete abandonment of conservatism and generality, in that all the prior beliefs and new observations which may combine to contribute to the refutation of the hypothesis must simply be ignored. As Quine notes, in order for a hypothesis to be refutable, "some imaginable event, recognizable if it occurs, must suffice to refute the hypothesis. Otherwise, the hypothesis predicts nothing, is confirmed by nothing, and confers upon us no earthly good beyond perhaps a mistaken piece of mind."[40]

The reason that irrefutable hypotheses are incapable of prediction or self-confirmation is that whenever an event occurs that the hypothesis failed to predict, an *ad hoc* hypothesis may always be introduced to retain the original one. Astrology is a prime example:

> Astrologers can so hedge their predictions that they are devoid of genuine content. We may be told that a person will "tend to be creative" or "tend to be outgoing," where the evasiveness of a verb and the fuzziness of adjectives serve to insulate the claim from repudiation. But even if a prediction should be regarded as a failure, astrological devotees can go on believing that the stars rule our destinies; for there is always some item of information, perhaps as to a planet's location at a long gone time, that may

39. QUINE, *supra* note 13, at 74-75.
40. *Id.* at 79.

> be alleged to have been overlooked. Conflict with other beliefs thus need not arise.[41]

An example of an irrefutable hypothesis in law is furnished by the *Younger* line of cases, considered above in connection with modesty. In *Younger*,[42] the doctrine of "Our Federalism" was justified largely on the basis that an ongoing state *criminal* proceeding was sought to be enjoined. Because criminal prosecutions are so much at the core of a state's function as an independent sovereignty, it was argued that it was especially important, in order to preserve "Our Federalism," that federal courts not interfere in such cases.[43] Soon after *Younger*, however, the doctrine was applied in an obscenity case on the ground that such cases were "quasi-criminal."[44] The doctrine was subsequently applied in cases which decreasingly resembled the stated paradigm of the state criminal prosecution, with a false distinction or qualification introduced at each step, until the doctrine was finally applied in purely civil proceedings.[45] Thus, by introducing an *ad hoc* hypothesis in every instance which failed to resemble sufficiently the paradigm of the original hypothesis, the Court rendered the latter irrefutable. As a result, it is no longer possible to predict in which cases "Our Federalism" will be applied. As a hypothesis, it is worthless.

The alternative to rendering a hypothesis irrefutable is, of course, to sacrifice whatever beliefs are necessary in order to accommodate whatever data the hypothesis failed to predict. Thus, assume that our original hypothesis is that water always boils at 100 degrees centigrade, and that this hypothesis is based on observing boiling points somewhere near sea level. If we then go into the mountains and discover that our hypothesis fails to hold true there, we have two options. First, we can render our hypothesis irrefutable by introducing some *ad hoc* hypothesis to "explain" the discrepancy. We could say, for example, that the spirits of the mountains are angered and are trying to taunt us by making water boil at a lower temperature. Alternatively, we can refute the hypothesis and revise it so as to do minimal damage to our overall web of belief, all the time being mindful of the virtues of conservatism, generality, simplicity and modesty. We would then proceed by first hypothesizing that water

41. *Id.* at 80.
42. 401 U.S. 37 (1970).
43. *Id.* at 45.
44. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).
45. *See supra*, note 29 and accompanying text.

always boils at 100 degrees centigrade and noting that this observation was made somewhere near sea level. Subsequently, when we observe that water boils at a lower temperature in the mountains, we refute our hypothesis that it always boils at 100 degrees centigrade. Being mindful of conservatism, however, we are loath to jettison in its entirety our earlier hypothesis which seemed to indicate that water boiled at some one constant temperature. Hence, having recorded all the circumstances surrounding our first observation, we attempt to isolate the relevant differences, and conclude that water boils at a lower temperature in the mountains than it does at sea level. At this point, it is only a matter of time and effort before we arrive at the truth.

The point, for purposes of constitutional interpretation, is simply that when a theory is made to bear too many *ad hoc* exceptions, qualifications, and three and four-prong tests, it approaches irrefutability and consequently becomes useless as a means of predicting like future cases or accommodating novel ones in a principled fashion.

III. The "General/Particular" and "Concept/Conception" Theories Reconsidered

A. The General/Particular Theory

This theory, or metatheory, would have the interpreter treat the morally or politically-oriented provisions of the text such as freedom of speech, assembly and religion, as instances, or particularized expressions, of a single moral or political theory which is embedded in the Constitution as a whole. Accordingly, interpretation under this theory involves using the particularized textual provisions as building blocks, or as steps in a ladder,[46] from which to construct a general constitutional theory. Once the general theory is so constructed, the interpreter can apply it to future cases and derive particular rights from it which are not explicitly stated in the text. Because this theory claims its origin in the text, and yet is not strictly limited thereto, it ostensibly avoids both the excesses of basic value theories and the limitations of strict interpretivist theories.[47] A good example of its application is Justice Douglas' opinion in *Griswold v. Connecti-*

46. Interestingly, this account precisely mirrors Plato's description of the ascent from opinion (*pistis*) regarding particulars to complete (including moral) knowledge (*noesis*) of the Forms and ultimately The Good, by means of the Dialectic. *See* PLATO, REPUBLIC *509d-511d.

47. This summation of the general/particular theory is paraphrased from Schauer, *supra* note 3, at 814-16.

cut,[48] wherein he derived an unstated "penumbral" right of privacy from the first amendment.

As noted at the outset of this paper, one of the criticisms of the general/particular approach to interpretation is that it reintroduces the very value-injection it seeks to avoid, in that the selection of particulars from which the general theory is to be derived will to some degree be informed by the theoretical predispositions of the interpreter. This criticism is expressed by Professor Schauer as follows:

> The process of selecting particulars is not and cannot be value-neutral. *Textually explicit particulars are analogous to observations from which we construct a theory*, and we cannot lightly ignore the extent to which such observations are controlled by theory. The instances are not just there waiting for us to build a theory around them. We have to select the particulars to use, and this selection process contains implicit judgments of value and importance.[49]

The problem with this criticism, aside from the fact that total value-neutrality is neither possible, necessary, nor even desirable in constitutional interpretation,[50] is that it assumes at best negligence, and at worst intellectual dishonesty, on the interpreter's part. Specifically, Schauer seems to want to argue that because of the *possibility* that the interpreter will ignore one provision in preference to another in order to preserve whatever theoretical predispositions he brings to the interpretive process, any theories generated under the general/particular model must be invalidated as not value-neutral. Schauer might as well say that we cannot engage in scientific theorizing because of the *possibility* that the scientific observer will look the other way when he observes that water repeatedly boils at less than 100 degrees centigrade in the mountains in order that he may preserve his theory, based on his observations of boiling water at sea level, that it never boils at less than 100 degrees centigrade. In other words, Schauer assumes that both the interpreter and scientific observer will ignore the dictates of responsible belief-formation (specifically, the virtues of conservatism and generality, noted above) in order to preserve whatever beliefs they bring to their respective tasks. This is a rash assumption indeed.

That jurists, contrary to Schauer's skepticism, are capable of a good deal of neutrality in ordering and accommodating apparently

48. 381 U.S. 479 (1965).
49. Schauer, *supra* note 3, at 818 (emphasis added).
50. PERRY, *supra* note 15, at 26-27.

conflicting constitutional values, is evidenced by Justice Rehnquist's opinion in *Pruneyard Shopping Center v. Robins*.[51] In that case, the Court held that a California Supreme Court decision which construed that state's constitution as permitting individuals to exercise free speech and petition rights on private property did not violate the property owner's property rights under the fifth and fourteenth amendments or his free speech rights under the first and fourteenth amendments. Writing for the Court, Justice Rehnquist stated:

> There is . . . little merit to appellants' argument that they have been denied their property without due process of law. In *Nebbia v. New York*, this Court stated:
>
> *[N]either property rights nor contract rights are absolute . . . . Equally fundamental with the private right is that of the public to regulate it in the common interest . . . .*
>
> ". . . [T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained."
>
> Appellants have failed to provide sufficient justification for concluding that this test is not satisfied by the State's asserted interest in promoting more expansive rights of free speech and petition than conferred by the Federal Constitution.[52]

While it is true that the relative value-neutrality exhibited by the Court in *Pruneyard* is not always the case, the *Pruneyard* opinion at least demonstrates that such relative neutrality is possible and, hence, that Schauer's assumptions to the contrary are insufficient grounds for discrediting the general/particular theory.

B. The Concept/Conception Theory

This theory, closely related to the general/particular theory, holds that constitutional provisions enacted broad concepts, rather than narrow conceptions. Thus, for example, while the Framers of the fourteenth amendment may have had a *conception* of equality which was consistent with "separate but equal," they yet enacted something more general which they knew would develop in ways not necessarily contemplated by their original conception.[53] Hence,

51. 447 U.S. 74 (1980).
52. *Id.* at 84-85 (citations and footnotes omitted) (emphasis added).
53. *See* Dworkin., *The Forum of Principle*, 56 N.Y.U.L. REV. 476, 494-95 (1981).

under this theory, constitutional provisions which embody *concepts*, such as equality and speech, as opposed to mere *conceptions*, such as "separate but equal," not only license, but in fact demand, non-interpretivist approaches.

As noted above, the most serious criticism of this theory is that it invites the interpreter to inject his personal values into the analysis in selecting which level of generality the broad concepts are to be stated at. If he states them at a sufficiently high level of generality, he can then reinstantiate particular rights or conceptions to which, the argument goes, the Framers might not have assented. Professor Tushnet states the objection as follows:

> The . . . objection rests on a frontal attack on the proposed distinction between concepts and conceptions, a distinction that reflects a general problem in constitutional theory. Frequently an analysis turns completely on the level of generality at which some feature of the issue under analysis is described. But the choice of that level must be made on some basis external to the analysis. For example, why describe the concept of equality on a level of generality so high that it obliterates the specific intention to permit segregation? After all, the concept is — at least in part — built up from particular experiences of what is seen as equal treatment; it is to that extent derived from conceptions of equality.[54]

If this criticism is merely directed against the claim that the concept/conception theory truly reflects Framers' intent, it is a valid one, though not impossible to argue with. If, on the other hand, the criticism means to say that Dworkin's theory allows undue license to be taken in interpreting the Constitution, it seems illogical.

The fact that a concept may have been derived from conceptions of equality, for example, which were contemporary to the Framers, cannot be held to *chain* that concept to those conceptions. Just as the Supreme Court's decision in *Plessy v. Ferguson* was objective but incorrect, so can it be said that the Framers of the fourteenth amendment had a conception of equality that was objective but incorrect. This is so because the tools (of social sciences, etc.) to *see* that the conceptions were incorrect were not available to the Framers of the fourteenth amendment or to the Justices in *Plessy*, as they *are* available today. But to argue that for this reason we cannot generalize — or extrapolate — and return to an uncontroversial concept of equality to rebuild our web from that point outward based on

54. Tushnet, *supra* note 1, at 791.

all the data which is currently available to us, is to throw out the baby with the bath water. It is tantamount to saying that because an astronomer's conception of the sun revolving around the earth (no one would argue that this observation was not objective) turned out, upon the receipt of more data, to be incorrect, we must then discard the *concept* (derived from that conception) of an interdependent system of planets whose movements affected, and were affected by, each other.

For this reason, one cannot responsibly argue that because the conception from which a concept such as equality is derived turns out to be incorrect, one is then obliged to throw out the *concept* as well. The strength of a hypothesis, what makes it capable of prediction and self-confirmation, is refutability. As noted above, however, this does not mean that when data comes in which contradicts the hypothesis, one should automatically throw out the hypothesis. Rather, we adjust, revise, and fine-tune the hypothesis as *conservatively* as possible in order to account for the contradictory data. It is only when the contradictory data is so overwhelming that the cost of retaining the hypothesis exceeds the cost of jettisoning it (that is, when retaining the hypothesis entails the sacrifice of a greater number of beliefs than discarding it does), that one is obligated to discard the hypothesis. As seen above in connection with refutability, the price of not discarding a hypothesis under such circumstances is the proliferation of ultimately so many *ad hoc* hypotheses to "explain" the discrepancies that the original hypothesis is rendered totally incapable of predicting or explaining events. This would be precisely the consequence of chaining ourselves to the Framers' conceptions, if indeed it is by any means possible to divine what those conceptions were.

To return to equality, the social sciences, in particular, and a heightened sensitivity to human relations in general, have shown us that segregation has imposed greater disadvantages on blacks than it has on whites (and we must be able to say that some degree of objectivity is possible in the social sciences and moral philosophy). Because segregation is a form of inequality, even on the term's least controversial, dictionary definition, we are justified, in adherence to the *concept* of equality embodied in the fourteenth amendment, in condemning it. This is so because no matter what concept the Framers had of equality, it is uncontroversial that it embodied the proposition that two and two make four. It is true that they may have thought that segregation was consistent with that *concept* — indeed,

the concept may even have been derived from a *conception* of "separate *but equal*." The fact that some one given *conception* was incorrect, however, is far from justification for discarding the *concept* derived from it. Rather, just as we do in science, we retain the concept (for example, that water boils at a given temperature) even though the conceptions from which the concept was derived (for example, the conception that water always boils at 100 degrees centigrade) turn out to be incorrect.

C. *The Underdeterminativeness Argument*

The third serious criticism, which is directed at both the general/particular and the concept/conception theories, is that they are underdeterminative. In essence, this criticism argues that since any number of theories may be generated from, and be equally consistent with, the same set of particulars, and yet yield different results for future cases, all such theories are underdeterminative, and cannot claim to be derived from the text. Professor Schauer sets forth this criticism in full as follows:

> [A]ny general/particular theory mistakenly assumes that one general principle (or theory) can be uniquely, or at least most correctly, derived from a set of particulars, or instances. This assumption, however, ignores the extent to which any theory — scientific, moral, or interpretive — is underdetermined by any number of specific instances or observations. Theory is underdetermined in this sense because any number of empirical observations, or specific instances, can generate and be consistent with a large and perhaps infinite number of explanatory theories. Moreover, each such explanatory theory will yield different predictions or results for future cases. For example, a given set of symptoms can be consistent with a number of different medical diagnoses, and to that extent the diagnosis is underdetermined by the observation of symptoms. Similarly, several different theories about the formation of the solar system might be equally consistent with our observations about the solar system. The principle of underdetermination of theory applies to a wide range of activities, and it has been frequently discussed in reference to the philosophy of science, to literary criticism, to historical explanation, and so forth. In each of these disciplines, theory acquires a different role, but the point remains the same: specific examples, instances, observations, or events can produce more than one theory equally consistent with those examples, instances, observations, or events.
>
> We see the same phenomenon in constitutional theorizing

> because a large number of different overarching theories would be consistent with the specific moral or political principles specified in the text. We may have good reasons to choose one theory rather than another, just as a doctor may have good reasons to choose one medical diagnosis over another that is equally consistent with the same symptoms. But the constitutional text does not determine the choice among theories equally consistent with it, and thus the argument that the theory is generated by the Constitution is seen to be a fake. Certainly we can require that the particular theory fit all of the textualized particulars as a necessary condition of its validity. But if this is taken to be a sufficient condition, then there is little limit on the extent to which quite different theories can find their source in the Constitution. If that is so, the text does not control the result in future cases and does not affect our decision of which competing coherent theory to accept. This does not mean that judges should be forbidden to construct moral or political theories, but it does defeat the claim that the theory so constructed is either mandated by or derived from the text.[55]

First, it is noted that the fact that a theory is underdeterminative does not make it unprincipled or subjective. It is just not a valid criticism of a *theory* (as it *is* with a putative "law" of physics, for example) to say that it turns out to be incorrect.

Second, and more important, as regards the authoritativeness argument, while Schauer's criticism may well defeat the claim that the results reached under the general/particular group of theories are *mandated* by the text, it does not defeat the claim that they are *derived* from the text. While Professor Schauer cites to some of Quine's work in theories of meaning, he appears to have ignored Quine's epistemology. When we speak of generating theories of constitutional interpretation, we are not talking about, and do not want to be talking about, irrefutable laws of interpretation. The latter serve no purpose, either in science or in law, because they predict nothing. Some hypotheses are good, some are bad; if they become exceedingly general (like astrology or "Our Federalism"), they become commensurately less answerable to any one particular observation or case. For this reason, we fine-tune a hypothesis to make it accommodate, and remain consistent with, as many new observations and data as possible, thus maintaining an optimum level of generality and predictability. The strength of this approach is that when any

55. Schauer, *supra* note 3, at 816-18.

one given theory cannot be made to bear the weight of explanation of many new data without making great sacrifices in generality, simplicity, or refutability, it is discarded in favor of a hypothesis that can bear the weight.

In sum, we *want* our theory to be underdeterminative, because that is precisely what makes it refutable. It must be the case that some future phenomenon will just not (try as we might) be explainable by the theory; then we see that the theory must be discarded in favor of a better one. To say that there was only one theory that was consistent with all particulars would make that theory irrefutable, like astrology or the "Our Federalism" cases, discussed above. Such a theory would be one hundred percent *determinative* and hence would be incapable of further development to make it answer to future counter-examples. In other words, a theory that "explains" everything, explains nothing.

Conclusion

If the Constitution is to remain the supreme Rule by which our society is governed, it must remain capable of accommodating change. In order to do so, however, it must be interpreted and the interpretation must be principled and objective. As was noted in the quotation from Schauer, above, regarding the general/particular theories, this sort of objectivity is difficult even in scientific observation, let alone in interpreting the meaning of the Constitution's vague language so as to resolve complicated contemporary disputes in a principled manner. For this reason, it is hoped that by referring the interpreter to a set of rules, such as Quine's, regarding what we may say we know and how we may most legitimately use what we know, we will provide more realistic constraints on interpretation than we do by handing the interpreter a 200-year old document and inviting him to use it as a blank check for the insertion of his personal values by asking him what it "means."